

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention & Resolution

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Neutrals

The ADR Inclusion Network: Addressing Diversity Collectively

BY MARIA R. VOLPE AND SHEILA M. SPROULE

Addressing diversity in the dispute resolution field, as in many other contexts, has gained widespread attention in recent years. For example, see the Institute for Inclusion in the Legal Profession at www.theiilp.com, and the recent American Bar Association Resolution 105 aimed at increasing diversity in the dispute resolution field (available at <http://bit.ly/2INrMys>).

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Not only does embracing diversity make good business sense as research studies have shown, it also resonates with the values of good dispute resolution practices—especially where third parties, like mediators, are expected to be mindful of and attentive to the parties and the setting to ensure that their sessions are inclusive and respectful.

For the dispute resolution field, however, how best to harness the disparate, ad hoc, and varied efforts aimed at embracing diversity has been a continuing challenge.

This article will discuss the roots and evolution of a continuing initiative that has attempted to deliberately shine a spotlight on diversity and inclusion in the dispute resolution field within New York State.

In the contemporary discourse about diversity, Marvin E. Johnson, a Washington, D.C.-

based JAMS Inc. neutral, and co-author Maria R. Volpe have noted that diversity has come to be used as “a very broad, catchall umbrella term that applies to many qualities and characteristics and is defined differently by different segments of society.” Marvin E. Johnson and Maria R. Volpe, “Roots of Diversity in Dispute Resolution: Some Preliminary Observations” 13/1 *ACResolution* 14 (Winter 2013) (available at <http://bit.ly/2UY9tbz>).

Inclusion is a more comprehensive term than diversity. It refers to not only paying attention to the representation of individuals from diverse backgrounds, but creating an inviting, fair, and respectful environment that will allow diversity efforts to succeed. See Vernā Meyers, “Diversity Is Being Invited to the Party; Inclusion Is Being Asked to Dance,” American Bar Association *GPSolo eReport* (June 28, 2017) (available at <http://bit.ly/2IL8TMD>).

In short, institutions and organizations need individuals who come from diverse backgrounds, but, just as important, they need to be deliberate about being inclusive in their efforts to welcome, recruit, and retain a diverse constituency.

The leadership of the initiative discussed in this article, the ADR Inclusion Network (see www.adrdiversity.org), chose to focus on enhancing both the diversity and inclusiveness of the dispute resolution field as its ultimate goal.

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CPR News

HIGHLIGHTS FROM THE CPR INSTITUTE'S PHILADELPHIA REGIONAL EVENT

Improving your analysis and addressing and defeating your own biases will lead to better decision-making.

That, explained consultant Annie Duke, will avoid the common phenomenon of “resulting,” a frequent default with which people judge the quality of the decision-making by assessing the quality of the outcome.

Duke, a consultant, author and former professional poker player, spoke with Dennis R. Suplee, a Philadelphia partner of Schnader Harrison Segal & Lewis, in a feature presentation at the CPR Institute's 2019 Philadelphia Regional Meeting. Duke suggested that better and different preparation would improve conflict resolution skills and practices.

The four-panel, 13-speaker networking event was held at the Union League on April 30, and was hosted by Schnader, whose chairman, David Smith, welcomed the 100 attendees



with opening remarks. Noah Hanft, CPR Institute president and chief executive officer (and *Alternatives* publisher), who will be stepping down from his posts this summer, also discussed CPR's current activities.

The first panel, “Neutrality and Party-Appointed Arbitrators: An Oxymoron,” featured marquee conflict resolution experts including Schnader partner Ralph Wellington, of Philadelphia, who moderated; Debevoise & Plimpton partner and former CPR Institute Chairman John Kiernan; W. Thomas McGough Jr., executive vice president and chief legal officer of Pittsburgh health care provider UPMC; Partner Barbara T. Sicalides, who works in Pepper Hamilton's Philadelphia and Washington offices, and Thomas J. Sabatino Jr., former general counsel of Aetna Inc., and current vice chair of the CPR Institute's board.

The hour-long opening panel covered a wide range of arbitrator conduct issues. Sicalides emphasized that potential tribunal members need to scrutinize their disclosures closely because of the many
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Alternatives



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Court Decisions

Scotus Introduces a New Federal Arbitration Act Presumption Against Consent to Class Arbitration

BY PHILIP J. LOREE JR.

The U.S. Supreme Court returned to the basics of class arbitration in April, examining whether consent to class arbitration may be inferred from ambiguous contract language.

Nearly a decade after determining party consent to class processes was fundamental, the Court asserted that class-arbitration decision makers can't infer consent using a policy—not intent—based contract construction rule.

The 5-4 opinion written by Chief Justice John G. Roberts Jr. in *Lamps Plus Inc. v. Varela*, 587 U.S. ___, No. 17-998 (April 24, 2019) (available at <http://bit.ly/2GxwFbC>), held that ambiguity wasn't enough to infer party consent to class arbitration. Parties would have to clearly express their consent to class arbitration before courts could impose it on them under the Federal Arbitration Act.

The decision overturned a Ninth Circuit decision using the California state default contract construction rule of *contra proferentem* to interpret against the drafter a contract that was ambiguous on class-arbitration consent.

The case creates a new presumption against class arbitration. This article analyzes the Court's latest arbitration decision.

A brief back story is essential in framing the Court's analysis earlier this spring in *Lamps Plus*. Nine years ago this month, the

author wrote about the Supreme Court's then-new opinion in this newsletter. Philip J. Loree Jr., *Stolt-Nielsen Delivers a New FAA Rule—And then Federalizes the Law of Contracts*, 28 *Alternatives* 121 (June 2010) (available at <http://bit.ly/2V8tADT>).



That article examined the Supreme Court's class arbitration decision in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (available at <http://bit.ly/2DOTTsX>). The case was at the core of April's *Lamps Plus* decision.

Stolt-Nielsen was, as the article explains, a then-groundbreaking decision that was, for various reasons, "inexplicably broad and inexplicably narrow in scope." 28 *Alternatives* 121, 125.

One reason it was inexplicably broad was that the majority opinion, by Associate Justice Samuel A. Alito Jr., acknowledged that "interpretation of an arbitration agreement is generally a matter of state law," but in the same space declared that "the [Federal Arbitration Act] imposes certain rules of fundamental importance, including the basic precept that 'arbitration is a matter of consent, not coercion.'"

The Court provided specific examples of these FAA rules of "fundamental importance," declaring that parties:

1. "are 'generally free to structure their arbitration agreements as they see fit[.]'"
2. may "agree to limit the issues they choose to arbitrate[.]"
3. may "agree on the rules under which any arbitration will proceed[.]"
4. may "choose who will resolve specific disputes[.]" and
5. may "specify *with whom* they chose to arbitrate." (Emphasis in original.)

While these rules were each derived from earlier Court decisions, *Stolt-Nielsen* added

a new one and declared it to be controlling in the case before it: "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (Emphasis in original.)

And the Court admonished that it "falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties."

Stolt-Nielsen, as readers may recall, had unusual facts. During the arbitration the parties *agreed* that there was no agreement between them on class arbitration.

Comparison of the parties' arbitration submissions revealed common-ground between the parties: they agreed that their contract was "silent" on class arbitration—that is, the parties did not reach an agreement one way or the other concerning class arbitration. The Court referred to this agreement as a "stipulation," even though it was apparently not (and did not need to be) embodied in a formal legal document.

Stolt-Nielsen was thus not a case that presented contractual ambiguity, which would have left the decision maker to choose between competing, reasonable interpretations of what the contract had to say about class arbitration.

Stolt-Nielsen's unusual procedural posture allowed the Court to vacate the arbitrator's award because it was indisputably not based on consent to class arbitration, which the parties agreed was never reached. Nor was it based on a default rule supplied by applicable law.

Instead, concluded the Court, the arbitrator's decision to impose class arbitration was based on public policy: the arbitrator's own notions of economic justice. See *Oxford Health Plans LLC, v. Sutter*, 133 S. Ct. 2064, 2068, 2069-70 (2013) (available at <http://bit.ly/2GxwFbC>).

(continued on next page)

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Court Decisions

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ly/2vHDDpq).

Having vacated the award the *Stolt-Nielsen*, the Court was able to avoid a remand to the arbitrator by enunciating its new FAA rule of fundamental importance, as noted above, that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”

The Court found there was no contractual basis because the parties instead stipulated that the agreement was silent on whether it permitted or precluded class arbitration.

One of the reasons that the *Stolt-Nielsen* decision was narrow in scope was, as explained nine years ago, that it left open the question of “[w]hat indicia of agreement must be shown for a court or arbitrator to order class arbitration?” 28 *Alternatives* at 130. That observation was consistent with Justice Ruth Bader Ginsburg’s dissent, which noted that a “stopping point” of the majority opinion was that “the Court does not insist on express consent to class arbitration.”

Noting that limitation in the scope of the *Stolt-Nielsen* decision, this author opined that it “mean[t] that consent to class arbitration might be found based on, for example, the parties’ conduct, ambiguous contract language that a court or panel concludes should be construed in favor of consent to class arbitration, or on some other objective indicator of consent to class arbitration.” 28 *Alternatives* at 130.

Fast-forward to the present. *Lamps Plus* has answered the question about whether consent to class arbitration may be inferred from ambiguous contract language simply by construing the contract against the drafter.

And, in the opinion by Chief Justice Roberts, and joined by Associate Justices Clarence Thomas, Samuel A. Alito, Jr., Neil M. Gorsuch, and Brett M. Kavanaugh, the Court said the answer was “no.”

Justice Thomas wrote a concurring opinion, and Associate Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia M. Sotomayor, and Elena Kagan, each wrote dissents.

Lamps Plus extended *Stolt-Nielsen*’s scope substantially by establishing a new federal arbitration-law rule, and a presumption against

consent to class arbitration: “Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.” Slip op. at 12.

We’ll refer to it as the “*Stolt-Nielsen/Lamps Plus* presumption.”

The new *Stolt-Nielsen/Lamps Plus* presumption is a federal common-law rule that applies in both state and federal court. The Court held that it preempts the rule of *contra*

Class Practice

The decision: The U.S. Supreme Court eliminates class arbitration without consent. Thoroughly.

Thoroughly? Only if Chief Justice Roberts’ April *Lamps Plus* opinion is viewed as all Scotus arbitration decisions should be: a warning about contract drafting.

Dealing with a new rule: There can be no inference of intent to consent to class arbitration. But that can’t be found in any contracts after all the post-*AT&T Mobility v. Concepcion* class waivers, right? *Lamps Plus* reminds that it’s time for reviewing those arbitration agreements, again.

proferentem, under which ambiguous contracts are interpreted against the drafter: “[t]he doctrine of *contra proferentem* cannot substitute for the requisite affirmative ‘contractual basis for concluding that the part[ies] agreed to [class arbitration].’” Slip op. at 12-13 (quoting *Stolt-Nielsen*, 559 U.S. at 684).

The presumption requires much more than simply “a contractual basis” for finding consent to class arbitration. It means, as a practical matter, that the parties must clearly and unmistakably consent to class arbitration.

Let’s take a closer look at *Lamps Plus* and discuss the issues it resolves and leaves open.

THE FACTS

Lamps Plus, headquartered in Chatsworth, Calif.,

sells light fixtures and related products. A hacker pretending to be a company official duped an employee into disclosing tax information for about 1,300 *Lamps Plus* employees. Somebody filed a fraudulent federal tax return in the name of a *Lamps Plus* employee, Frank Varela.

Varela, like other *Lamps Plus* employees, had entered into an arbitration agreement with his employer. But on behalf of a putative class of similarly situated employees, he filed suit against his employer in a California district court for damages he allegedly sustained from the data breach.

Lamps Plus moved to compel arbitration on an individualized—not classwide—basis, and to dismiss (not stay) the lawsuit. The district court granted the motion to compel arbitration and the motion to dismiss, but compelled arbitration on a classwide basis. It dismissed the case on a without-prejudice basis.

Lamps Plus appealed to the Ninth U.S. Circuit Court of Appeals, which affirmed the district court’s order.

The Ninth Circuit acknowledged that *Stolt-Nielsen* required a contractual basis to establish consent to class arbitration, and that the parties’ agreement did not expressly mention class arbitration. But that, opined the Ninth Circuit, was “not the ‘silence’ contemplated in *Stolt-Nielsen*[,]” because the *Stolt-Nielsen* contract was silent in the sense that the parties had stipulated there was no agreement on class arbitration. 701 Fed. Appx. 670, 672 (9th Cir. 2017) (available at <http://bit.ly/2W66tv1>).

The Ninth Circuit proceeded to determine that the contract was ambiguous on class-arbitration consent. For certain parts of the “agreement seemed to contemplate ‘purely binary claims[,]’” Slip op. at 2-3 (quoting 701 Fed. Appx. at 672), while other parts were broad enough to encompass class arbitration, including the phrase “arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings concerning my employment.”

Faced with contract ambiguity, the Ninth Circuit resolved it by applying the *contra proferentem* rule under which ambiguities are construed against the drafter, a rule that the Ninth Circuit said “‘applies with peculiar force in the case of a contract of adhesion.’” Slip op. at 3 (quoting 701 Fed. Appx. at 672) (quoting *Sandquist v. Lebo Auto., Inc.*, 1 Cal. 5th 233, 248, 376 P. 3d 506, 514 (2016)).

Since Lamps Plus drafted the agreement, the Ninth Circuit construed the contract against it and determined that the parties had consented to class arbitration. Senior Circuit Judge Ferdinand Francis Fernandez dissented, stating that the agreement was not ambiguous, and the majority's holding was a "palpable evasion of *Stolt-Nielsen*." Slip op. at 3 (quoting 701 Fed. Appx. at 673).

Lamps Plus petitioned the nation's highest court for certiorari, "arguing that the Ninth Circuit's decision contravened *Stolt-Nielsen* and created a conflict among the Courts of Appeals." Slip op. at 3. Varela opposed the petition on the merits and argued for the first time that the Ninth Circuit, and thus the U.S. Supreme Court, lacked jurisdiction over Lamps Plus's appeal.

The Supreme Court granted the petition for certiorari, rejected Varela's appellate jurisdiction argument, and reversed the Ninth Circuit's decision.

APPELLATE JURISDICTION

The Court first disposed of Varela's appellate jurisdiction challenge.

Varela's argument was that the court had no jurisdiction because it granted Lamps Plus's motion to compel arbitration, even though the court had compelled class arbitration, not individualized arbitration.

Federal Arbitration Act 9 U.S.C. § 16 governs appellate jurisdiction. Section 16(a)(1)(B) authorizes interlocutory appeals from orders denying motions to compel arbitration, but 9 U.S.C. § 16(b)(2) says that appellate courts do not have jurisdiction over interlocutory orders granting motions to compel.

The flaw in Varela's argument was that the appeal was not interlocutory, but a "final decision with respect to an [FAA-governed] arbitration ..." within the meaning of 9 U.S.C. § 16(a)(3). The district court had directed the parties to proceed to arbitration and dismissed the action.

"[I]n *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U. S. 79 (2000)," stated the Supreme Court, "[w]e held that such an order directing 'the parties to proceed to arbitration, and dismiss[ing] all the claims before [the court], ... is 'final' within the meaning of §16(a)(3), and therefore appealable." Slip op. at 4 (quoting *Green Tree*, 531 U.S. at 89).

So it was in *Lamps Plus*.

In *Green Tree*, the Court had denied a motion for a stay, and granted the motion to compel arbitration. *Green Tree* left open the question whether the district court should have granted the requested stay.

Justice Stephen Breyer's *Lamps Plus* dissent argued that the Court should have decided whether the district court should have granted a stay.

The Court rejected this argument based on the language of FAA Section 3 and the case's procedural posture. "The FAA," stated the Court, "provides that a district court 'shall on application of one of the parties stay' the case pending the arbitration." Slip op. at 4 n.1 (quoting 9 U. S. C. § 3 (emphasis added by the Court)).

But neither party requested a stay of litigation.

The *Lamps Plus* majority therefore rejected Justice Breyer's jurisdictional analysis, stating it was "premised on two events that did not happen—a District Court ruling that was never issued denying a stay request that was never made." Slip op. at 4 n.1.

Varela argued that *Green Tree* did not control because Lamps Plus did not have standing to appeal—that is, Lamps Plus was not aggrieved by the district court's decision.

According to Varela, Lamps Plus sought an order compelling arbitration and dismissing the case, and the district court granted the relief it requested, albeit in the form of class, rather than individualized, arbitration.

But the Court was not persuaded, because Lamps Plus did *not* get what it requested—it sought bilateral, not class arbitration. "[S]hifting from individual to class arbitration," the Court explained, is a 'fundamental' change that 'sacrifices the principal advantage of arbitration' and 'greatly increases risks to defendants.'" Slip op. at 5 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333, 348, 350 (2011) (available at <http://bit.ly/2VcI4mi>)).

Lamps Plus had the required personal stake in the appeal because it had an interest in avoiding the "consequences" of class arbitration. Slip op. at 5 (citation omitted).

THE NEW PRESUMPTION

The Court began its analysis of the merits by reiterating the principal purpose of the FAA, which is "to enforce arbitration agreements

according to their terms." Slip op. at 6 (quotations and citations omitted).

"[O]rdinarily," explained the Court, courts "accomplish that end by relying on state contract principles." Slip op. at 6 (citing *First Options of Chicago Inc. v. Kaplan*, 514 U. S. 938, 944 (1995)).

But under the obstacle preemption doctrine, a species of conflict preemption, the FAA preempts state law "to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA." Slip op. at 6 (quotations omitted; citing *AT&T Mobility*, 563 U.S. at 352).

The Court said that "at issue in this case is the interaction between a state contract principle for addressing ambiguity and a rule of fundamental importance under the FAA, namely that arbitration is a matter of consent, not coercion." Slip op. at 6-7 (quotations and citation omitted).

That rule of fundamental importance, the Court explained, is the "first principle" underlying all the Court's labor and commercial arbitration jurisprudence. Slip op. at 7 (citing *Granite Rock Co. v. Teamsters*, 561 U. S. 287, 299 (2010)).

"Consent," said the Court, "is essential under the FAA because arbitrators wield only the authority they are given[.]" which "they derive... from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." Slip op. at 7 (quotation and citation omitted).

Harkening back to *Stolt-Nielsen*, the Court explained that "[p]arties may generally shape [arbitration] agreements to their liking[.]" but whatever choices the parties may make, "the task for courts and arbitrators at bottom remains the same: 'to give effect to the intent of the parties.'" Slip op. at 7 (quoting *Stolt-Nielsen*, 559 U.S. at 683-84).

In effectuating party intent in the class-arbitration context, the Court said "it is important to recognize the 'fundamental' difference between class arbitration and the individualized form of arbitration envisioned by the FAA." Slip op. at 7 (quoting *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (available at <http://bit.ly/2Y66dwK>) (other citations omitted)).

In bilateral arbitration, the Roberts *Lamps Plus* opinion noted, "parties forgo the procedural rigor and appellate review of the courts in

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order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.” Slip op. at 7-8 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

The benefits that make bilateral arbitration attractive do not exist in class arbitration, which “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” Slip op. at 8 (quoting *AT&T Mobility*, 563 U.S. at 348).

“Indeed,” Chief Justice Roberts wrote, “we recognized just last Term that with class arbitration ‘the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.’” Slip op. at 8 (quoting *Epic Systems*, 138 S. Ct. at 1623).

Even apart from the “new risks and costs” class arbitration imposes, the *Lamps Plus* opinion stated that “it also raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class—again, with only limited judicial review.” Slip op. at 8 (citations and quotation omitted).

Because of these “crucial differences” between class and individualized arbitration, *Stolt-Nielsen* explained that there is ‘reason to doubt the parties’ mutual consent to resolve disputes through classwide arbitration.’” Slip op. at 8 (quoting *Stolt-Nielsen*, 559 U.S. at 687, 685–686).

That is what led the *Stolt-Nielsen* opinion to hold “that courts may not infer consent to participate in class arbitration absent an affirmative ‘contractual basis for concluding that the party agreed to do so[,]’ and that “[s]ilence is not enough. . . .” Slip op. at 8 (quoting *Stolt-Nielsen*, 559 U.S. at 684, 687. (Emphasis is the Court’s.)

The Supreme Court said its “reasoning in *Stolt-Nielsen*” governed the *Lamps Plus* outcome. “Like silence,” declared the Court, “ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to ‘sacrifice[] the principal advantage of arbitration.’” Slip op. at 8 (quoting *AT&T Mobility*, 563 U.S. at 348).

The Court explained that its “conclusion aligns with our refusal to infer consent when it comes to other fundamental arbitration questions.” Slip op. at 8. Referring to the *First Options* reverse presumption against arbitrators determining arbitrability, the Court said, “we presume that parties have *not* authorized arbitrators to resolve certain ‘gateway’ questions, such as ‘whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.’” Slip op. at 9 (quoting *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion). (Emphasis in *Lamps Plus* opinion.)

Under that *First Options* reverse presumption, explained the Court, “we will not conclude that they have done so based on ‘silence or ambiguity’ in their agreement, because ‘doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.’” Slip op. at 9 (quoting *First Options*, 514 U.S. at 945) (emphasis in original).

The reasoning behind the *First Options* reverse presumption, said the Court, was what the *Stolt-Nielsen* Court relied upon when it ruled that there must be an affirmative, contractual basis for courts and arbitrators to impose class arbitration on a party to an arbitration agreement, and that reasoning likewise governed the *Lamps Plus* outcome. Slip op. at 9 (citing *Stolt-Nielsen*, 559 U.S. at 686-87).

And from that reasoning, it follows that “[n]either silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself.” Slip op. at 9.

A STATE LAW OBSTACLE?

Having articulated the *Stolt-Nielsen/Lamps Plus* presumption against class arbitration, the next question for the Court was whether that presumption preempted the state law rule of *contra proferentem*, under which contract ambiguities are resolved against the drafter.

After determining that the arbitration agreement was ambiguous on class arbitration, the Court resolved that ambiguity by applying *contra proferentem* and interpreting the agreement against *Lamps Plus*, the drafter.

Contra proferentem, explained the Court, “applies ‘only as a last resort’ when the mean-

ing of a provision remains ambiguous after exhausting the ordinary methods of interpretation.” Slip op. at 9 (quoting 3 A. Corbin, *Contracts* § 559, pp. 268–270 (1960)). It construes ambiguous contracts “against the drafter based on public policy factors, primarily equitable considerations about the parties’ relative bargaining strength.” Slip op. at 9-10 (citations omitted).

The Court in *DIRECTV Inc. v. Imburgia*, 136 S. Ct. 463, 470 (2015), said that “the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was.” And, said the *Lamps Plus* Court, “[t]his case brings those limits into focus.” Slip op. at 10.

The Court determined that *contra proferentem* was a rule that, by its terms, applies “only after a court determines that it *cannot* discern the intent of the parties[,] and which, “[l]ike the contract rule preferring interpretations that favor the public interest, . . . seeks ends other than the intent of the parties.” Slip op. at 10 (citation omitted).

The FAA permits class arbitration only when it is the product of consent, not when it is “‘manufactured by [state law]. . . .” Slip op. at 10 (bracketed text in original) (quoting *AT&T Mobility*, 563 U.S. at 348). The Ninth Circuit, by applying *contra proferentem*, “a doctrine that ‘does not help to determine the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have given to the language used[,]’ imposed on *Lamps Plus* class arbitration on a basis other than consent. Doing so was “flatly inconsistent with the ‘the foundational FAA principle that arbitration is a matter of consent.’” Slip op. at 11.

The Court addressed the argument made by Justice Kagan in her dissent, and by Varela, that the *contra proferentem* doctrine did not discriminate against arbitration agreements and thus should not be preempted by the FAA. The argument posited that, since *contra proferentem* applies equally to both arbitration agreements and other contracts, it is neutral and nondiscriminatory for purposes of FAA Section 2’s savings clause.

The Court explained that, under *AT&T Mobility*, “such an equal treatment principle cannot save from preemption general rules ‘that target arbitration either by name or by more subtle methods, such as by ‘interfer[ing] with fundamental attributes of arbitration.’” Slip op.

at 11 (quoting *Epic Systems*, 138 S. Ct. at 1622 (quoting *AT&T Mobility*, 563 U.S. at 344)).

In *AT&T Mobility*, the “general applicability” of the so-called Discover Bank rule discussed in the case prohibiting class action waivers in both litigation and arbitration proceedings “did not save it from preemption under the FAA with respect to arbitration agreements, because it had the consequence of allowing any party to a consumer arbitration agreement to demand class proceedings ‘without the parties’ consent.’” Slip op. at 11 (quoting *Epic Systems*, 138 S. Ct. at 1623).

Consequently, the Discover Bank rule “interfer[ed] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA.” Slip op. at 11-12 (quotation and citations omitted).

For the same reasons, “[t]he general *contra proferentem* rule cannot be applied to impose class arbitration in the absence of the parties’ consent.” Slip op. at 12.

Responding to Justice Kagan’s assertion that the opinion represented a “watershed” in arbitration jurisprudence, the Court said the majority opinion “is consistent with” the well-known federal-law presumption of arbitrability (the “Presumption of Arbitrability” or “*Moses Cone* Principle”), under which ambiguities in the scope of an arbitration agreement itself are resolved in favor of arbitration. Slip op. at 12:

The [Federal] 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, 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.

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

JUSTICE THOMAS’S CONCURRING OPINION

Justice Clarence Thomas was the critical fifth vote that enabled the Court not only to reverse the Ninth Circuit’s judgment but also to make the majority opinion binding on lower courts for stare decisis purposes.

While the majority opinion accepted the Ninth Circuit’s conclusion that the contract

was ambiguous, and not simply silent on class arbitration, Thomas said the agreement was “silent as to class arbitration,” and “[i]f anything, the agreement suggests that the parties contemplated only bilateral arbitration.” Thomas, J., concurring, slip op. at 1.

In support, he cited three excerpts from the parties’ agreement to which Thomas added emphasis, including: “*The Company and I* mutually consent to the resolution by arbitration of all claims ... that *I* may have against the Company.”

In Thomas’s view, the agreement “provide[d] no ‘contractual basis’ for concluding that the parties agreed to class arbitration,” and that he “would therefore reverse on that basis.” Thomas, concurring, slip op. at 1-2 (quoting *Stolt-Nielsen*, 559 U.S. at 684).

Pointing out that the Court relied on obstacle preemption principles to hold that the FAA preempted the *contra proferentem* rule, Thomas wrote that he “remain[ed] skeptical of this Court’s implied pre-emption precedents.”

But Thomas nevertheless “join[ed] the opinion of the Court because,” he wrote, “it correctly applies [the Court’s] FAA precedents.”

THE FOUR DISSENTS

For the most part, the Court is divided along ideological lines about class arbitration. Thus, it is not surprising that each of the Court’s four more liberal justices not only dissented but wrote separate dissents.

Justice Ginsburg: Justice Ruth Bader Ginsburg’s dissent, in which Associate Justices Stephen Breyer and Sonia Sotomayor, joined, was a summary of the general reasons she believes that the Court’s class arbitration jurisprudence, especially *Lamps Plus*, is unfair to consumers and unwarrantedly beneficial to large corporations which serve consumer markets.

Justice Kagan: Whereas Justice Ginsburg’s dissent was a broad-based criticism of the Court’s arbitration jurisprudence over the past few decades, with a special focus on more recent class arbitration jurisprudence, Justice Elena Kagan’s dissent focused on the legal grounds for her belief that the Court should have affirmed the Ninth Circuit’s opinion.

Kagan’s first main point, in Part I, was that the arbitration clause language providing for arbitration of “any and all disputes, claims or controversies” must be read to include *class*

‘disputes, claims or controversies.’” Kagan, J., dissent, slip op. at 2-4. (Emphasis is Kagan’s.) According to Justice Kagan’s interpretation, the agreement unambiguously contemplated class arbitration.

Justice Kagan’s Part II point was that, even if assuming the contract is ambiguous on class arbitration, then the FAA required the ambiguity to be resolved by California state law, in this case, the *contra proferentem* rule. According to the dissent, the FAA does not preempt that rule because it applies equally to all contracts, including arbitration agreements, and thus cannot be said to discriminate against arbitration agreements. Kagan, J., dissent, slip op. at 4-14.

Justices Ginsburg and Breyer joined in Justice Kagan’s dissent, but Justice Sotomayor joined only in Part II of her dissent, which addressed the *contra proferentem* rule.

Justice Sotomayor: Justice Sonia M. Sotomayor’s dissent opined that the Court “went wrong years ago in concluding that a ‘shift from bilateral arbitration to class-action arbitration imposes such ‘fundamental changes,’ that class action arbitration ‘is not arbitration as envisioned by the [FAA].’” Sotomayor, J., dissent, slip op. at 1 (quoting *Stolt-Nielsen*, 559 U.S. at 686; and *AT&T Mobility*, 563 U.S. at 351).

Contrary to *Stolt-Nielsen*, Sotomayor’s dissent expresses her belief that the difference between class and individualized arbitration is a procedural matter.

While Sotomayor stopped short of endorsing Justice Kagan’s Part I conclusion that the contract unambiguously evidenced consent to class arbitration, Sotomayor concluded that the “contract was at least ambiguous as to whether Varela in fact agreed that no class-action procedures would be available in arbitration if he and his co-workers all suffered the same harm ‘relating to’ and ‘in connection with’ their ‘employment.’” Sotomayor, J., dissent, slip op. at 2.

Justice Sotomayor’s dissent concluded that the Court should not have held that the FAA preempted California’s *contra proferentem* rule. It “also note[d] that the majority reaches its holding without actually agreeing that the contract is ambiguous,” and that Justice Thomas’s “concurrence... offers reasons to conclude that the contract unambiguously precludes class arbitration, which would avoid the need to displace state law at all.”

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Court Decisions

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The Court, wrote Sotomayor, “normally acts with great solicitude when it comes to the possible pre-emption of state law, but the majority today invades California contract law without pausing to address whether its incursion is necessary.” Sotomayor, J., dissent at 2-3 (citation omitted). “Such haste,” she concluded, “is as ill advised as the new federal common law of arbitration contracts it has begotten.” Sotomayor, J., dissent, slip op. at 3.

Justice Breyer: As discussed above, Justice Stephen Breyer issued a dissenting opinion that argued that the Court did not have appellate jurisdiction over the district court’s decision. Justice Breyer joined in Justice Ginsburg’s and Justice Kagan’s dissenting opinions.

THE PRESUMPTION, ANALYZED

Even though the Court has not yet decided whether class-arbitration consent is a question of arbitrability, determination of class-arbitration consent by courts and arbitrators will now presumably be decided in a way akin to how disputes about the scope of arbitration agreements are decided under the Presumption of Arbitrability, and its close cousin, the *First Options* reverse presumption against arbitrability of arbitrability (the “*First Options* Reverse Presumption”). (The *First Options* “arbitrability of arbitrability” presumption puts the question of whether the matter is subject to arbitration to a court, not an arbitrator. More below.)

Prior to *Lamps Plus*, the Presumption of Arbitrability, the *First Options* Reverse Presumption, and the *Howsam/John Wiley* presumption of arbitrability of procedural matters (more below) were the only Federal Arbitration Act-imposed arbitration-agreement interpretation presumptions recognized by the U.S. Supreme Court.

The Court has added to the mix the *Stolt-Nielsen/Lamps Plus* Presumption against Class Arbitration.

The Presumption of Arbitrability was discussed in the Court’s opinion, and the Court said that presumption was “consistent with” the *Stolt-Nielsen/Lamps Plus* Presumption against Class Arbitration. To rebut the Presumption of Arbitrability, it is ordinarily necessary to exclude clearly from the scope of a broad arbitration agreement

a dispute if the agreement can reasonably be interpreted to require arbitration of the dispute.

The *First Options* Reverse Presumption, under which courts must presume that parties did not agree to submit arbitrability questions to arbitrators unless there is “clear and unmistakable” evidence that the parties intended to arbitrate arbitrability, essentially mirrors the Presumption of Arbitrability.

Just as a party must under the Presumption of Arbitrability clearly *exclude* from arbitration a matter that might otherwise fall within the scope of an ambiguous arbitration agreement, so too under the *First Options* Reverse Presumption must a party clearly and unmistakably *agree* to arbitrate the issue of whether a case is eligible to be subject to arbitration. Silence or ambiguity on arbitration of arbitrability questions means that the parties are deemed not to have agreed to arbitrate arbitrability—it goes to the court.

The *Howsam/John Wiley* presumption of arbitrability of procedural matters is another close-cousin of the Presumption of Arbitrability:

“procedural” questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide.

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964)) (internal quotation marks omitted).

Just as the parties must under the Presumption of Arbitrability clearly *exclude* a particular issue (other than an arbitrability issue) from arbitration if it would otherwise fall within the scope of an ambiguous arbitration agreement, so too must the parties clearly *exclude* a particular procedural issue from arbitration to rebut the *Howsam/John Wiley* Presumption.

Under the *Stolt-Nielsen/Lamps Plus* Presumption, ambiguities concerning class arbitration cannot establish consent to arbitration. Consistent with the other FAA presumptions, that means that clear and unmistakable evidence of party consent to class arbitration language must be present to establish consent to class arbitration.

Decision makers will be expected to examine the arbitration agreement as a whole and determine whether it is reasonably susceptible

to an interpretation under which the parties affirmatively consent to class arbitration. If not, then that will end the inquiry and there will be no class arbitration.

If the answer to the question is “yes,” then the next question will be whether the arbitration agreement is reasonably susceptible to an alternative interpretation under which the parties did not affirmatively consent to class arbitration, including one under which the parties reached no agreement on class arbitration one way or the other.

If the answer to *that* question is “yes,” then that will end the inquiry and there will be no class arbitration. If the answer is “no,” then the decision maker should find consent to class arbitration.

This author expects that class arbitration-consent outcomes will be the relatively rare exception, not the rule, particularly in respect to adhesive consumer contracts—which, in a post-AT&T *Mobility* world, are likely to contain class arbitration waivers in any event. Thus, at least where, as in *Lamps Plus*, a court makes the class arbitration determination, then one would expect a finding of class arbitration consent to be a rare occurrence.

OPEN ISSUES?

Even though *Lamps Plus* established a broad presumption against class arbitration consent, the Court nevertheless left some class arbitration issues open. One issue is whether, and if so, to what extent, the presumption may be rebutted by extrinsic evidence of party intent, assuming such evidence is available.

Typically, the *contra proferentem* rule, as the *Lamps Plus* Court explained, is one of “last resort.” State law contract principles typically permit the factfinder to consider extrinsic evidence of intent, which may or not be available, to resolve contract ambiguity.

The *Stolt-Nielsen/Lamps Plus* presumption preempts the state-law *contra proferentem* rule because it resolves ambiguity in a manner that is not based on party intent, but on equitable considerations. The Court concluded that, given the differences between class and individualized arbitration, permitting courts to resolve ambiguities about consent with a rule that relies on considerations other than party intent violated the FAA.

But, assuming extrinsic evidence is avail-

able, allowing parties in an appropriate case to present to the court extrinsic evidence of intent would arguably not violate the FAA in the way *Lamps Plus* says *contra proferentem* does. The same might also be true if ambiguity can be resolved or avoided by application of intent-based canons of construction. (*Contra proferentem* is not an intent-based canon.)

Class arbitration proponents, however, need to be realistic about the utility of this potential *Lamps Plus* loophole. Particularly in the context of adhesive contracts, extrinsic evidence is likely to be nonexistent, as adhesive contracts are, by definition, not the product of contract negotiations. Therefore, one wouldn't expect there to be any meaningful, objective evidence of what, for example, one party might have said to the other about class arbitration.

Evidence of context or the "surrounding circumstances" presumably will not be particularly probative of class arbitration consent. Even non-privileged internal documents concerning the form contract at issue, assuming they exist, are not necessarily likely to say much or anything about class arbitration consent.

In addition, the summary nature of FAA proceedings may pose procedural challenges to those who might request discovery or evidentiary hearings. See, e.g., 9 U.S.C. §§ 4 & 6.

Another open issue is whether class arbitration consent presents a question of arbitrability.

As was the situation in *Stolt-Nielsen* and *Oxford Health Plans*, there was no occasion for the Court in *Lamps Plus* to decide whether class arbitration consent presents an issue of arbitrability that is presumptively for the Court.

In *Stolt-Nielsen* and *Oxford Health Plans*, the parties unreservedly agreed to submit the class arbitration issue to arbitration, whereas in *Lamps Plus*, they unreservedly agreed to submit the issue to the Court.

That doesn't mean all class arbitration questions will be decided by courts. True, several circuits have ruled that class arbitration presents a question of arbitrability. And the Supreme Court's emphasis—in class arbitration cases from *Stolt-Nielsen* through *Lamps Plus*—on the fundamental differences between class and bilateral arbitration may provide a basis for deeming class arbitration consent a question of arbitrability if the Court decides to address that issue.

But assuming the Supreme Court addresses the issue in a future case, there is no guarantee that the Court will determine that class arbitra-

tion consent is an issue of arbitrability, even though there's reason to believe that the Court may be leaning in that general direction.

Perhaps more important, many contracts contain (or incorporate by reference) "Delegation Provisions" under which the parties clearly and unmistakably agree to submit arbitrability questions to arbitration. See *Rent-A-Center v. Jackson*, 130 S. Ct. 2772 (2010) (available at <https://bit.ly/2HxOILK>), and *Henry Schein v. Archer & White Sales*, 139 S. Ct. 524 (2019) (available at <https://bit.ly/2CXAgPw>). Where courts determine that parties have agreed to submit arbitrability questions to arbitration, arbitrators will decide class arbitration questions.

CLASS CONSTRUCTION

While class arbitration opponents have scored a clear victory in *Lamps Plus*, it could turn out to be limited if class arbitration consent questions are required to be decided by arbitrators.

Lamps Plus will not necessarily change significantly the consent to class-arbitration calculus in cases where the parties submit class-arbitration-consent questions to arbitration, and arbitrators construe, in apparent good faith, objectively ambiguous arbitration clauses to "unambiguously" show consent to class arbitration.

Under the Supreme Court's *Oxford Health Plans* decision, if the arbitrator was in good faith arguably interpreting the contract, then the determination by the arbitrator that the contract was "unambiguous" could well be deemed simply an error of law. Such errors do not provide a basis for vacating an arbitration award on the ground the arbitrator exceeded his or her powers under FAA Section 10(a)(4).

In most or all cases the result would probably be the same in circuits that recognize not only *Oxford Health Plans*' Section 10(a)(4) vacatur (i.e., for manifest disregard of the agreement), but also vacatur for manifest disregard of the law, as bases for vacating an arbitration award.

If an arbitrator determines in good faith that a contract unambiguously shows consent to class arbitration, then the *Stolt-Nielsen/Lamps Plus* presumption would not be relevant, and therefore something an arbitrator could legitimately disregard if he or she saw fit.

And if the arbitrator's award acknowledges the existence of the *Stolt-Nielsen/Lamps Plus* presumption but states the arbitrator's con-

clusion that the presumption does not apply because the contract is unambiguous, then that would likely make the award even more difficult to vacate.

Part I of Justice Kagan's dissent, which concluded that the *Lamps Plus* arbitration agreement unambiguously evidenced consent to class arbitration, may provide arbitrators with some additional insurance against vacatur for manifest disregard of the agreement or manifest disregard of the law.


Given that three U.S. Supreme Court justices believe that a contract like the *Lamps Plus* agreement unambiguously demonstrates consent to class arbitration, it may appear all the more reasonable for an arbitrator to conclude in good faith that a similarly worded arbitration agreement is likewise unambiguous on class arbitration consent.

Class arbitration opponents would be well advised not only to structure their agreements to negate any inference of intent to consent to class arbitration—as many or most have done through class arbitration waivers prior to and since *Stolt-Nielsen*—but also to exclude clearly and unmistakably from those agreements disputes concerning class arbitration.

One final issue the Court necessarily left open concerns appellate jurisdiction. The Court was not faced with a situation where either party requested a stay of litigation pending arbitration, and so there was no reason for the Court to consider whether the district court should have granted a requested stay.

In the Second Circuit, for example, if a party requests a stay of litigation pending arbitration of an arbitrable matter, then the district court has no discretion to deny the stay. See *Katz v. Celco Partnership*, 794 F.3d 341, 345 (2d Cir. 2015) (recognizing a split in the circuits).

This is an important issue because stays of litigation pending arbitration are not appealable under the FAA, 9 U.S.C. § 16(b)(1), and if the Court has ordered a stay of litigation pending arbitration, then there is, by definition, no "final decision with respect to arbitration[]" from which an appeal may be taken. 9 U.S.C. § 16(a)(3).

The timing of appeals is always an important strategy consideration. A delay in the appeal of a district court's decision imposing class arbitration can cause arbitration opponents to incur substantial time and monetary costs prior to having the opportunity to appeal. 

International ADR/Part 1 of 2

How Uncitral's Working Group II on Arbitration Is Analyzing the Field to Help Expedited Processes

BY PIOTR WÓJTOWICZ & FRANCO GEVAERD

International arbitration has been facing well-publicized challenges in recent years, including costly, lengthy, and complex procedures. Practitioners have been addressing scrutiny, and even interference, by state courts or legislative meddling.

International arbitration, like domestic U.S. arbitration, also has been facing “litigationalization.” See Thomas Stipanowich, “Arbitration: The ‘New Litigation’” *U. of Ill. Law Review* No. 1 (2010) (available at <http://bit.ly/2DMVoIo>).

Overall, it's the formation of a Zeitgeist that is detrimental to international arbitration.

These challenges can be framed as the rise of inefficient arbitration proceedings. While inefficiency might not yet be the rule in international arbitration, it is a specter that overhangs proceedings and might get worse if no further action is taken.

The good news is that the international arbitration community is alerted and has demonstrated a readiness to act and to implement counter-measures to safeguard arbitration's fitness for its purpose. Practitioners are working to preserve arbitration as an efficient and neutral international dispute resolution tool.

In addition to past and continuing efforts by ADR providers, a key effort to combat problems has emerged on the horizon in the past year from the United Nations. The long-time arbitration source, the United Nations Commission on International Trade Law, best

known as Uncitral, has commenced work “to improve the efficiency and quality of arbitral proceedings.” Uncitral Report A/73/17, 51st Session (June 25-July 13, 2018) ¶244 (available at <http://bit.ly/2LjwdDd>).



Its focus is that “expedited arbitration would provide generally applicable tools for reducing the cost and time of arbitration.” *Id.* at ¶245.

In this first of two parts, Uncitral's expedited arbitration work is reviewed below. The recent Uncitral Working Group II deliberations are discussed, as well as the basics of the framework that is emerging.

BACKGROUND AND OVERVIEW

Uncitral was established by the U.N. General Assembly in 1966 to combat impairments to international trade stemming from diverging national laws. Resolution 2205 (XXI) (Dec. 17, 1966) (available at <http://bit.ly/2YbsE3R>). The commission is the United Nation's main body for modernizing and harmonizing international business rules. It holds its sessions once or twice a year, alternating between the U.N. Vienna International Centre and the United Nations New York headquarters.

Uncitral has six Working Groups—see <http://bit.ly/2VDLoag>—which are responsible for performing the “substantive preparatory work on topics” in the various Working Group areas of specialization. See the United Nation's “A Guide to Uncitral” (available at <http://bit.ly/2J2maR1>).

Since 2000, Working Group II has been responsible for addressing issues regarding arbitration, mediation conciliation, and dispute settlement. The Working Groups also typically meet once or twice a year to discuss projects and submit works to the commission. Once finalized, the U.N. General Assembly adopts the works by means of resolutions.

Commission and Working Group discussions are open to Uncitral's 60 member states and to observers, i.e., interested international organizations and non-member states. [The CPR Institute, which publishes this newsletter with John Wiley, has been invited to participate in discussions of different Working Groups with an observer delegation. A box in next month's Part 2 will explain fully the CPR Institute's observer delegation role in Working Group II on Expedited Arbitration.]

THE GENESIS

Before the 51st Uncitral session (June 25-July 13, 2018) referenced above, several state-delegations submitted to the commission proposals for potential future conflict resolution efforts that could be undertaken by the Working Group II. This was the genesis of the Working Group II expedited arbitration undertaking.

Switzerland and the United States jointly proposed to focus on expedited arbitration and adjudication, thereby directly addressing the inefficiency issue. Their proposal resonated well and was affirmed by a related proposal submitted by Italy, Norway, and Spain. Uncitral Note A/CN.9/959, para. 3-4 (available at <http://bit.ly/2H36jzH>).

At the 51st Uncitral session, the commission acknowledged the proposals and decided that the Working Group should prioritize work on expedited arbitration. See Uncitral Report A/73/17 at ¶¶ 245 and 252. That framework, if any, is to be expected to be in the form of Uncitral rules for the use of parties and tribunals, and not in the form of an Uncitral Model Law.

Accordingly, the Working Group II discussed expedited arbitration during its 69th session on Feb. 4-8, 2019, at the United Nations headquarters in New York. Uncitral Annotated Provisional Agenda A/CN.9/WG.II/WP.206 (available at <http://bit.ly/2Wq7uhN>).

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THE DELIBERATIONS

During the 69th session—the first session devoted to the topic—the Working Group broadly discussed how to conduct expedited arbitration in a new Uncitral framework. For further details, see Note by Secretariat, Settlement of commercial disputes—Issues relating to expedited arbitration, A/CN.9/WG.II/WP.207 (Feb. 4-8, 2019) (available at <http://bit.ly/2vJlxmJ>); Report of Working Group II (Dispute Settlement) on the work of its 69th session, A/CN.9/969 (Feb. 4-8, 2019) (available at <http://bit.ly/2LnVtse>).

The session began, first, with an acknowledgment that the nature of expedited arbitration features shortened time frames, cut costs, and incorporates other elements simplifying the proceedings. The subject itself provided the framework: strict time limits would apply, and procedural steps would be limited.

Second, it was pointed out in the general remarks that arbitral institutions had already introduced expedited arbitral proceedings, which could provide reference points for the Working Group. Accordingly, the institutions were invited to share their experiences throughout the session.

Third, the question of form also was a significant fundamental point in the Working Group debate. The discussion evolved around whether an independent set of rules, or an annex to the Uncitral Arbitration Rules, or merely guidelines should be drafted. The decision was taken to discuss the form at a later stage and to start with the substantive work.

Fourth, the Working Group discussed whether the efforts should encompass arbitration in general or be limited to commercial arbitration—in particular, whether investment arbitration should be included.

Strong views were expressed to focus the work on international commercial arbitration and not seek to address expedited procedures for investment arbitration since Working Group III, on investor-state dispute settlement, was deliberating reform. It was also questioned whether expedited procedures would fit investment arbitration because those disputes are complex, encompassed public policy issues, and involved states, not parties.

Finally, in view of the Working Group efforts on “other types of procedure,” including emergency arbitrator and adjudication, which

also could be used in nonexpedited procedures, further information will be gathered by the Working Group on addressing the issues later.

FRAMEWORK ELEMENTS

While for most part the Working Group has not yet made decisions, the discussion might indicate trends and a potential outcome—if any. The discussion was premised on efficiency while preserving quality, due process, and fairness. The following is an overview of the issues discussed throughout the weeklong session.

The issues reviewed can be found at the

Faster and Better

The goal: Improving arbitration, internationally.

The players: Members of the U.N. Commission on International Trade Law—Uncitral's Working Group II.

The method: Developing rules, exact form TBD, that offer parties expedited processes. This month, the authors set the stage with background and some of the deliberations. Next month, more specifics on the framework. This fall, the Working Group reconvenes.

comprehensive Uncitral documents linked above, Note by Secretariat, Settlement of commercial disputes, and Report of Working Group II (Dispute Settlement).

The session encompassed a preliminary discussion regarding selected and mostly general issues.

DUE PROCESS AND FAIRNESS: The consensus was that due process and fairness were important elements of international arbitration and caution should be applied so that expediency doesn't curtail those rights. The Working Group acknowledged the difficulty of the task to balance process efficiency with parties' due process rights—that is, their right to present their case and fair treatment.

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS RESULTING FROM EXPEDITED ARBI-

TRATION: It was acknowledged that the work should encompass the recognition and enforcement of arbitral awards resulting from expedited arbitration. As a rule, those awards would be enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, best known as the New York Convention.

Yet if breaches of due process or fairness occurred under the expedited procedures, enforcement could be affected. To alleviate any threats, it was recommended to offer guidelines akin to the 2006 Recommendation regarding the interpretation of Articles II (2) and VII (1) of the New York Convention. Furthermore, recognition and enforcement of decisions by an emergency arbitrator, and under adjudication, could also be considered by the Working Group.

The Uncitral secretariat was charged with gathering further information on case law on the enforcement of awards resulting from expedited arbitration, particularly where due process requirements were mentioned. It was also requested by the session representatives to collect information on the roles of institutions administering expedited arbitration.

MECHANISM FOR THE APPLICATION OF EXPEDITED ARBITRATION: The Working Group discussed the conditions that should be established for the expedited framework to apply.

Reference was made to arbitral institutions which adopted a variety of processes. Common criteria were money thresholds. Under some rules, expedited procedures also could be triggered upon a case-by-case assessment in view of special circumstances.

As a result, the session delegates acknowledged that a simplified procedure was not limited to low-value disputes. Also, high-value disputes could be dealt with under expedited rules if the circumstances so warranted.

Concerns were raised whether financial thresholds or characteristics of the case and relevant circumstances should apply. Setting a financial threshold could be difficult, as Uncitral would reflect a variety of legislative schemes with different economic backgrounds. It was generally acknowledged that the determination should depend on the case's circumstances.

A further concern was raised that, in ad hoc arbitration, the lack of an appointing authority would impede the process. Even if the parties agreed upon the authority, the question remained how that authority would deter-

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International ADR

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mine whether expediency applied. As a result, arbitral institutions were invited to share their experience on the trigger events they relied upon to apply expedited proceedings.

The point in time for determining the application also will require careful consideration. Parties might not anticipate whether the simplified procedure should apply to their dispute when signing a contract. Consideration might be given to opt-in after a dispute arose even if it was acknowledged that parties might not be able to agree to further procedures as the dispute evolved. Thus, the necessity for referencing an

expedited procedure in a contract was raised.

It was acknowledged at the Working Group's 69th Session that parties' agreement should be the determining factor for the application of expedited arbitration, and that parties could include in their arbitration agreement threshold criteria. But the agreement should not be the only determining factor.

Thus, it was decided to consider mechanisms under which expedited arbitration applied even without the parties' agreement. Concerns were raised that neither the arbitral tribunal, the appointing authority, or an arbitral institution might be vested with powers to impose a decision on the parties.

It was generally agreed that the parties should be able to opt out of expedited arbitration. Many

factors could argue for non-expedited arbitration being more appropriate: additional claims, counterclaims, and the dispute's complexity. Yet it was suggested that only the parties should have the right to decide and not, among other entities, an administering institution.

It was said that if the process provided for enough flexibility, an opt-out into non-expedited arbitration was not necessary.

* * *

In Part 2 next month, the authors dive deeper into the potential forms the Uncitral reforms may take—An inclusive set of rules? An annex to the Uncitral Arbitration Rules?—and describe the role the CPR Institute took as an observer delegation at the Working Group II 69th Session.

Neutrals

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With no other entity focusing solely on increasing the diversity and inclusiveness of the dispute resolution field as a combined collective, the Network organizers made it their agenda to concentrate on how to be inclusive in providing colleagues from diverse backgrounds with recognition, support and opportunities and how to offer users a diverse pool of practitioners.

DIVERSIFYING ADR PROCESSES

Moreso than other contexts, it is particularly important for dispute resolution practitioners to pay attention to diversity, especially mediation, a process where the third party has the responsibility of engaging all the disputing parties who are at odds with each other.

Mediators are expected to pay special attention to how they present themselves to parties or how their words or actions may be perceived by the parties. The prescription for mediators' work is detailed in the Model Standards of Conduct for Mediators, which require that they "conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality." See Standard II. Impartiality. Sec. B. (Available at <http://bit.ly/2DACm84>.)

Furthermore, mediators must refrain from acting "with partiality or prejudice based on

any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason." Id., at Sec. B1.

The Model Standards' guidance to mediators that they proceed cautiously and deliberately in their interactions with parties points to the importance of creating an inclusive environment for all. If adhered to, all parties should feel welcome, and be provided with an opportunity to open up and to participate with ease.

Additionally, the significance of who serves as convener of disputing parties is magnified by the fact that most dispute resolution processes occur behind closed doors with someone who may not be known to them. The invisibility of the mediator's work to anyone but the parties raises the importance of trust placed on the mediator to conduct a fair and supportive process.

Whether or not parties are given a choice to select their intervener depends on the context. Efforts to provide lists with names of third parties from diverse backgrounds and experiences have become the subject of much discussion and examination.

For example, recently, Jay-Z's arbitration case raised questions about the lack of diversity on a roster of arbitrators he received from the American Arbitration Association's New York Large Complex Case Roster. Only three of the 200 arbitrators were African American. Sopan Deb, Jay-Z Criticizes Lack of Black Arbitrators in a Battle Over a Logo, *N.Y. Times* (Nov 28, 2018) (available at <https://nyti.ms/2ZIkMYU>); see also Jay-Z's petition to stay arbitration at <http://bit.ly/2PydRgp>.

Two major practices have produced this conversation: (1) The historic reliance on relationships, i.e. referrals to third parties with whom one is familiar, and (2) The effects of implicit, or unconscious, bias which lead individuals to make decisions based on unconscious attitudes toward others who are not like them. See Ohio State University Kirwan Institute for the Study of Race and Ethnicity (available at <http://bit.ly/2PCvv2t>).

The emphasis on choosing interveners who are known to users or their representatives led to the selection of handpicked providers, even when the roster lists may be diverse. As a result, it is understandable that there has been a lingering obliqueness about who serves as a dispute resolver in a field that relies on relationships and addresses complex psychological factors like unconscious bias. This is compounded by processes that are virtually unknown to users and others who have little or no knowledge about them.

There are other challenges facing the discourse about diversity and inclusion in the dispute resolution field. Well noted are the reliance on volunteerism and limited compensated opportunities; lack of career paths; lack of opportunities for practice, learning and attaining mentorship in order to gain the requisite experience, among others.

Even when there is a significant commitment to paying attention to diversity, given the dominance of solo practitioners and small programs, it is daunting for practitioners to do the necessary work to ensure inclusiveness since, often, they operate in silos and lack the necessary resources.

Additionally, dispute resolution organizations express difficulty in ensuring a diverse pool of dispute practitioners. These organizations also operate with their own criteria for placing practitioners on their rosters that creates another set of constraints and challenges, which makes it more difficult to ensure that the diverse practitioners on the roster will get chosen over the known practitioners who are called upon more frequently.

The result is that any efforts that are undertaken on both the individual and organizational fronts to promote diversity can go unnoticed, gain limited visibility, have little impact, apply disparate criteria or goals, or are insufficient in addressing the need for broad-based representation.

HARNESSING DISPARATE EFFORTS

While there is no shortage of lip service given to the importance of diversity and inclusion, connecting the countless efforts by practitioners, programs and organizations to achieve these goals has remained relatively ignored.

To explore how to work more collaboratively in leveraging the talents and resources of individuals who are interested in furthering diversity in the dispute resolution field in the New York City area, in 2017, co-author Sheila Sproule convened a group of leading local ADR practitioners and scholars to discuss the local state of affairs regarding ADR diversity.

The initial participants included co-author Maria R. Volpe and more than 40 New York dispute resolvers, who serve as directors of private and public dispute resolution organizations, academics, practitioners and leaders and members of bar association diversity committees. [Editor's note: former CPR Institute vice president Niki Borofsky participated in the group's formation; CPR publishes this newsletter with John Wiley. Borofsky's Network efforts are discussed further below.]

While all founding participants of the Network were committed to furthering diversity, they were widely scattered and disconnected from each other. They shared one common goal, however: to collectively try to address diversity and inclusion in dispute resolution throughout New York State and, as a result, elevate awareness with the gatekeepers and users of these services.

The co-founders decided to create a new entity to continue the dialogue, the ADR Inclusion Network, which would promote diversity and inclusion within the New York State dispute resolution field.

The Network's work is shaped by a steering committee, which provides "leadership,

A Diversity Manifesto

Why inclusion is essential: Mediation engages all disputing parties. The process literally requires an understanding of diverse parties to work.

Moving forward? "[H]ow best to harness the disparate, ad hoc, and varied efforts aimed at embracing diversity has been a continuing challenge."

The latest step: The ADR Inclusion Network in New York has broken down the issues for committees that address specifics. Here, two of the founders describe the details that are pushing real actions to get to diversity goals.

guidance, and/or resources relevant to the members' goals," but it is the members who make decisions on which actions to take, by consensus. See list of Network steering committee and founding members at www.adrdiversity.org.

Any interested entities, dispute resolution practitioners or individuals addressing diversity or inclusion in their own fields of practice or study have been invited to join one or more of the Network's four diverse subcommittees:

- a. EDUCATION SUBCOMMITTEE, which focuses on ways to educate providers and users on diversity, inclusion and implicit bias;
- b. INCREASING ACCESS SUBCOMMITTEE, which addresses ways to create opportunities for newer, less-experienced practitioners;
- c. SELECTION OPPORTUNITIES SUBCOMMITTEE, which addresses ways to enhance

and increase the selection of experienced diverse practitioners; and

- d. RESOURCES SUBCOMMITTEE, which gathers existing resources related to diversity, inclusion and implicit bias, as it relates to the dispute resolution and other fields.

Since the Network operates without a budget, staff or dedicated resources, it relies on members to undertake a variety of activities and initiatives. In order to communicate, the Network members created two means of exchanging information: a listserv to communicate in real time, and the website, linked above, to provide information about the Network, developed by co-author Maria R. Volpe and JAMS Inc.'s Niki Borofsky.

MISSION AND GOALS

Embodied in the Network's mission is "the fundamental concept that neutrals with a wide variety of cultural and life experiences—based upon characteristics such as gender, race, ethnicity, age, sexual orientation, and disability—enrich the alternative dispute resolution (ADR) process by bringing diverse perspectives to resolving disputes."

It continues by stating that, "These perspectives stem from a range of personal and professional backgrounds that, in practice, may better serve, instill confidence in, and create greater perceived fairness in the ADR processes offered by, for example, better reflecting the communities served by the neutrals or providing normatively better outcomes for the end-users of those ADR processes."

To that end, the Network's goals are:

1. increasing the awareness of, use, visibility, availability, and selection of diverse neutrals within New York State in all aspects of the ADR field, including on state and federal court rosters and private and community ADR providers and programs;
2. improving the inclusion and growth of prospective diverse neutrals within New York State, while maintaining a focus on increasing the use of existing diverse neutrals; and
3. functioning as a resource for New York State on the topic of ADR inclusion and diversity.

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Neutrals

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The full charter, including the material above, is available at www.adrdiversity.org.

EMERGING AGENDA

The Network participants have been laying the groundwork to better understand and promote diversity. Their agenda has been to identify and learn from the challenges and successes in the New York State dispute resolution field and from each other. Additionally, they have been examining what dispute resolvers are doing in other states or contexts to address similar issues within their ranks.

Network members have been creative in sharing the group's work as part of panels at other events. The Network collaborated on a plenary panel discussion organized by the New York State Unified Court System for the 2017 Mediation Settlement Day kickoff event, titled "Diversity and Inclusion in Dispute Resolution, 2.0," taking steps to increase the use, visibility, availability, inclusion and growth of diverse mediators, in conjunction with the New York State Unified Court System and the other sponsors, FINRA Dispute Resolution and the NYC Bar Association's ADR Committee.

Mediation Settlement Day is a nationwide, annual event that raises awareness about the process, highlights the resources available for parties in conflict, and promotes mediation use. See <http://bit.ly/2LaGGRx>. Panelists at the 2017 event included co-author Maria R. Volpe; Niki Borofsky; Fordham University School of Law Prof. John Feerick, who is the school's former dean and director of the Feerick Center for Social Justice; Rekha Rangachari, who is executive director of the New York International Arbitration Center; and Maurice Robinson, EEO Officer, Assistant Director, and Executive Agency Counsel of the New York City Housing Authority.

Three Network members participated at a CLE session on Diversity, Inclusion and Elimination of Bias in Arbitration and Mediation at the Practising Law Institute's Securities Arbitration 2018 program: Princeton, N.J., neutral Laura Kaster and NBC Universal Media LLC Vice President Beth Trent were presenters, and Ken Andrichik, who recently started his own consulting practice after many years as

senior vice president, chief counsel and mediation director at FINRA, moderated. The topics addressed the current state of diversity in the legal profession and ADR, the impact of implicit bias, how diversity can improve dispute resolution processes, and included proposed techniques for enhancing diversity. (Available at <http://bit.ly/2GSwuZR>.)

In addition, the Network has co-sponsored and developed the topics and questions for breakout sessions at New York Law School's 2018 and 2019 annual ADR and Diversity Symposium. This program is led by Network member F. Peter Phillips, an adjunct law professor and director of the Alternative Dispute Resolution Skills Program, at New York Law School. Other co-sponsors included ADR organizations led by founding Network members. See 2019 program at <http://bit.ly/2GTALwa>; see also "CPR News, What is Diversity? Really?" 37 *Alternatives* 34 (March 2019)(available at <http://bit.ly/2GRzC8a>).

At the New York State Council on Divorce Mediation's 2018 annual conference, this article's co-authors, along with fellow Network member Bathabile Mthombeni, University Ombudsman at Binghamton University, Binghamton, N.Y., gave a presentation addressing diversity, inclusion and implicit bias, and discussed the Network's efforts. See "Addressing Diversity, Inclusiveness, and Implicit Bias: Concerns Facing Mediators" (available at <http://bit.ly/2DPq9MX>).

At the 2018 Association for Conflict Resolution for Greater New York (ACR-GNY) annual conference, four Network members—Niki Borofsky; Maurice Robinson; and New York attorney-mediators Jonathan Latimer and M. Salman Ravala—were on a panel on diversity, inclusion and equity in ADR. Additionally, the Network was given a display table that provided another opportunity for members to share the Network's work with attendees. See "Practicing What We Preach: Tips to Facilitate Diversity, Inclusion and Equity in ADR" (available at <http://bit.ly/2IN9LjX>).

The Network co-sponsored last month's 2019 New York International Arbitration Center's NYIAC Talks session, the "2019 Diversity & Inclusion Symposium: The Collaborative Path Forward for Arbitral Institutions and Affinity Groups." It featured Network members Rekha Rangachari and Jeffrey Zaino, an American Arbitration Association vice president, and was conducted with the assistance of Network members Joanne Saint Louis and

Mansi Karol, who are both AAA ADR services directors. (See <http://bit.ly/2PAZ4By>).

The May 2019 event was co-sponsored by NYIAC, the ADR Inclusion Network, the American Arbitration Association's International Centre for Dispute Resolution; *Alternatives'* publisher, the International Institute for Conflict Prevention & Resolution; JAMS Inc., and the U.S. Council for International Business, a longtime advocate for businesses on open markets and regulation, and an affiliate of the U.S. Chamber of Commerce.

In addition to these events, the Network's members have been citing the group at a wide range of ADR events where they have given presentations. And, as the Network's existence becomes known, it is being invited to collaborate with other organizations seeking to shine the spotlight on diversity, inclusion, and equity.

Finally, the Network members are generating information sheets on how best to advance diversity and inclusion in the dispute resolution field. Co-author Sheila Sproule has launched a Best Practices Series. The first tip-sheet will focus on how to make events more diverse and inclusive. All will be posted on the Network's website for easy access.

HIGHLIGHTING THE BENEFITS

Network member Theodore Cheng, a New York neutral, has developed an information sheet for parties in dispute resolution who choose their dispute resolver. Theodore K. Cheng, "The ADR Mosaic: Moving the Conversation Beyond Raising Awareness of Diversity." New York State Bar Association, *Diversity & the Bar* magazine (Fall 2018) (available at <http://bit.ly/2L7fBP4>).

The concept, conceived by his colleague, New York attorney-mediator Stephen Gilbert, at a College of Commercial Arbitrators event while they were together on a diversity and ADR panel, is designed as a one-page handout for parties and their counsel to highlight "the benefits of having a diverse panel of arbitrators."

Informally named the "mindbug sheet," after the term coined by Harvard University Prof. Mahzarin R. Banaji and University of Washington Prof. Anthony G. Greenwald (see Mahzarin R. Banaji, and Anthony G. Greenwald, *Blindspot: Hidden Biases of Good People*. (New York: Delacorte Press, 2013)), Cheng brought the concept to the Network so

that all dispute resolvers could benefit from it and customize it to their “particular provider, court program, or end-user.”

As Cheng notes, the handout ends with this reminder: “Who serves on your panel is one of the most important decisions you will make in your arbitration.”

Within the Network, its listserv and meetings have provided opportunities for members to share notable and time-sensitive developments related to diversity such as the American Bar Association’s adoption of Resolution 105 aimed at increasing diversity in dispute resolution (linked in the first paragraph above); the release of new publications on diversity; efforts by ADR organizations to survey how their users select their dispute resolution practitioners; future diversity and inclusion programs, workshops, events members are involved in or are aware of; other dispute resolution programs’ diversity commitments (see, e.g., the diversity statement from the New York Southern District federal court’s mediation program, headed by Director Rebecca Price, at <http://bit.ly/2UQGzKE>, and the New York Eastern District federal court’s mediation panel application form at <http://bit.ly/2vsULz6>, overseen by ADR Administrator Robyn Wein-

stein); new and recent efforts like JAMS dispute resolution clauses’ diversity inclusion language (available at <http://bit.ly/2GPKDKW>), the CPR Institute’s diversity pledge (available at <http://bit.ly/2UNQArC>), and the American Arbitration Association’s commitment to providing arbitrator lists to parties with at least 20% diverse panelists where party qualifications are met (available at <http://bit.ly/2vsRqzX>).

The CPR Institute also has added a diversity statement to the neutrals’ nomination letter that it sends to parties considering candidates for their ADR matter. The statement in full appears at <http://bit.ly/2PNrw3n>.


The Network’s agenda continues to emerge as its participants explore ways to increase diversity and inclusion in the dispute resolution field. Among the Network’s pending efforts are a diverse speakers’ bureau housed on the Network’s website that would provide a list of talented professionals who are ready, willing and able to speak on the vast variety of dispute resolution processes and to help ensure that program panels are as inclusive as possible; an “ADR Diversity Day” event; a calendar of diversity and inclusion as well as implicit bias events in New York; and a potential “Shadowing Club”

sign-up sheet that allows newer practitioners to gain experience and knowledge, accompanied by a mentorship confidentiality agreement.

* * *

While diversity has historically been addressed in a variety of ways among dispute resolvers—see Marvin E. Johnson and Maria R. Volpe, “Roots of Diversity in Dispute Resolution: Some Preliminary Observations,” *ACResolution*, above—the immediate value of having a collective group of individuals who are knowledgeable about and committed to diversity like those of the ADR Inclusion Network is that there is a wealth of concentrated knowledge that can be shared on instant notice.

Collectively, the Network participants have been building on lessons learned from past efforts and generating ideas for new activities. The hope is that their combined efforts can demonstrate how to walk the talk about diversity and inclusion so that disputing parties, neutrals and ADR organizations can all reap the benefits of diversity and inclusiveness.

The Network aims to amass and model the best practices of diversity and inclusiveness relevant for the dispute resolution field. 



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potential snags. Kiernan strongly backed her assessment, noting that the “worst mistake” an arbitrator can make is to not disclose a key fact about the arbitrator’s experience. He added that “there is no downside in erring on the side of disclosure.”

Said Sabatino, “Nothing is worse than surprises” from nondisclosures during the arbitration.

Wellington focused the panel on the tension between party-appointed arbitrators and the challenge of an effective process, especially on the questions of calling for and processing evidence, and the potential for judicial review.

In the second session, Annie Duke warned that doing homework before acting is necessary to avoid the fallacy of equating the quality of the result to the quality of the decision. She discussed confirmation bias at length—that is, the phenomenon that new information or evidence that backs the point of view becomes the predominant basis of decision-making. “People fall prey to confirmation bias,” she said.


A panel presentation on mediation issues was presented as an interactive classroom, with a series of hypotheticals, by moderator Eugene Farber, of White Plains, N.Y.-based Farber, Pappalardo & Carbonari; Carole Katz, who heads her own ADR firm in Pitts-

burgh, and Schnader counsel Timothy K. Lewis, a former Third U.S. Circuit Court of Appeals judge and a former CPR Institute board member.

A big part of the panel focused on a mediation in which the neutral learns that one side has not received a key document from its adversary, which has produced a major valuation distortion in the matter. The panel reviewed the neutral’s potential actions to get the material disclosed, or even to withdraw from participation.

“We really can’t be a tool of a fraud,” warned Farber.

Before a networking reception, the program concluded with remarks on diversity by Princeton, N.J., neutral Laura A. Kaster, who has been active in a variety of inclusion efforts at the CPR Institute and elsewhere. (A description of some of Kaster’s work is in the cover article of this month’s issue, Maria R. Volpe & Sheila M. Sproule “The ADR Inclusion Network: Addressing Diversity Collectively,” 37 *Alternatives* 81 (June 2019).)

Kaster urged attendees to draw up lists of competent women and minority arbitrators and mediators to have at hand when conflict arises. She asked the audience to mentor, sponsor, recommend and, most important, hire diverse neutrals as a best ADR practice. 



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