First Mediated Settlement of a Native American Land Claim

By Louis Coffey

This article addresses a mediation settlement approved by the Federal District Court for the Western District of New York of the Seneca Nation of Indians claim of land against the state of New York, which also included the U.S. government.

It is the first Native American land claim ever to be resolved by settlement: several others have been attempted, but failed. It may also be the first Native American land claim in which the tribe regained possession of and sovereignty over its tribal lands, as historically courts did not dispossess non-tribal occupants of the disputed tribal lands and typically awarded tribes compensatory monetary damages. A major difference in this case was that the tribal lands were occupied by tenants of the state of New York, the party that had wrongfully acquired the tribal lands. As tenants, the occupants would have been subject to dispossession, and the state, the offending party, was not in possession of most of the tribal land at issue. There was some question as to what remedy a court might fashion in this case particularly since the defendant had leased the disputed lands to a third party. Of course, it is such subtleties that open a door to serious negotiations.

The dispute had continued, in one form or another, for close to 150 years. The most recent iteration was a lawsuit initiated in 1985 in federal district court.

The land involved was confiscated by the state of New York beginning in 1858 as part of the development of the Genesee Valley and Erie Canals, but was not part of the canal bed. In 1866, the state paid the Seneca $1,396.04, inclusive of interest to the date of payment, for a fraction of the acquired land. There is no evidence of any payment for the remaining lands. Commercial use of the Genesee Valley Canal was abandoned in 1878 and commercial use of the Erie Canal was abandoned in 1892.

At the time of the mediation, much of the tribal land was occupied by tenants of the state of New York. Other parts were used for a public road, lake bed, dam, spillway and boat launch. The land spans two counties, two municipalities and a special services district that has the statutory status of a municipality.

In the settlement, the tribe: (1) regained possession, record title and sovereignty over its land, free of possessory claims by the then-occupants and New York State; (2) received monetary damages for the period of dispossession; (3) joint jurisdiction over the public road; (4) use of the lake bed, dam and spillway; (5) issuance of fishing and boating licenses and (6) regulation of use of the lake — parts of these areas are not necessarily on tribal land.

The logistics consisted of travel to Philadelphia, coincidentally the place where the tribe was first granted sovereignty over the land by the United States, as well as conference calls and e-mail messages.

During the three years of mediation, the mediation process was sidetracked to some degree by the governor running for a new term, which diverted the attention of the executive

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branch and heightened partisan tension between the Republican governor’s office, the then-Democratic attorney general’s office and the less-partisan New York Government Accounting Office. This division of focus also affected the opposing party as there were two elections of the tribal council, which also included the replacement of the tribe’s attorney general and changes in the tribe’s settlement committee. Late in the proceedings, the tribe fired one of its lawyers (all Native Americans) because of philosophical differences with the newly elected tribal chief.

Although the U.S. Department of the Interior and the U.S. Department of Justice were represented in the mediation, the settlement was structured in a way that avoided any need to get Congressional approval; a concern early in the process. The Federal Indian Trade and Intercourse Act, 25 U.S.C. §177, known as the Non-intercourse Act, requires Congressional approval of any alienation of tribal lands. It was the failure of the state of New York to obtain Congressional approval that resulted in Senior Judge John T. Curtin of the Federal District Court for the Western District of New York finding that the state had wrongfully acquired the Seneca Tribal Land. I was then appointed by Judge Curtin to mediate the remedies.

Cultural differences between the tribe and the governmental entities were palpable. I researched the tribe’s history and culture before having any contact with the parties. Having some knowledge of the foreign culture is critical when mediating cross-cultural disputes. If the mediator doesn’t understand the culture of the parties, the mediator will never gain the respect or trust of the party and may never understand their motivations and goals.

The Seneca Nation of Indians is matriarchal in its governmental and economic structure. It makes decisions based on what it believes to be in the best interests of the seventh generation to come — “the faces yet unseen” — a concept now foreign to mainstream America, which often focuses on today’s bottom line with little regard for the future. The Seneca have a relationship to the land that is unlike that of mainstream America; it deeply discounted its damages claim in exchange for a return of its tribal lands, free and clear of all possessory interests and encumbrances of any kind.

The governmental structure of the Iroquois Nation, with its three branches of government and bicameral legislature, was the model for the early United States government, with Iroquois chiefs acting as advisors to the founding fathers. However, the Iroquois fell from favor when they backed the British in the revolution. The Seneca tribe is the largest of the five tribes that make up the Iroquois League.

This mediation encountered its share of roadblocks. Individuals, government officials and another Indian tribe unsuccessfully petitioned the court on two occasions to intervene in the mediation process. Judge Curtin, who retained jurisdiction over the case during the mediation process, suffered a major heart attack and stroke during the mediation process, but recovered well and remained involved.

The mediation team achieved 100 percent participation by the then-current residential occupants of the tribal lands in a program in which the occupants were bought out.

A week after the court approved the Seneca settlement, the Second Circuit reversed the District Court in a different land claim. There, the District Court awarded $480 million in damages instead of giving the Cayuga Tribe possession of its former New York tribal lands. In its opinion, the Second Circuit said that the tribe has no remedy, neither possession nor damages. The appeal period in the Seneca settlement has expired; no appeal was taken.

Louis Coffey is the president of Coffey Consulting Co., serves as a mediator and arbitrator and is of counsel to Wolf, Block, Schorr and Solis-Cohen L.L.P. He specializes in resolving complex business disputes and major real estate/construction claims. He is on the American Arbitration Association’s Complex Commercial and Construction Arbitration and Mediation Panels, the International Institute for Conflict Prevention and Resolution’s Panel of Distinguished Neutrals and the U.S.-China Business Mediation Center’s Panel of Mediators, and is a dispute resolution provider in the Native American Dispute Resolution Network of the U.S. Institute of Environmental Conflict Resolution.
Collaborative Practice — Another Alternative

By Diane D. Hitzemann

History
In 1990, Stuart G. Webb had practiced family law in Minneapolis for almost 20 years. A successful civil litigator in his early career, he also experienced trauma in his personal life; the result was a transition to family law with a commitment to helping families. Over time, he became discouraged because of the effect the legal process had on families. He determined that the court system, conceived in the Middle Ages and developed to handle property disputes in the 18th century, is ill-suited for family disputes in the 21st century.

He developed the premise that removing the trial option from initial consideration would create a heightened degree of communication and trust leading to settlement.

There would be an understanding that if it were determined at any time that settlement was no longer an option, the attorneys from both sides would withdraw from the case, and the parties would retain new attorneys to seek final resolution. He called this settlement “model collaborative law” and the lawyer a “collaborative lawyer.” Webb removed court from his practice effective Jan. 1, 1991, and his process has been honed into what is now termed the collaborative practice of law.

Collaborative Practice
In collaborative practice, the parties in legal conflict retain trained collaborative lawyers in order to resolve their differences and attain legal resolution to the conflict by engaging in client-centered dialogue in a safe environment. The fundamental basis of the process is the commitment by all parties and counsel not to litigate the dispute. Settlement by agreement is the sole purpose and goal of the legal representation; interest-based, cooperative negotiations replace adversarial maneuvering, and litigation is seen as a last rather than a first resort. In the collaborative approach, the lawyers and clients must learn to leave their anger and resentments at the door and come to the process in a spirit of goodwill and motivation to work things out. The role of the lawyers is to help their clients arrive at a fair settlement and get on with their lives.

The primary objective of the collaborative process is getting parties from dispute to resolution efficiently, and with as little financial and emotional damage as possible, while securing an agreement that addresses their true interests. It is based upon a problem-solving model rather than an adversarial model. The focus is on the future rather than the past and on rebuilding relationships rather than finding fault. Parties are encouraged to communicate openly and respectfully — to hear and understand each others’ needs and interests, and to come to agreement based on those needs and interests, rather than on their individual positions.

The lawyers are trained dispute resolution professionals who work as guides, advisers, legal counselors and facilitators. Solutions are worked out in direct four-way negotiating sessions with clients and lawyers participating; the lawyers do not control communications or outcome. Collaborative lawyers play an important role in setting a respectful tone of positive energy — they are responsible for “modeling” appropriate behavior, which can result in good decisions. Financial experts and mental health/child specialist consultants are

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brought into the process as neutrals, not hired guns. All participants say what they believe to be true in a transparent process, which empowers the clients, who will ultimately live with the results, to have ultimate responsibility for the outcome.

**Collaborative lawyers play an important role in setting a respectful tone of positive energy — they are responsible for “modeling” appropriate behavior, which can result in good decisions.**

The Participation Agreement

The cornerstone of the collaborative process is the binding participation agreement signed by all parties and counsel. Elements of the participation agreement include the commitment to a good-faith, interest-based and respectful bargaining process, the voluntary, early, complete and continuing disclosure of information and joint retention of all experts as neutrals. It allows no threat of or resort to court proceedings by parties or counsel during participation in the collaborative process, and absolutely disqualifies the lawyers and all neutral experts from ever appearing in court in connection with the dispute. The lawyers also commit to withdraw from representing a client known to be acting in bad faith.

Benefits of Collaborative Practice

Multiple benefits to the parties result from using the collaborative process. The transparent negotiating process results in creative win-win solutions; parties and counsel say what they believe to be true as they reason with one another as opposed to a sequence of two-way communications between the lawyers, who control the exchange of information for strategic advantage. Any cooperative possibility can be used in crafting creative solutions without the litigation constraints of limited jurisdiction, limited time and limited attention. The destructive escalation of adversarial hostility can be eliminated, maximum privacy of the parties is maintained, and the cost has typically been found to be much less than litigating the same set of issues. Most importantly, parties control the quality and shape of the outcome. They own the resolution of the dispute, because results are always consensual — no third party dictates dispute resolution.

Conclusion

As the newest form of dispute resolution, collaborative practice combines the problem-solving focus of mediation with the advocacy and counsel of traditional representation. Collaborative practice groups have been formed to promote and expand the model in more than 35 states, Canada, Australia and many European countries. The International Academy of Collaborative Professionals (IACP) has been established as a worldwide interdisciplinary nonprofit organization dedicated to transforming the practice of dispute resolution. Professionals and parties alike are drawn to Stu Webb’s vision — to preserve family bonds and relationships in the process of a life transition.

Diane D. Hitzemann is a sole practitioner in Schuylkill County, and a co-founder of Pennsylvania Collaborative Practice. She serves as a mediator providing court custody mediation services for Berks County, is on the mediation panel for the U.S. District Court, Middle District of Pennsylvania, and as a special education mediator for the Pennsylvania Office for Dispute Resolution. She also specializes in creating wills and estate plans.

Note on a Recent Supreme Court Decision Regarding Arbitration

In a recent decision, *Buckeye Check Cashing v. John Cardegna*, 2006 U.S. Lexis 1814 No. 04-1264, Feb. 21, 2006, the U.S. Supreme Court, [Judge Alito took no part in the decision], was faced with the question of whether a state court, here Florida, or an arbitrator has jurisdiction to decide an entire contract void or decide an ADR/arbitration provision void.

With only a single dissent by Judge Thomas, where he tersely stated that the Federal Arbitration Act need not be applied in a state court action, the remainder of the Court clearly stated, “regardless of whether it is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 801, 18 L.Ed.2d 1270, and *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1” at Page 2 of the Lexis electronic pagination.

The Court also clearly stated that a court and not the arbitrator should have jurisdiction no matter how the contract’s arbitration provision was written when it is solely the arbitration clause that is the focus of the dispute.

In summary, the arbitration clause’s validity is severable and disputes on this clause’s validity are to be decided by a court while questions about the whole contract’s validity are to be decided by an arbitrator when the contract contains an arbitration clause.
Update on Utah’s Medical Malpractice Arbitration Statute

By Thomas B. Salzer

For several years in this newsletter, articles have highlighted aspects of Utah’s precedent setting statute, 78-14-17, allowing physicians to have their patients sign agreements to arbitrate and forego judiciary remedies if future malpractice allegations arise. In essence, and succinctly, this statute allows a physician to ask his/her patients, in non-emergency situations, to either agree to resolve malpractice claims through arbitration as opposed to court processes, or to end the patient-physician relationship soon after refusing to sign an arbitration agreement. In a 2004 Utah Law Review note (2004 Utah L.R. 325, 328), it states that the revised statute has met with such success in reducing losses by physicians and/or the physician’s malpractice insurance carriers that 80 percent of Utah physicians currently provided arbitration agreements to their patients.

This aggregate percentage is not to be extrapolated because some specialists used these agreements widely, with as much as 90 percent of some specialists incorporating them in their practice, and some specialists, such as pediatricians, hardly used them at all. It was not possible to guess why some specialists favored using arbitration agreements and others did not although it was possible to speculate that physicians directly employed by comparatively large hospitals or large managed care businesses were not encouraged to use these agreements.

[T]here were no immediate plans to have a 2005 or 2006 blanket reduction in insurance rates attributed to this statute.

In a very recent discussion with an Utah insurance professional, in an attempt to corroborate the Utah Law Review note, I learned from this single source that there were no immediate plans to have a 2005 or 2006 blanket reduction in insurance rates attributed to this statute. Also, this source stated that while it was not possible to confirm or deny the 80 percent claim in the law review note, he estimated that about 55–65 percent of Utah physicians currently provided arbitration agreements to their patients.

Some Useful Tips Regarding Employment Benefits Disputes

By Thomas B. Salzer as editor of material presented by Craig Martin, William Scogland and Amanda Amert in a 2005 issue of “The Corporate Counselor”

Often it is a good idea to incorporate an arbitration policy in employee benefits handbooks in the event a dispute concerning benefits needs to be resolved. Conservatively, when an arbitration process is cited in a benefits handbook, do not assume that a call for arbitration will be interpreted as a wider agreement to arbitrate other issues [non-employee benefits disagreements] even if the collateral dispute shares a set of facts with the benefit dispute. See Simon v. Pfizer, 2005 WL 383709 (6th Cir. Feb. 18, 2005). Also be aware that ERISA-oriented disputes must follow ERISA-mandated administrative claims procedures. Furthermore, if there are references to state arbitration acts, there might be a reluctance by a federal court feel to invoke the Federal Arbitration Act even when there is a federal question present, such as dealing with ERISA issues. See Carter v. Health Net of California, 374 F.3d 830, 836 (9th Cir. 2004)

The employer must be careful to have a consistent arbitration policy if it is stated in different places in the employer’s literature such as the employee handbook because a court found all the arbitration policies ambiguous and therefore unenforceable. See, Christianson v. Poly-America, Inc. Medical Benefit Plan, 2002 WL 31421684 (D. Minn. Oct. 25, 2002)
Summary of Alternative Dispute Resolution Committee
Meeting of March 8, 2006

New Business
ADR Institute — The second ADR Institute [was] held on March 9, in Philadelphia. About 90 participants and seven faculty [were] expected. There is a need for a common evaluation form/format and it would be helpful to have the participants’ comments by the June 8 PBA Committee/Section Day to be held in Hershey.

ADR Award Presentation — The Sir Francis Bacon Award and a Special Recognition Award will be presented during the June 8 luncheon which is part of the PBA Annual Meeting and Committee/Section Day. (See Page 2 of this newsletter.)

Senate Resolution 160 was passed by both houses as noted by Dave Hostetter, executive director of the Joint State Government Commission. Hostetter noted that there is a legislative task force to be formed within the next eight weeks; comprised of four members from the House and four members from the Senate. The task force will then select citizens to be appointed to the Advisory Committee, for which Hostetter is currently collecting resumes. Interested individuals can send their resumes to dhostetter@legis.state.pa.us. Hostetter estimated that an initial organizational meeting could be anticipated by July 4, 2006. He indicated that an advisory committee of 25 – 30 members was optimal to ensure covering the state geographically and interest-wise without being too large or unwieldy. The goal is to have about a 50/50 split between lawyers and law members on the advisory committee. He further commented that the Resolution was introduced in September 2005 and adopted at the end of February 2006, which was within customary timeframes. The task force has no formal time limit to finish its work but it is expected that it should complete its work in one to four years.

Subcommittee Reports
1. Awards Subcommittee — Ed Blumstein is the recipient of the Sir Francis Bacon ADR Award and State Senator Greenleaf will receive the Special Recognition Award.

2. Collaborative Law Subcommittee — This group met in February by conference call with about 20 members participating. They discussed educating the public and noted the existence and need to expand collaborative law practice in legal services for the indigent. The subcommittee also discussed their plan to publish articles in at least the next three issues of the ADR newsletter. The subcommittee anticipates efforts to have PBI both include collaborative law training in broader programs such as an Employment Law Institute, Estates Law Institute, ADR Institute and Family Law Institute. In addition, plans are being made with PBI to have Stu Webb and Ron Ousky, nationally recognized trainers on collaborative law, give a one-day advanced training.

3. Statewide Agency Subcommittee — There have been no reported mediations in the last six months, which has led to the conclusion that this ADR process is underutilized by Pennsylvania governmental agencies. A possible remedy is to put out more reminders to agencies to consider mediation.

4. Family Group Decision Making — Combined city- and state-supported programs are increasingly using facilitative models of mediation, particularly concerning juvenile dependency. There is an April 28 presentation by Jim Nice featuring family group decision making.

5. Court-Annexed Mediation Programs — The subcommittee is continuing to develop its survey of courts around the commonwealth.

6. Justice Initiatives/Custody Program — There [was] a planned meeting on March 23. Judy Shopp is the contact person for that event.

7. Committee Retreat — There was a discussion about the possibility of having a 1½- or 2-day retreat. Some suggestions were to 1) have it in conjunction with an ADR Institute; 2) to have it at Dickinson Law School. If such a retreat comes to fruition, it should consider tracks or concentrations of events to attract professionals who specialize in family law, commercial issues, estate issues, real estate or international law. This would enable to participants to attend the portion of the retreat that would be relevant to them.

Old Business
Apology Issue — PBA President Bill Carlucci had asked that a joint ad hoc committee comprised of members from several PBA committees be formed to continue the discussion on this matter. After a lengthy discussion with chairs from the Health Care Committee, the Interdisciplinary Committee and the Civil Litigation Section, it was decided to try a different route. The ADR Committee co-chairs met by conference call with Tom Wilkinson and Toby Oxholm to try and come up with a more simple resolution. It is hoped that this smaller group will be more able to come up with an acceptable proposition for the Civil Litigation Section. Once that is accomplished, the other two committees can be contacted in hopes of gaining their support. There is no visible quick resolution to this issue.

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Early Intervention — It was noted that in family matters, Pennsylvania courts have ordered mediation but there are always claims/allegations in medical malpractice that constitutionally protected rights to a trial may be infringed upon with ordering mediation. Historically, med-mal arbitration boards generally did nothing to justify the time or expense, so they were closed down and mediators were limited in their opportunities. There were discussions both as to whether these matters were a follow-on to the Supreme Court Med-mal Task Force and may be continued to be discussed in this Task Force, and whether a PBA resolution was needed seeking mandatory mediation as a step prior to going to trial. If such a resolution was adopted by PBA, it could then be presented to the Pennsylvania Medical Society. A lot of groundwork needs to be done with the trial lawyers before this idea could ever come to fruition.

Next Meeting Date: June 8, 2006 – Hershey Lodge & Convention Center
A business meeting is scheduled for 2:30 - 4:30 p.m., immediately followed by a reception from 4:30 - 5:30 p.m. All members are encouraged to attend.

Help With Your PBA Listserv

The following instructions should help in your use of the section’s listserv.

To subscribe to the listserv, complete the form on the front page of the PBA Web site (www.pabar.org). Once subscribed to the listserv you will get the following confirmation message:

“File sent due to actions of administrator traci.raho@pabar.org”

To unsubscribe, send a message to adr-request@list.pabar.org with “unsubscribe” in the subject.

If you change your e-mail address, you must unsubscribe the old e-mail address using the old e-mail address and subscribe the new e-mail address using your new e-mail address. Sending an e-mail to the list will not change your e-mail address on the listserv.

To post a message to the listserv, address your e-mail to adr@list.pabar.org.

To reply only to the sender, hit “Reply,” and type your personal reply to the sender. This response will only go to the sender, not to the entire listserv membership. You can use the message header to manually add other recipients outside of the sender or the membership.

To reply to the entire listserv membership, hit “Reply to All,” and type your response in the message body. This response will go to the sender and also to the entire listserv membership.

IMPORTANT: When you reply to a message, make sure that the listserv name is included either in the “to” or “cc” fields. If you see the listserv name with “bounce” included in the name, remove that address. The “bounce” address is a black hole. You may have to manually add the listserv address to one of the address fields in order for your reply to make it to the members of that list.

For customer service, contact Traci Raho, PBA Internet coordinator, (800) 932-0311, ext. 2255.

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Is ADR That Much More Time Efficient?

By Thomas B. Salzer

We all advocate arbitration as a more expedient process than going through the courts. This claim may be attributed to some arguably ineffective, redundant and costly — to clients — discovery procedures that are prohibited in arbitration agreements. Arbitrations are seen as more time-efficient because arbitrators are chosen specifically for a dispute and will give some priority on their calendars for this process. The reality is if full-time professional arbitrator(s) are selected, then these individuals are likely to keep their arbitration schedules as packed as any judge and are really no more focused on any specific dispute than a judge is.

Also, arbitration — in practice — is susceptible to delaying tactics, such as one party filing court challenges to an arbitrator’s jurisdiction and/or an arbitrator’s power to make credible decisions. Take for example the following dispute reported in the Montgomery County Law Journal (Montgomery County Intermediate Unit v. Montgomery County Intermediate Unit Education Association) where the courts upheld one challenge in favor of the plaintiff and then on appeal in favor of the defendant — which ultimately has taken seven years and counting from the time the alleged cause of action took place. There are no express conclusions being made here other than attorneys and clients can prolong the ADR process, as the following facts speak for themselves.

On March 24, 1999, the employer [Montgomery County Intermediate Unit] of a special needs teacher fired the teacher after 17 years of good continuous service, charging he persistently violated school rules of process by not getting appropriate approval for having a cable service wired to his classroom for his students use. The employer claimed the teacher, when asked, was not immediately forthcoming about his actions to the necessary administrative supervisor, which the employer translated into a charge of “lying” with this same claim recharacterized as “immoral behavior.”

As a preliminary matter, the employer fought the defendant over whether the matter could even be arbitrated, so it was on or just before Feb. 16, 2000, that the arbitrator informed all parties that he believed he had jurisdiction. On March 16, 2000, the employer appealed the arbitrator’s determination. On July 21, 2001, a Montgomery Commonwealth Court found for the appellant that the arbitrator did not have jurisdiction and directed the parties to follow a hearing process defined by statutes and the school code. On Aug. 6, 2001, the teacher represented, in part, by the Montgomery Co. Intermediate Unit Education Association appealed the Commonwealth Court decision. On May 3, 2002, the Commonwealth Court overruled the trial court and “remanded the matter to the arbitrator for the completion of the arbitration process,” at 797 A.2d 432. The employer filed an “Application for Exercise of King’s Bench Powers” with the Supreme Court of Pennsylvania which was denied on July 25, 2002 (111 MM 2002).

There were arbitration hearings held on Nov. 21 and 22, 2002; Feb. 3; April 8 and 24 and May 1, 2003. A year later — to be precise, on May 15, 2004 — the arbitrator issued his findings for the teacher. On June 9, 2004, the employer petitioned the Court to vacate this arbitration finding for a variety of reasons, including a finding that the arbitrator’s findings were contrary to Pennsylvania common law. Again about a year later — on June 24, 2005 — the trial court denied the employer’s petition to vacate, with one of many conclusions stating, “The Court must defer to Arbitrator Bloom’s findings because we cannot substitute our judgment for those of the fact-finders when there exists support for his conclusions in the record.” On July 22, 2005, the employer appealed this decision to the Commonwealth Court where the matter resides currently as an active docket # 1539 CD 2005. The detailed summary of the procedural history and various findings are reported in the Montgomery County Law Reporter, 2006, pages 143-5 to 143-16.

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Association of Conflict Resolution Annual National Conference

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• Offering a track for commercial issues in mediation;
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• International issues in mediation;
• and more.