

Selection of recent ADR cases/articles, etc. from the net include...

- DoD “issues” Franken Amendment guidance on arbitrations.
- Perils of parallel litigation and arbitration.
- Can “inadequate” discovery result in an award being vacated?
- Where employment disputes may be “related” to employment but not subject to arbitration given the dispute must be “arising from” the employment relationship.
- When awards are “binding” on the parties, can this preclude further judicial review of that award?
- Legal error grounds to overturn an arbitral award?
- Arbitral immunity
- Med-Arb
- Can a non-attorney, obtain a mailing list of attorneys in order to offer mediation services when a disbarred attorney is unable to obtain same?
- And the signatory is...?
- Is court ordered mediation merely a “check the box” exercise?
- ADR in a Bag!
- Speaking engagements
- And more!

DoD Implementation of Franken Amendment on Restricting the Use of Arbitration.

On February 17, 2010, the DoD Director of Defense Procurement and Acquisition Policy issued a Memorandum under the subject of “Class Deviation to Implement Additional Contractor Requirements and Responsibilities Restricting the Use of Mandatory Arbitration Agreements.”

This direction to the DoD acquisition community mandates that the use of FY 2010 DoD funding is restricted by §8116 of the FY 2010 DoD Appropriations Act whereby such funds in excess of \$1 million cannot be used for specified contract actions after February 17, 2010, unless the contractor agrees to not to enter into any agreement, or enforce any existing agreement, with any employee or independent contractor to resolve disputes through arbitration arising under title VII of the Civil Rights Act of 1964 as well as torts arising/relating to “sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.” A contract clause is also provided such that after June 17, 2010, no funds may be expended absent a “contractor certification that it requires each covered subcontractor” not to take similar actions prohibited by the prime.

While applicable contract actions are stated in the “Deviation,” they generally include all contractual actions that exceed \$1 million of FY 2010 funding except “contract modifications adding more than \$1 million ...to a contract awarded prior to February 17, 2010,” unless work is added to such contracts. Commercial contracts are exempt. And, the clause and the legislation provide that “the prohibitions...do not apply with

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respect to a Contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.”

Comments were solicited by DoD for receipt within two weeks of the memo—the ABA and industry associations have prepared comments.

Observations on this ADR development include the following:

- While no direct guidance is provided, arguably, the enforcement of employee/independent contractor agreements in the US, e.g. perhaps there is US Federal District Court jurisdiction, would seemingly limit these prohibitions to the international arena—the area noted of significant concern in earlier Congressional hearings. However, as a practical matter, will contractors/subcontractors eliminate any/all arbitration agreements for uniformity under the guise of these prohibitions? Is this of special import given the broad range of possible claims including those that arise solely beyond those enumerated and/or in conjunction with claims that include an allegation in the identified areas?
- Will this set a new trend in use or non-use of arbitration for commercial contracts/subcontracts with all firms that do any government business or...?
- Is the litigation budget going to be significantly impacted? If so, how is this change in a company's dispute management process going to be priced into contracts/subcontractors—as a direct charge or as part of the overhead with different rates depending upon year of “funding”?
- DoD has known at least since December 2009 that this legislation would be forthcoming yet has not published any required notice in the Federal Register and was specifically requested by industry for feedback to specific areas of inquiry. Is it appropriate to use a “purported” deviation process for an action that clearly impacts the public?
- Discuss with counsel.

(Can better clause drafting solve the problem?—ed)

U.S. 1st Circuit Court of Appeals, March 01, 2010
Powershare, Inc. v. Syntel, Inc. , No. 09-1625

In parties' action for breach of a business agreement, a district court's denial of defendant's motion to stay litigation pending arbitration is reversed where: 1) the agreement contains a mandatory arbitration provision; and 2) the standard of review to be employed by a district judge when reviewing a magistrate judge's order on a motion to stay litigation pending the resolution of a parallel arbitration proceeding is under the "clearly erroneous or contrary to law" standard elucidated in Rule 72(a). Case available at [Powershare](#)

(Can “inadequate” discovery result in an award being vacated?—ed)

A listserv reports that “a recent case handed down by the Court of Appeals overturning the Third District Court’s order vacating an arbitration award and denying its confirmation. The case is Hicks v. UBS Financial Services, Inc. 649 Utah Adv. Rep. 7 No 20080950-CA filed Feb. 4, 2010 UT, App 26. The Court held that “erroneous discovery decisions” could serve as the basis for overturning an arbitration award, but the showing of “prejudice” in connection with the arbitrator’s discovery decisions must be substantial.”

(Arbitration for matters "arising out" of employment may not cover matters that are "related to" employment? Also, if arbitrators voluntarily provided rationale/reasoning for their award and were held to that act? Finally, is, in effect, manifest disregard of the law alive and well?—ed)

“A decision vacating an arbitration panel's award of compensatory damages in favor of three financial advisors arising from their claims of wrongful discharge, pursuant to the rules of the National Association of Securities Dealers (NASD), is affirmed where: 1) the district court did not abuse its discretion in remanding the award to the arbitration panel for clarification of the bases of the award; 2) the arbitration panel committed no mere error of law, rather, by rendering an award whose underlying legal basis exceeded the bounds of arbitrable employment-related disputes cognizable under NASD Rule 10101 as interpreted in Zandford v. Prudential-Bache Secs., Inc., 112 F.3d 723 (4th Cir. 1997), the panel exceeded its powers under 9 U.S.C. section 10(a)(4).”
U.S. 4th Circuit Court of Appeals, February 22, 2010. Decision at [James](#)

(When awards are "binding" on the parties, this may preclude further judicial review of that award!—ed)

California Appellate Districts, February 22, 2010
Oaktree Capital Mgmt., LP. v. Bernard, No. B207865
Trial court's judgment confirming an arbitration award against defendant-investor for breach of fiduciary duty, arising from his failure to disclose an investment opportunity to his real estate investment hedge fund is affirmed as the arbitration agreement here barred judicial review, as it stated that the arbitrator's award will be "binding" and that "all decisions of the arbitrator...shall not be subject to appeal." Case available at [Oaktree](#)

(Does legal error constitute grounds to overturn an arbitral award?—ed)

Arbitration agreement's requirement that an award be rendered in accordance with California substantive law did not unambiguously expand the scope of judicial review, so trial court correctly ruled that it could not review arbitrator's decision for legal error.

Gravillis v. Coldwell Banker Residential Brokerage Company - filed February 26, 2010, Second District, Div. One

Decision available at [Gravillis](#)

National Arbitration Forum Trade Practices Litigation Civil No. 09-1939 (PAM/JSM) (D. Minn. 2/22/2010) Paul A. Magnuson, United States District Court Judge. Decision not available on line.

Arbitral immunity, consumer debt, arbitration, etc.

Morgan Phillips, Inc. v. JAMS, Inc.//2010 WL 310769 (Jan. 28, 2010)

“Morgan Phillips, Inc. hired JAMS, Inc. to resolve a dispute with a supplier regarding nonconforming products. Under an agreement between Phillips and its supplier, JAMS employee John Bates was to give binding resolution to the dispute. In an ensuing meeting between all parties, Bates made a multi-hour effort to settle the case. Bates expressed an intention to exercise his authority as arbitrator and render a binding decision should the effort fail. Settlement attempts were unsuccessful; however, before reaching a decision as arbitrator, Bates announced that his emotional reactions to the situation had caused him to become too compassionate to both sides and withdrew from his duties. Phillips subsequently sued JAMS and Bates in state court alleging breach of contract and negligent breach of the duty to provide binding arbitration services. The court entered judgment in favor of defendants, finding that Bates properly recused himself and was immune from suit under absolute arbitral immunity. Phillips appealed to Court of Appeal of California. The Court affirmed. The Court made note that Bates did not simply refuse without principle to make a decision, but instead, withdrew on the basis of a doubt as to whether or not he could be fair. Therefore, the Court held that Bates was protected by both arbitral and quasi-judicial immunity.” Case available at [Phillips](#)

(Can a non-attorney, never licensed, obtain a mailing list of attorneys in order to offer mediation services? Here a disbarred attorney couldn't —ed)

“Bar association's refusal to sell its mailing list to disbarred attorney, who sought to sell mediation services to association's members at lower cost than that charged by other mediators to whom association had sold the list, did not constitute unfair competition where association was not a competitor of plaintiff, was not alleged to have engaged in anti-competitive conduct, reasonably contended that its refusal to facilitate a disbarred lawyer's efforts to solicit its members was consistent with its objective of enhancing community respect for the law, and was not alleged to have damaged the market for low-priced mediation services or otherwise harmed consumers.”

Drum v. San Fernando Valley Bar Association - filed February 24, 2010, Second District, Div. Five

Decision available at [Drum](#)

(Who is the signatory?—ed)

“Arbitration agreement between hospital and medical group did not bind individual doctors who did not sign the agreement and derived no benefits from the group's relationship with the hospital during the time that the agreement was in effect. Arbitration provisions in employment agreement were procedurally and substantively unconscionable where they contained "egregious and draconian" limitations on potential remedies, required each party to share in arbitration expenses, empowered arbitrator to assess expenses against any of the parties, placed limitations on discovery, and did not compel a reasoned opinion or findings by the arbitrator. Such unconscionability so tainted the agreement that the offensive provisions could not be severed, rendering the agreement to arbitrate unenforceable.”

Suh v. Superior Court (Cha Hollywood Medical Center) - filed February 18, 2010, Second District, Div. Five

Case available at [Suh](#)

(Who controls court ordered mediation process?—ed)

Without a willingness to engage in risk analysis, mere attendance at mediation is insufficient to constitute good faith effort. (Bkrcty. S.D.N.Y.) *In re A.T. Reynolds & Sons, Inc.*//2010 WL 423007 (Feb. 5, 2010)

“After filing for bankruptcy relief, debtor A.T. Reynolds & Sons, Inc. was purchased by Boreal Water Collection, Inc. Boreal became involved in a dispute with creditor Wells Fargo Bank, N.A., regarding wages owed to Reynolds employees. The United States Bankruptcy Court of the Southern District of New York ordered all parties to mandatory

mediation. Following mediation, the mediator submitted a report explaining that Wells Fargo appeared prepared only to reiterate the predetermined position that it was unwilling to offer any dollar figure in settlement. The Court concluded that Wells Fargo had failed to mediate in good faith and issued an order to show cause as to why Wells Fargo should not be held in contempt for violation of the mediation order. Wells Fargo argued in its defense that it sent a representative with full settlement authority and that it took exception to the mediator's refusal to furnish a list of issues to be discussed prior to the mediation. The Court was unmoved. The Court held that Wells Fargo entered the mediation only to assert the supremacy of its legal argument and not to contemplate risk analysis. The Court also disapproved of Wells Fargo's pre-mediation demands for the mediator to produce a list of enumerated issues, finding them to be in violation of a General Order vesting all procedural control of the process in the mediator. Consequently, the Court sanctioned Wells Fargo in the amount of the mediation's costs."

Available at [Reynolds](#)

ADR LUNCHTIME SERIES

"I'm sorry, mediation may not work for you!" ... "As a mediator or mediation program manager, have you encountered a prospective participant whose attitude, behavior, or affect is so extreme that you're uncertain whether mediation will work? You may even think that allowing this person to participate in mediation would cause more harm than good. Could you turn this person down? How would you decide? Drawing from her extensive experience as a mediator and co-author of *From Determining Capacity to Facilitating Competencies: A New Mediation Framework*, the presenter will engage participants in identifying a framework for making a determination about whether or not - or how - to go forward with mediation under these circumstances. And through this interactive discussion, the presenter will identify basic competencies for participation in mediation and best practices for a mediator or program manager to facilitate those competencies in a federal workplace setting."

Judith M. Filner - Mediator;

Sponsored by the Interagency ADR Working Group, Workplace Conflict Management Section

Date: Thursday, March 11, 2010 Time: Noon - 1:30 PM

Location: U.S. Department of Energy 1000 Independence Ave., SW, Room GJ-015
Washington, D.C. 20585 Contact Cindy Mazur, ADR Director, FEMA, at
cindy.mazur@dhs.gov or (202) 646-4094.

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Future Speaking Topics Include—

- Seattle South Sound and Puget Sound NCMA Chapters, National Education Seminar, “Risk Management for Complex U.S. Government Contracts and Projects”
Registration info: Tami Grant, grantt@wsdot.wa.gov
- Mid Florida and Jacksonville NCMA Chapters, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."