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DISPUTE RESOLUTION ALERT

An Update on World Developments In Mediation and Arbitration

Looking Forward in Mediation: Today's Successes & Tomorrow's Challenges

BY LINDA R. SINGER, ESQ.
AND MICHAEL K. LEWIS, ESQ.

What We Have Accomplished

As two of the members of the first generation of what now has come to be called the field of dispute resolution, we cannot help but be impressed by how mainstream we have become. Within the American Bar Association, what began in the 1970s as the "Special Committee on the Resolution of Minor Disputes" subsequently was renamed

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A Call for Solomon!

Potential Trouble with the Employee Free Choice Act

BY MICHAEL PETERSON, ESQ.

A labor union organizing bill called the "Employee Free Choice Act" (EFCA) stands poised for serious consideration in the up-coming Congress. The bill passed the House by a wide margin in 2007 but stalled in the Senate. Democrats, including the then presidential candidate Barack Obama, have made it clear that the EFCA would be among the first bills brought forward in the next Congress. While almost all of the debate regarding the bill has centered on the proposed change in how unions would be selected as collective bargaining representatives (by effectively replacing traditional private ballot elections with union card certification), the bill contains arbitration provisions which would cause

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the "Special Committee on Dispute Resolution," before it evolved into the Section on Dispute Resolution 15 years ago. The Section, which currently boasts approximately 17,000 members, including a large number of non-lawyers, is one of the most vibrant sections in the Association. Beyond the Section, virtually every meeting and continuing legal education effort of other ABA sections, including TIPS (the Tort and Insurance Practice Section), Litigation, Administrative Law, and Labor and Employment features at least one session devoted to mediation or arbitration, frequently both.

The changes in the ABA reflect the changes in legal institutions. The embrace of alternative dispute resolution, particularly mediation, by court systems has been nothing short of revolutionary. Hastened by the passage of the Civil Justice Reform Act of 1996, which required all federal district courts to adopt plans to reduce delay in their civil caseloads, virtually every court has instituted some sort of mediation program. Some states, following the lead of Florida and Texas, have adopted legislation or court rules mandating mediation in the overwhelming majority of civil and family cases.

A few federal agencies began as early as the 1980s to experiment with the use of mediation to resolve significant public disputes. Among the leaders was – and remains – the Environmental Protection Agency, which has used mediation to resolve disputes over the remediation of hazardous waste under the statutory scheme that created the federal "Superfund." With the participation of the EPA and the Department of Justice, private mediators have been instrumental in settling disputes over the allocation of hundreds of millions of dollars in clean-up costs among hundreds of parties. EPA and other federal agencies also have experimented with the use of regulatory negotiation to involve the disparate stakeholders concerned about the content of a proposed rule or regulation in making recommendations to administrators on highly contested and controversial regulations.

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Some state agencies also have been active in applying what we have learned about mediation to public policy. In early experiments, the Attorneys General in Massachusetts and Maryland developed programs to mediate individual consumer disputes while tracking disputes in order to pursue patterns of unfair practices.

There was an early commitment to use mediation to resolve community disputes. The result of early experiments supported by the federal government in cities such as Atlanta, Washington, Houston, and Honolulu, and by local groups such as the Community Boards in San Francisco, has produced a fabric of community mediation centers across the country. Although the funding of such centers has waxed and waned over the years, with some not stable enough for anyone to guarantee that they will be around through the next funding cycle, the community mediation center movement has been remarkably resilient. Now supported by their own association, the National Association for Community Mediation, the centers continue to rely primarily on enthusiastic volunteers to provide mediation in a variety of neighborhood and minor criminal disputes.

Starting in the 1980s, some of the organizations that ran community mediation centers began experimenting with introducing mediation into

elementary and secondary schools. From those seeds, the growth in school-based, "peer" mediation programs has been little short of astronomical. Today, many of the largest public school systems in the country have embraced some sort of mediation programs, with varying degrees of training and commitment. The JAMS Foundation recently announced an initiative designed to spur the training of all public school teachers in conflict resolution skills.

While community and some court mediation programs grew primarily on the backs of volunteers, the past 25 years have witnessed the growth of a vibrant class of professional mediators. Many of these mediators began by providing neutral services within their existing professional practices as lawyers, planners, academics, psychologists or social workers. Many of them since have built practices focused entirely on providing neutral services. These neutrals practice in a variety of settings; some court systems, notably almost every federal court of appeals, employ small numbers of mediators to mediate full-time for the court; some administrative agencies and private organizations employ mediators or ombudsmen to resolve internal or external disputes. Many neutrals practice as sole practitioners, or in small organizations. JAMS, the only national for-profit company offering neutral services, maintains 23 offices across the country, with approximately 200 full-time mediators and arbitrators. The oldest of the large provider organizations, the American Arbitration Association, continues to maintain a nationwide roster of neutrals.

Our own careers have followed a similar pattern to that of the field as a whole. Active for 35 years in promoting the field and in starting dispute resolution organizations in community and public settings, as well as teaching and evaluating various methods of dispute resolution, we both spend most of our time at present as full-time, professional neutrals. Along with our colleagues who have been heavily invested in the growth of the field, we believe that we can claim significant victories. There seems to be little question that the growth of mediation has drastically increased parties' access to processes that permit direct participation in the resolution of their own disputes. There is extensive literature to suggest that such participation significantly increases the level of satisfaction with the resulting resolutions – win or lose. Although there remains much to be learned, there is evidence that the use of mediation has led to high rates of resolution and to satisfaction with those results.

Also significant is the fact that mediation in recent years has been used to resolve increasingly high stakes disputes, including class actions and mass torts. As an example, mediation produced a resolution of the nationwide class action brought in 1997 on behalf of African-American farmers against the U.S. Department of Agriculture for racial discrimination in the administration of USDA's farm credit programs. The settlement has resulted in almost a billion dollars of benefits going to a class of approximately 22,000 farmers. Mediation also has resolved major employment discrimination class actions against major firms in the financial services, automobile, and retail industries, as well as some of the huge class actions surrounding the collapse of Enron. Mediators also have been involved in resolving disputes arising out of the massive destruction caused by hurricanes in Florida, Louisiana and Mississippi. The benefits of the process have become obvious regardless of the size of the dispute.

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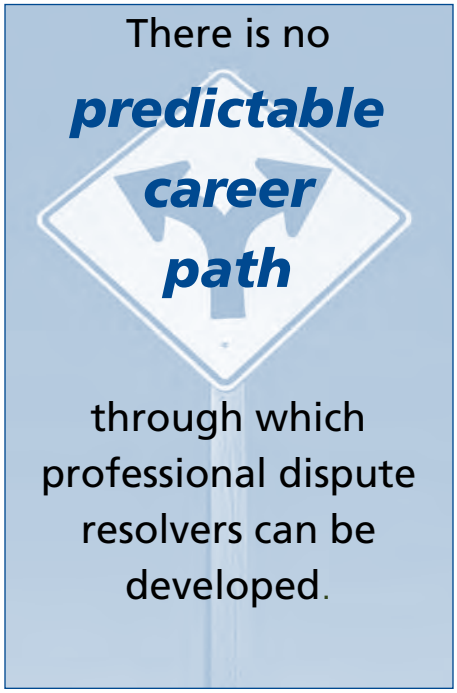
Challenges

The triumphs of the recent past should not hinder us from trying to understand some perplexing anomalies of the field. While there are pockets of heavy mediation use, the geographic spread of the process is uneven. Law firms that represent clients in mediations daily in California rarely, if ever, mediate in other parts of the country. In some states, virtually any civil case can be referred to mediation for an attempt at resolution before trial. In other states, court use of mediation is virtually non-existent.

Another perplexing problem is that demonstrated success does not necessarily result in continued stable funding. A primary example of this phenomenon is provided by the state offices of mediation. Begun as pilot projects in a number of states in the mid-1980s, state offices of mediation attempted to provide a platform for the provision of mediation in public disputes. By all accounts, the state offices were successful, offering mediation services to disputes that had proven intractable to resolution through existing processes. Yet, when state budgets became tight a few years later, many state offices failed to survive, or survived with severe reductions in their ability to deliver services.

Despite the growth in a cadre of professional mediators, there is no predictable career path through which professional dispute resolvers can be developed. To the young law school graduate, it seems unsatisfactory to respond that the best way to develop a practice as a mediator is first to work as a litigator until one ages sufficiently. Although some academic programs have evolved, it is not apparent that the resulting degrees provide stepping stones to a professional practice.



Ironically, one of the biggest enemies of successful mediation may be the institutionalization that we all applaud. Laws and rules are prescriptions limiting the parties' and the mediator's ability to tailor a process most suited to the resolution of the dispute at hand. Among the dangers of adoption of mediation by courts and administrative agencies is the tendency of those institutions to envelope their mediation schemes with rules. To the agency or court, the rules are necessary to ensure that any court or agency-sponsored program is accountable to the bureaucratic needs of the institution. For the mediator, those same rules may be viewed as an obstruction to creating a mediation process that responds to the needs of the parties. Another problem with institutionalizing mediation is the routinization that may cause a new process to become simply another hurdle to getting a civil trial or obtaining a hearing before an adjudicator.

In addition to these concerns, there is little question that the current pool of full-time professional mediators is made up largely of white males. This demographic seems to have held steady despite the diversity of many pools of volunteer mediators. Although there are some notable exceptions, the universe of professional mediators does not reflect the larger society, or even the lawyers who tend to be pivotal in the choice of mediator for a given legal case.

Given the substantial increase in the use of mediation in the past 25 years, it seems fair to opine that use will continue to increase over the next 25 years. The challenge of the field as we have defined it historically will be to solve two essential problems: maintaining vibrant, flexible processes in the face of increased imbedding of mediation into standard court and agency processes, and demonstrating the value of mediation so that the next budget crisis does not result in a loss of mediation opportunities.

It also will be important to continue work on developing a career

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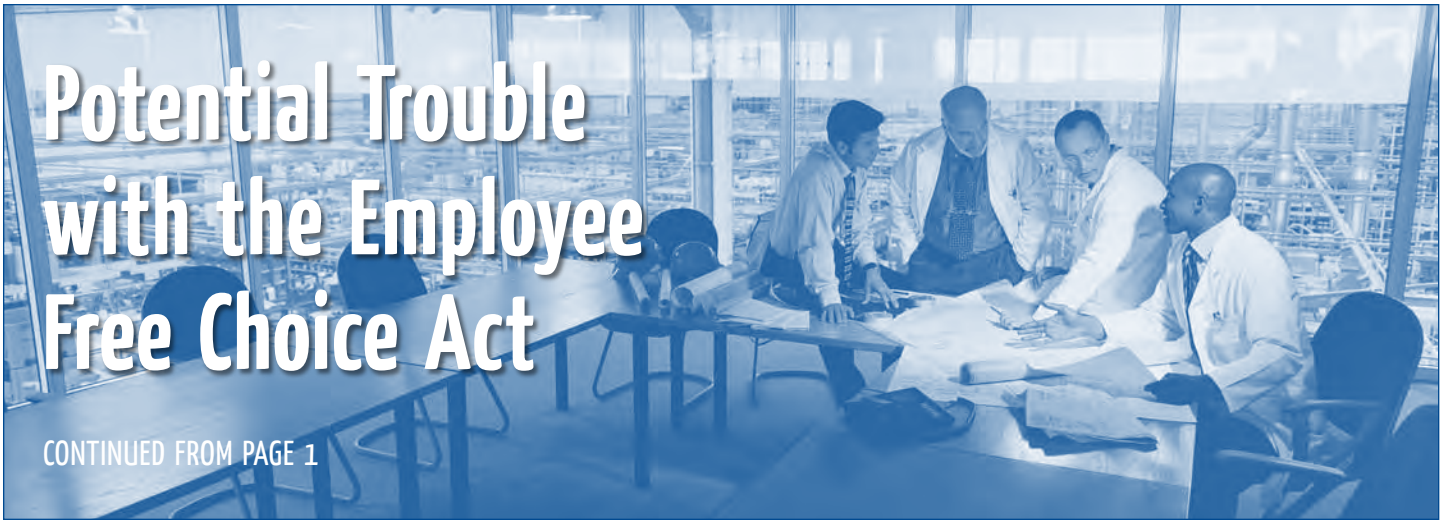

Potential Trouble with the Employee Free Choice Act

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an even more fundamental change in U.S. labor law and relations and it would have a significant impact on the arbitration profession.

Under the EFCA, once a union is certified the collective bargaining representative, the employer is required to meet with the union within 10 days of the union's request and make "every reasonable effort to conclude and sign a collective bargaining agreement." If no agreement is reached within 90 days, either party can request mediation from the Federal Mediation and Conciliation Service (FMCS). Should mediation fail to produce an agreement within 30 days (or a longer period if agreed upon by the parties), the FMCS would refer the matter to an "arbitration board established in accordance with such regulations as may be prescribed by the [FMCS]." An "arbitration panel" would then "render a decision settling the dispute" which is "binding upon the parties for a period of two years," unless the parties agree in writing to amend the "contract." In other words, an arbitral panel would effectively be required to write the terms of the first collective bargaining agreement, which would govern the terms and conditions of employment for the employees in the bargaining unit.

The legislation's arbitration provisions would be a sea change in labor law regarding collective bargaining and the use of labor arbitrators. Under current practice, where a union has been recognized by the employer or certified by the National Labor Relations Board (NLRB) as representing the employees, the National Labor Relations Act (NLRA) requires employers and unions to engage in good faith collective bargaining. This requires that the parties negotiate with the intent of trying to reach an agreement unless and until they reach an impasse.

Because the Act neither compels either party to agree to a proposal nor requires a concession and does not interject the government into the determination of the content of the agreement, ours is commonly called a "free collective bargaining" system. If a party fails to negotiate in good faith, it will be prosecuted by the NLRB for committing an unfair labor practice. In addition to the prospect of legal sanctions, the parties are motivated to reach an agreement in order to avoid economic pressure by the other party either through a strike or a lockout. This process forces each party to prioritize important issues and find ways to achieve them through trade-offs or compromises. The end product – the collective bargaining agreement – reflects these trade-offs in a way that only the parties themselves can achieve.

For over 50 years the heart and soul of most private sector collective bargaining agreements has been the voluntary surrendering of economic weapons (no strike no lockout clause) in exchange for a commitment to resolve disputes arising during the contract's term through final and binding arbitration. In such circumstances, labor arbitrators interpret the language of the collective bargaining agreement to resolve disputes arising under the agreement between the union and management. By contrast, the EFCA would invoke compulsory interest arbitration requiring the arbitral panel to actually write the disputed terms of the underlying agreement and impose it on employees, labor and

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management. For example, arbitral panels would be required to make important economic decisions such as health insurance coverage limits, whether the company must provide retiree health coverage, or whether a company must begin contributing to a union's defined benefit plan instead of a company sponsored 401(k) plan, and many other decisions. In addition, arbitrators would be required to make numerous non-economic decisions regarding the workplace, which could include, among many others, decisions regarding employee classifications, staffing, overtime and seniority rules.

Interest arbitration is a rarely-used method by which an employer and union agree to send disputed issues to arbitration that would otherwise be resolved through collective bargaining and the arbitrator effectively writes the terms of the contract. One arbitrator cogently observed that interest arbitration is "more clearly legislative than judicial. The answers are not to be found within the four corners of a pre-existing document which the parties have agreed shall govern their relationship." Because employers and – up to this time – unions have generally been wary to let third parties dictate the most important terms of employment, interest arbitration is used much less frequently than grievance arbitration. As noted in one leading treatise, "the most popular use of labor arbitration concerns disputes involving the interpretation or application of the collective bargaining agreement. There is much less enthusiasm for its use, even on a voluntary basis, as a means of resolving disputes over terms of new or renewable contracts." Indeed, the FMCS has reported that of the 2,179 topics reported by arbitrators in 2007, only 13 of them related to the topic of "new or reopened contract terms." Moreover, when interest arbitration is used it is generally in connection with compulsory arbitration in the public sector. In those rare instances where interest arbitration has been accepted in private sector situations, it has been done so voluntarily. As one interest arbitrator noted, an agreement to submit disputes to interest arbitration "is bottomed on voluntary, privately negotiated agreements – not compulsory arbitration awards." This, however, would not be the case under the EFCA.

Proponents of the EFCA claim that compulsory first contract arbitration is necessary because employers do not bargain in good faith with newly organized unions, their goal being to undermine the union's support among the employees. Even though such a tactic is illegal, organized labor asserts that unions and employers are allegedly only able to negotiate 32 percent of first contracts within one year. While there is no conclusive data on this point, the failure to reach agreement on a first contract is attributed by the bill's supporters exclusively to employer recalcitrance as part of a strategy of undermining the union's support among the employees.

But the difficulties in negotiating a first contract cannot be underestimated. Because collective bargaining agreements are often complex agreements affecting the long term economic interests of both employees and employers, negotiations typically take several months and even longer in first contract situations. Indeed, the NLRB recently noted the difficultly of first contract negotiations and recognized that such negotiations can typically take twice as long as negotiations on subsequent contracts. One factor that makes first contract negotiations more difficult is newly certified unions trying to make good on campaign promises made to employees while campaigning for their support. However, when these promises come up against reality at the bargaining table, it is often very difficult to reach agreement, especially when an employer is already offering wages and benefits to its employees that match those of its competitors. When this reality is combined with a lack of any historic track record between the parties, especially where coupled with inexperienced negotiators at the bargaining table,

reaching agreement on a package that satisfies the union's political needs while being economically realistic or even feasible for the employer can be extremely difficult and time consuming. In the end, however, any deal must be agreed upon by the parties.

Because of the EFCA's short time frame and automatic imposition of arbitration at the request of either party, the parties, rather than earnestly seeking agreement, would be more likely to position themselves for the impending arbitration with proposals unlikely to be accepted by the other party. The strategic premise would be that the parties' respective positions would serve as an outside boundary from which the arbitrators would seek the "middle ground" in writing the contract. There would be little or no incentive for the parties to develop reasonable proposals, prioritize important issues and engage in the give-and-take that is part of the collective bargaining process. As one arbitrator explained, "the availability of a procedure yielding compulsory [arbitration] awards tends to demoralize the bargaining process. Such procedures, it is widely believed, inhibit normal bargaining by inviting unreasonable offers and demands designed to compel arbitration…by deterring bargainers from assuming responsibility for a settlement when they believe better terms might be arrived at through terminal arbitration." Indeed, President Truman's Secretary of Labor, Lewis B. Schwellenbach, recognized that the imposition of compulsory arbitration creates "a weakening of free bargaining and an increasing reliance on the compulsory arbitration procedures." In testimony on the EFCA, former FMCS Director Peter J. Hurtgen, also a former NLRB Chairman, echoed the same sentiments: "I spent 20 years of my practice in Florida where I represented many public employers in the negotiation of their collective bargaining agreements. That process, under state law, ended in non-binding interest arbitration. More often than not, the parties bargained simply to set the issues up for the arbitrator which resulted in days and weeks of hearings. The process led to hearings and imposed legislative body decisions — not agreements. Any process which ends with an imposed contract will perforce put the parties into their positioning and arbitrating shoes, not their bargaining shoes."

Not only would the EFCA's compulsory arbitration provisions undermine collective bargaining but it would handicap the bargaining relationship from the very beginning and the importance of first contract bargaining cannot be overstated in the development of the parties' bargaining relationship. Collective bargaining for the first agreement is the most important negotiation and sets the dominant tone of the union's and employer's relationship for the years to come. Interjecting a third party panel of arbitrators to impose terms that the parties are supposed to negotiate will hinder the development of the bargaining relationship that the parties must rely on to achieve prosperous labor relations. In addition, the parties will be less inclined to negotiate disputes under an imposed contract, which will result in industrial strife and even more arbitration regarding the terms and

application of the imposed contract. In the end, it is safe to say that some or all of the stakeholders – the employees, union and employer – will be dissatisfied and unhappy with an imposed contract.

While the EFCA's first contract provisions would present arbitrators with very serious decisions which will have long lasting effects, the bill wholly fails to supply the arbitrators with any standards, guidance or direction. The EFCA simply states any standards would be prescribed by the Director of the FMCS. The legislation does not provide any rules of procedure or evidence nor does it identify or limit the issues that a panel may consider. This is particularly troubling because, traditionally, the parties to labor disputes agree beforehand to submit disputes to arbitrators and agree on the scope of such arbitrations. However, under the EFCA the parties would not have agreed

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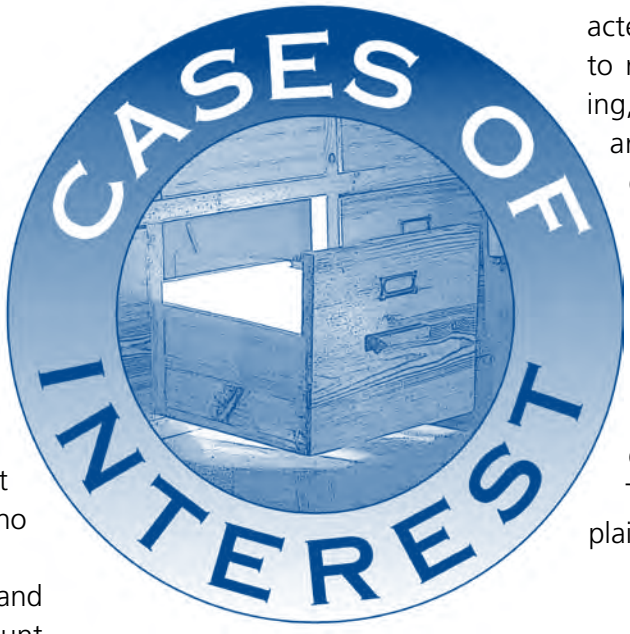

Participation in Arbitration Not a Defense to Bad Faith Suit

Brehm v. 21st Century Insurance Co. Cal. App. 2 Dist, September 16, 2008

Brehm was involved in an auto accident with an underinsured motorist. 21st Century and Brehm attempted to negotiate a resolution of the claim, but Brehm demanded the policy limit of $100,000 while 21st offered no more than $10,000.

The claim went to arbitration and Brehm was awarded the full amount requested.

Thereafter, Brehm filed a complaint against 21st Century, alleging bad faith. The trial court granted 21st's demurrer. Brehm amended. 21st demurred and the trial court granted the demurrer without leave to amend. Brehm appealed.

21st argued that it could not be sued for bad faith because it lived up to its contractual obligations to arbitrate UIM claims. The Court held that the UIM arbitration law contemplates a good faith attempt to resolve the claim without the need for a contested hearing, and therefore, the mere existence of an arbitration clause did not constitute a full defense to a claim of bad faith.

The Court noted that a bad faith claim will not be sustained merely because an insurance company lost in arbitration. "[T]he provision precludes evaluating whether an insurer acted in good faith in attempting to resolve the dispute by considering, after-the-fact, the results of the arbitration proceeding. What it does not mean is that the insurer is relieved of its obligation to act reasonably in attempting to settle any disagreement with its insured concerning a UM/UIM claim or its duty not to withhold unreasonably payments due under a policy."

The order dismissing the complaint was reversed.

Dismissal of Case Without Prejudice Nullifies Arbitration Order

Cardiff Equities Inc. v. Superior Court of Los Angeles County Cal. App. 2 Dist., September 23, 2008

Cardiff entered into a contract with a real estate developer to develop property in South Carolina. The contract contained an arbitration provision. A second agreement

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to arbitration nor would they have agreed to the scope of the arbitrator's authority.

What is more, given the new method of union organization, it is anticipated that unionization will dramatically increase. Because of the proliferation of new union bargaining units there will be a much higher need for experienced arbitrators who will be responsible for resolving disputes regarding first labor contract negotiations. But there is simply a dearth of arbitrators with sufficient economic, business, and industry specific expertise to author first contracts if the EFCA were to become law. One expert opined that writing first contracts would require wisdom and experience of biblical proportions. Peter J. Hurtgen, former Chairman of the NLRB and Director of the FMCS, noted:

"No outside agency, whether arbitration, courts, or government entity has the skill, knowledge, or expertise to create a collective bargaining agreement….The negotiation of a collective bargaining agreement is the search for mutually resolving each side's interests. It must be done with tradeoffs and separate prioritizing. Only the parties can do that. There are no standards for arbitrators to apply. There is no skill set for arbitrators to use. Solomon is simply unavailable." ■

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acted as a guaranty of the return of Cardiff's initial investment under the first contract. The guaranty contained no arbitration provision.

Sometime later, Cardiff sued the developer (and other defendants) for breach of both agreements. The defendants moved to compel arbitration and stay litigation and the trial court granted the motion. Cardiff then moved to lift the stay and to amend his complaint, indicating an intent to sue only under the second contract. After the filing but before hearing, Cardiff moved to dismiss the first lawsuit without prejudice. That motion was granted.

Cardiff also filed a suit under the amended complaint.

The trial court set a status conference where the developer filed a motion to stay based on the order compelling arbitration in the first case. The court granted the motion, concluding that the dismissal of the first case didn't impact the arbitration order.

Cardiff sought review, and the California Court of Appeal (District 2) held that the order to arbitrate did not preclude the voluntary dismissal of the first case, and that the dismissal of the case caused the dismissal of orders associated with that case, including the order to arbitrate. Moreover, Cardiff had the right to refile the second claim, and, as amended, the claim did not implicate the arbitration clause as did the claim in the first lawsuit. The Court ordered the stay lifted.

The Court noted that had Cardiff appealed from the trial judge's ruling that the two contracts were sufficiently intertwined that they were as one, and had the appeal resulted in affirmance of that finding, that Cardiff would be precluded from later arguing that the second complaint related to matters independent from the first. However, once the first complaint was dismissed without prejudice, Cardiff was free to refile.

Public Policy Not Viable FAA Defense After *Hall Street*

Carey Rodriguez Greenberg & Paul, LLP v. Arminak
S.D.Fla., October 28, 2008

The CRGP law firm filed and won an arbitration action against its former client, Arminak, to collect some $67,000 in unpaid fees. Arminak opposed the motion to confirm, arguing that the fees were excessive and thus the arbitrator's award was contrary to public policy.

The District Court for the Southern District of Florida held that the arbitration was an FAA arbitration, and after the *Hall Street* case, the only grounds for vacation of an award are those listed in FAA section 10. As there is no public policy exception delineated in section 10, the Court deemed itself as having no choice but to confirm.

Manifest Disregard Still Viable Standard After *Hall Street*, But Standard Not Met

Stolt-Nielsen SA v. AnimalFeeds Intern. Corp. C.A.2 (N.Y.), November 04, 2008

AnimalFeeds filed an antitrust action in district court in Pennsylvania alleging an international conspiracy among shippers to control the price of space on cargo vessels. The case was transferred to a MDL court in Connecticut, and the parties then filed an arbitration agreement.

In that agreement, the parties agreed to follow specific rules regarding class actions. The relevant contractual arbitration provisions in the parties' underlying agreements are very broad in scope, but silent as to whether the clauses permit class actions.

The parties' initial arguments focused on whether the silence allowed or prohibited class actions. The arbitrators concluded that class actions were allowed.

In its motion to vacate, S-N argued that that arbitrators' award was made in manifest disregard of the law. The district court granted the motion to vacate, holding that the arbitrators "failed to make any meaningful choice-of-law analysis." They therefore failed to recognize that the dispute was governed by federal maritime law, that federal maritime law requires that the interpretation of charter parties be dictated by custom and usage, and that S-N had demonstrated that maritime arbitration clauses are never subject to class arbitration.

AnimalFeeds appealed to the Court of Appeal for the Second Circuit which reversed the district court. The Court reviewed the standards for a successful vacatur based on manifest disregard. They described the burden as heavy and composed of three factors. The law must be (1) clear and applicable (2) improperly applied and lead to an erroneous outcome and (3) that the law was known and intentionally ignored.

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The Court discussed the topic of whether the holding in the *Hall Street* case eliminated manifest disregard as a standard for vacatur, and the Second Circuit joined a group of courts holding that it did not.

Then in application of the factors to the case at bar, the Court held that the arbitral panel did not manifestly disregard the choice of law issue, nor did it manifestly disregard any maritime rules or practices, nor did it manifestly disregard state law.

The Court reviewed case law regarding the interpretation of arbitral contracts regarding class actions and ruled that the silence in the contract gave the arbitral panel room to conclude that class action arbitration was permitted. The Court noted that law requires courts to defer to arbitral decisions, even if the reviewing court would have decided the matter differently in the first instance.

Interim Arbitral Ruling on Contract Interpretation Not Grounds for Ripe Appeal

Dealer Computer Services, Inc. v. Dub Herring Ford C.A.6 (Mich.), November 18, 2008

Dealer Computer Services provided specialized computer software to a large number of automobile dealers. Contracts between DCS and its customers contained similar arbitration clauses. The clauses were silent with respect to class actions.

Dealers alleged that DCS violated its contracts and moved for arbitration. A three arbitrator panel ruled, at the dealers' request, on a question of contract interpretation. The panel held that the contract allowed the dealers to pursue class arbitration.

DCS moved to vacate the award and for default judgment, while the dealers moved to dismiss, arguing that the district court lacked jurisdiction. All three motions were denied, and the court entered judgment in favor of dealers – i.e., dealers would be allowed to pursue the class arbitration. DCS moved for reconsideration, and that motion was denied. DCS appealed from the denial of its various motions.

The Sixth Circuit found that the dispute was not ripe, as there was no "clear likelihood" that the dealers would obtain class certification and thus no clear likelihood that the "harm alleged would come to pass"; and that there was no "hardship in withholding judicial review" at this stage in the proceedings.

The Court vacated the orders of the district court, and noted that DCS could appeal after a class was certified. The case was remanded to the district court with orders to dismiss the case for lack of jurisdication.

Federal Court Construes Arbitration Clause to Require Arbitration of Dispute Over Fully Paid Debt

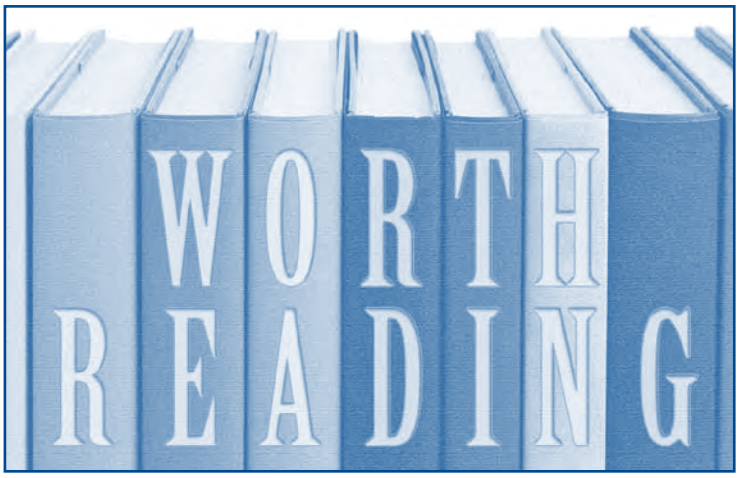
Koch v. Compucredit Corp. C.A.8 (Ark.), 2008

Mary Koch filed suit on behalf of herself and a putative class, alleging that Compucredit and co-defendants violated two regulatory laws by attempting to collect on a debt that she had already paid. The defendants, purported assignees of the original creditor, moved to compel arbitration under the arbitration clause contained in the credit card agreement between the assignor and Koch. The district court denied the motion, reasoning that because Koch didn't owe anything on the account, that there was nothing to assign. Given that the assignment of the credit agreement was invalid, and the defendants did not have an agreement to arbitrate with Koch.

Compucredit appealed to the Court of Appeals for the Eighth Circuit arguing that the issue of whether the assignment was valid was a question for the arbitrator. The Court held that this question went to the basic question of arbitrability, and therefore should have been before a court, absent clear intent of the parties to bring such an issue to the arbitrator.

The Court distinguished the *Buckeye* and *Prima Paint* cases (in which questions about the validity of, respectively, an allegedly illegal contract and a contract obtained by fraud were for the arbitrator to decide).

In reaching the ultimate question, the Court construed the arbitration clause in the original contract between Koch and Compucredit to control any dispute arising out of a transaction that occurred during the contract period. As Koch's transaction, though fully paid, was within that period, any accusation (frivolous, meritorious or in between) was for the arbitrator to decide. The Court reversed the district court and sent the case to arbitration. ■



BY RICHARD BIRKE, ESQ.

Space is limited this issue, so while we love to offer our lengthy opinions about our favorite books, we are forced to restrain ourselves this time out.

However, if Winter finds you in need of a short, easy, uplifting read, try ***Listening is an Act of Love*** (Penguin, 2008). It's the story of and stories from the StoryCorps Project. The stories selected are the best of the extensive collection amassed by the Project, and they are individual tales of people's life stories. Reading the book will be useful to mediators and negotiators as a means to polish their skills in listening and also to refresh their reverence for the power of personal narrative. Just as all politics are local, all conflict resolution is personal, and narrative is often an essential prelude to settlement.

And if the StoryCorps project leaves you feeling too good and you need something maudlin for balance, a surprisingly good read is found in Alan Weisman's ***The World Without Us*** (Thomas Dunne, 2007). The book is about how the earth would respond if humans were to suddenly disappear. Weisman offers a sobering look at how human activity has changed the earth, and how it will continue to change it after we're gone. The book covers prehistory, biology, anthropology and other fields with a remarkable fluidity, and somehow manages to be hopeful even as it discusses the unbelievable lengths of time it will take for nuclear fuels to "compost."

If it has anything direct to do with conflict resolution, it's this; it's hard to maintain interest in continuing a protracted fight when you realize how precious life is, and how much hard work lays ahead in structuring a sustainable existence for an ever-enlarging population.

But, sadly, I join the list of critics piling on to pan Malcolm Gladwell's recent offering, ***Outliers*** (Little Brown, 2008). A quick web search of the book will give you most of the major critiques – lightweight, not a coherent theme, not a well-told tale. I liked *Blink* and to a lesser extent The *Tipping Point*, and I hope Gladwell continues to write about decision making from his unique perspective, but you can pass on *Outliers*, or at least wait until it comes out in paperback.

That will have to hold you until next time. We will return next time with a book about the life of the founder of Aikido, and perhaps a second short review of a fun release about negotiation and psychology. Until then, we hope everything you read is Worth Reading.

DO YOU HAVE A BRIGHT IDEA FOR A STORY?

The ***Dispute Resolution Alert*** is always looking for new and interesting articles. To find out how to submit, go to:

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We hope to hear from you.

Looking Forward in Mediation

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path for would-be professional mediators. Equally important will be preserving the ability for non-professional mediators to continue their practices, with the appropriate training and support. This will not be an easy task. The history of professionalization is that the members of a new profession have a tendency to attempt to raise the moat, forbidding anyone else to practice in their professional domain without jumping through the same hoops as those practicing professionally. Much of the vitality and growth of the mediation field over the past 25 years has come through the hard, dedicated work of volunteers. Their efforts must be supported in the future.

Beyond the "field" as we have conceived it, is the reality that mediation has barely penetrated the consciousness of the politicians and diplomats who govern our country and other so-called world powers. The past few years have provided disheartening examples of destructive ways of approaching conflict and only rare examples of constructive, meditative approaches. In order to realize the full potential of the processes we espouse, we may have to expand our horizons beyond the interpersonal or even substantial legally defined disputes to the ways in which politicians deal with one another and governments deal with their own citizens and with the rest of the world.

Although a few private, non-profit organizations have begun to venture into developing processes to address disputes in other countries and internationally, it is obvious from a cursory glance at any daily newspaper how much more should and could be done. One can only hope that part of the broad appeal of Barack Obama's presidential campaign has come from the notion of inclusive, participatory decision making and the responsibility of public leaders for resolving disputes.

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