

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

- “ADR Question of the Month?”
- Federal court jurisdiction takes a winding road?
- Expanding access to Federal courts?
- Referee verses Arbitrator—clear?
- Mediation as a condition precedent to arbitration
- And, the incentive to participate in contractual mediation is...?
- Having the “right” mediator!
- Avoiding arbitration on financial grounds
- More on non-party discovery
- ADR in a Bag!
- Speaking engagements
- And more...including an answer!

Question from a reader...what would be your answer(s)? See below for a suggested approach, but first...

“We are negotiating a Distribution Agreement between a Mexican distributor and a U.S. manufacturer. Our client is the manufacturer.

“With regard to the dispute resolution clause, neither party wants to give the other home country advantage.

“Any suggestions for (i) an appropriate neutral country and (ii) the applicable in country arbitration body (ICC, IACC, AAA, UNCITRAL, etc.) would be greatly appreciated.”

(Court expanding jurisdiction—only in arbitration area?—ed)

In proceedings that could widen the scope of forums to compel arbitration, etc. the US 9th Circuit Court of Appeals in Geographic Expeditions, Inc. v. Estate of Lhotka, No. 09-15069, on March 31, 2010, ruled that the “District court erred in ruling that plaintiff had to prove by a preponderance of the evidence that the amount in controversy exceeded \$75,000 for court to take jurisdiction over petition to compel arbitration because plaintiff had not removed the case from state to federal court but commenced the action in federal court. Legal certainty standard applies when a party files a petition in federal court to compel arbitration, even when the opposing party is suing the federal petitioner in state court; good faith allegations in plaintiff's petition as to the amount in controversy are sufficient to establish jurisdictional amount unless it appears legally certain that the amount in dispute is \$75,000 or less...” The contractual cap on liability (less than \$75,000) will not control! The case is available at [Geographic Expeditions](#)

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(Waiver still in the works and if the (original) arbitration panel issues an award does it still have jurisdiction in any “purported” remand?—ed)

U.S. 1st Circuit, April 01, 2010

Kashner Davidson Sec. Corp. v. Mscisz, No. 09-1356

From the court...

“In *Kashner Davidson Securities Corp. v. Mscisz*, 531 F.3d 68, 79 (1st Cir. 2008), we held that the arbitration award at issue in this case must be vacated because the arbitrators acted in manifest disregard of the law. We did not specify what, if anything, the district court should do after vacating the award. On remand, the district court entered an order vacating the arbitration award and remanding the matter to the arbitral body for further proceedings. It then denied the appellants' motion under Federal Rule of Civil Procedure 60(b) for relief from the remand order. The appellants now challenge both the remand order and the order denying their Rule 60(b) motion, arguing that both contravene our mandate.

“For the reasons that follow, we affirm the decision of the district court to issue the remand order. However, we also direct the district court to clarify its position on whether the arbitration should proceed before the same panel of arbitrators or a newly constituted panel....”

Case is available at [Kashner](#)

(Be careful in drafting any clause that can have possible “other” interpretations!—ed)

Ambiguous referee clauses that do not refer expressly to arbitration are unenforceable. (Del. Supr.)

//*Kuhn Construction, Inc. v. Diamond State Port Corp.*//2010 WL 779992 (Mar. 8, 2010).

“Diamond State Port Corporation solicited bids for a construction project. Kuhn Construction won the bid and contracted to perform the work. The contract included a referee clause, which allowed Diamond to arbitrate ‘questions’ but not ‘claims,’ as defined in the rest of the contract. A dispute arose and Diamond attempted to institute arbitration. Kuhn did not participate and asked for injunctive relief from the court. Diamond moved to compel arbitration. The lower court found for Diamond. Kuhn appealed to the Supreme Court of Delaware. The Court reversed. Kuhn argued that the referee clause is ambiguous and therefore unenforceable. The Court agreed, finding that the language of the referee clause was not clear and unambiguous. The Court reasoned that “when sophisticated parties enter into agreements, they have the power to bargain away their right to an impartial arbiter; however, the contract must reflect that the parties clearly and intentionally bargained for whether and how to arbitrate.” Available at [Kuhn](#)

Case is dismissed for failure to allege compliance with mediation as a condition precedent to litigation. (Ga. App.)

//Houseboat Store, LLC v. Chris-Craft Corp.//, 2010 WL 817753 (March 11, 2010)

“The Houseboat Store entered into a contract with Chris-Craft Corp. to sell Chris-Craft products and keep an inventory of Chris-Craft parts. The agreement contained a clause requiring that the parties participate in non-binding mediation prior to filing any legal action. The contract also contained a choice of forum clause naming Florida as the forum. Chris-Craft was alleged to have breached the contract with Houseboat; Houseboat subsequently filed suit in Georgia state court. Chris-Craft filed a motion to dismiss with a copy of the agreement attached to the motion, arguing that Houseboat had not satisfied the condition precedent of mediation. The court granted Chris-Craft’s motion to dismiss. Houseboat appealed to the Court of Appeals of Georgia. The Court affirmed. The Court reasoned that the mediation provision was binding and Houseboat did not allege that it had complied with the provision. Furthermore, the Court dismissal was appropriate because Houseboat had filed the action in Georgia in violation of the forum selection clause.”

(And, the incentive to participate in a mediation is...?--ed)

Judges may not impose attorney fees as a sanction for refusing to mediate where such a sanction is not contained in the court rules. (Mich. App.)

//In re Hills Revocable Living Trust//2010 WL 785915(March 9, 2010)

“Kay T. Hill executed a revocable living trust agreement where she named Elizabeth Moeller and Karen Winford beneficiaries. After Hill’s death, Winford became the successor trustee of the agreement. The agreement contained a mediation provision. Moeller, unhappy with how the estate was being handled, petitioned to remove Winford as trustee. The parties initially submitted the matter to mediation but could not reach a resolution because Moeller refused to mediate. The probate court required Moeller to pay Winford’s attorney fees incurred after the failed mediation as a sanction for rejecting the mediation process. Moeller appealed to the Court of Appeals of Michigan. The Court reversed. The Court held that the mediation court rules do not include a provision that allows parties to collect attorney fees as a sanction for failed mediation. The probate court did not have the authority to impose such a sanction without a provision in the court rules.” Available at [Moeller](#)

(Nice to have the “right” mediator!—ed)

Assistance of skilled mediator in formulating agreement in principle evidences parties’ intent to be bound by the agreement. (Mass. App.) //Targus Group Intern., Inc. v. Sherman// 2010 WL 729020 (Mar. 5, 2010)

“Targus Group International, Inc. (Targus) entered into a sales agreement with Howard Sherman, Sean Brosmith, and Scott Oshry (Group) for the purchase of a corporation. A dispute arose with each party alleging that there were misrepresentations in the sales agreement. The parties agreed to mediate the dispute. After thirteen months of mediation, the parties memorialized the terms of their agreement in a document titled “Agreement in Principle.” The mediator and both parties signed the agreement. Group later failed to comply with the agreement. Targus sued in state court alleging Group was in breach. The trial court found for Targus. Group appealed to the Appeals Court of Massachusetts, Suffolk. The Court affirmed. Group had argued that the agreement lacked the completeness, definiteness and the binding intentions of the parties to be enforceable. The Court disagreed. The Court found it convincing that the agreement was the result of a professional mediation process that had begun thirteen months earlier and was conducted by a recognized expert. In addition, the Court found it significant that the agreement did not reference any unresolved issues or future mediation sessions.”

(From a reader.... When can a party avoid arbitration on financial grounds especially if non-waivable statutory rights involved?—ed)

Brady v. Williams Capital Group, AAA, New York Court of Appeals
"[T]he issue of a litigant's financial ability is to be resolved on a case-by-case basis and that the inquiry should at minimum consider the following questions: 1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in an arbitral forum."

“The appeal arose from a decision of the Appellate Division requiring the respondent to pay all fees, despite an "equal share" clause in the arbitration agreement. The dissent in that decision argued that petitioner had not presented facts as to her financial resources and, alternatively, if the equal share provision were to be held to be unenforceable the entire arbitration provision should be declared void.

“The Court of Appeals remitted the case to the trial court "for a hearing to determine, in light of the standard we enunciate today, whether petitioner was financially able to share equally in the arbitration fees and costs." The court also noted its agreement with the lower courts "that the terms of the parties' Arbitration Agreement, rather than the AAA rules, controlled." Case is available at [Brady](#)

(And, how does one conduct non-party discovery for arbitrations and/or are arbitrations self-limiting as to discovery?—ed)

Non-party discovery: ConnectU Inc. v. Quinn Emanuel

“In a 23-page Decision and Order entered on March 11, the Commercial Division of the N.Y. Supreme Court, N.Y. County (Lowe, J), denied a motion to compel certain firms and companies to comply with subpoenas issued by arbitrators at the request of a party in the arbitration. While the subpoenas were worded to direct the companies to appear before the arbitration panel, the court observed that the subpoenas were addressed to entities, and not individuals, and the subpoenas called for production of documents weeks ahead of the start of the evidentiary hearings. The court, for these reasons, treated the subpoenas as calling for document discovery from non-party witnesses....”

ADR Seminar April 29, 2010
ADR LUNCHTIME SERIES

Mediating Disputes in the Workplace: Suggestions from Procedural Justice Research about What Matters and Why

If people perceive a process as "procedurally just," they are very likely to perceive the resulting decision as fair and to comply with it, even if they do not like it. Substantial research has identified the process characteristics that result in these perceptions of "procedural justice." The presenter will discuss how procedurally just mediation sessions can help managers develop their skills. In addition, understanding this research can help mediators utilize private sessions creatively, while assisting with party satisfaction and effectiveness in communication and decision-making. This presentation will take a fresh look at mediation's role in our workplace.

Nancy Welsh - Professor of Law, Penn State University, Dickinson School of Law, Carlisle, PA. Sponsored by the Interagency ADR Working Group, Workplace Conflict Management Section

Date: Thursday, April 29, 2010 Time: Noon - 1:30 PM (EST)

Location: U.S. Department of Energy
1000 Independence Ave., SW, Room GJ-015
Washington, D.C. 20585

Please RSVP by April 23, 2010, with name, citizenship, and agency/employer to: Cindy Mazur, ADR Director, FEMA, at (202) 646-4094

Future Speaking Topics Include—

- Seattle South Sound & Puget Sound NCMA Chapters and Golden Gate (San Francisco) NCMA Chapter, National Education Seminar, “Risk Management for Complex U.S. Government Contracts and Projects.”
- Jacksonville and Mid Florida NCMA Chapters, "How to Negotiate Fair/Reasonable Prices in Sole Source Government/Commercial Procurements."
- Golden Gate (San Francisco) NCMA Chapter, National Education Seminar, “Risk Management for Complex U.S. Government Contracts and Projects.”

Information on speaking/teaching engagements in connection with various aspects of Alternative Dispute Resolution (ADR) and basic/advanced negotiation techniques— seminars/workshops— may be arranged by sending a message to ADROffice@Rumbaugh.net

An Answer to the above question? What do you think?

“There are several facets to consider, in my view, on the topic.

“First it is always recommended to have a letter of credit that is properly confirmed, etc. that can be the payment vehicle for international transactions (and usually cross LCs for "guarantee" of performance) with the arbitral provisions in the proposed underlying agreement (your distribution agreement) mirrored in the body of the LC. Thus, any eventual dispute involving \$ (assuming that is the currency of choice) claim/damages will be readily arbitrated and enforced--through the NY Convention--if necessary. Another aspect is any eventual need for arbitral discovery which is in disfavor in most foreign countries and (somewhat) limited by some federal cases in the US--an important consideration.

“Another consideration is if there is a need for equitable relief and if arbitration is still the vehicle for initially obtaining that form of relief? If ultimate enforcement has to be in the local courts, how receptive are the courts to a local/foreign arbitral award calling for equitable action--local counsel could assist in that regard.

“There are a couple of presentation items/outlines that may be of assistance in the drafting on _____ website. On balance it is suggested here that a "fair" solution be seriously advanced, i.e. having the party initiating the demand to have their choice as to location/rules perhaps with specific countries of US/Mexico to ensure a narrow choice range--while this may seemingly create a horse race, it puts the party that is purportedly harmed in control--which could be either party! Geographical diversity in an arbitrator is also an important aspect. But incorporating a mediation condition precedent to arbitration will dampen the perceived "race" affect and select a mediator known and respected by the other side! Finally, consider carve outs for equitable relief if the local courts are preferred.

“Again, local counsel can provide greater assistance to ensure enforcement and create a viable tool for resolution of disputes.”

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