

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

- US Supreme Court rules on viability of arbitral class-actions
- California Supreme Court “modifies” landmark decision and “now” permits an “expanded” scope of review of arbitral awards for “errors in law?”
- Is an arbitration clause addressing arbitration administration, appointment of arbitrators, etc. severable?
- Confidentiality of arbitration awards
- Postponement requests—“be careful how you ask!”
- Remand to an/which arbitral panel?
- Does mediation confidentiality provide a “license” to violate the law?
- Unconscionability and the US Supreme Court
- UNCITRAL arbitration rules under revision
- Speaking engagements
- And more...!

(The US Supreme Court on April 27, 2010, provides guidance on arbitral class actions. With arbitrations being founded in contract law... what’s the status of the case law on joining non-signatories, effect on consolidations, arbitral rules in the area, “manifest disregard of the law,” same result as in this case if it was a consumer case, etc.?—ed).

“Imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act. A party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that party agreed to do so. An implicit agreement to authorize class action arbitration is not a term that an arbitrator may infer solely from the fact of an agreement to arbitrate.”

Stolt-Nielsen S.A. v. AnimalFeeds International Corp. – case available at [Stolt](#)

(Another view of the decision—ed)

“The United States Supreme Court held 5-3 (opinion by Alito, dissent by Ginsburg, and Sotomayor taking no part) that imposing class arbitration on parties whose arbitration clauses are “silent” on the issue is inconsistent with the FAA.

“In 2003, a Department of Justice criminal investigation revealed that Stolt-Nielsen was engaging in an illegal price-fixing conspiracy prompting AnimalFeeds, one of its customers, to bring a putative class action against them. The Judicial Panel on Multidistrict Litigation ordered consolidation of all pending claims against Stolt-Nielsen in the District Court of Connecticut. In 2005, AnimalFeeds served petitioners with a demand for class arbitration designating New York City as the place for arbitration. The parties selected a panel of arbitrators and stipulated

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that the contract's arbitration clause was "silent" with respect to class arbitration. The arbitrators then determined that the arbitration clause allowed for class arbitration. Stolt-Nielsen filed an application to vacate the arbitrators' award and the District Court vacated the award, concluding that the arbitrators' decision was in "manifest disregard" of the law because they did not conduct a choice-of-law analysis. The Court of Appeals reversed.

"The Supreme Court held that under the FAA, an arbitrator may not compel a party to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. The Court also concluded that the arbitrators' failure to consider the FAA when rendering its decision made their conclusion a statement of their own policy choice and therefore exceeded its powers."

(And, the California Supreme Court on April 26, 2010, "modifies" its earlier landmark (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1,) decision on limiting scope of court reviews of arbitral awards, i.e. "some" awards having errors of law by an arbitrator are subject to being vacated? And, what if there is no official record of the arbitral proceedings, reasoned awards "now" required (even if non-attorney arbitrators), status of having another arbitral panel "hear" appeals, etc.? Is "manifest disregard of the law" the standard for vacating awards in California?—ed)

"Where plaintiff sued employer for employment discrimination, and employer later asserted that plaintiff was required to request arbitration within one year of the date the dispute arose under employment agreement, arbitrator clearly erred in concluding that tolling provisions in (California) Code of Civil Procedure Sec. 1281.12 did not apply and that plaintiff's claim was time-barred. Where an employee subject to a mandatory employment-arbitration agreement is unable to obtain a hearing on the merits of his Fair Employment and Housing Act claims, or claims based on other unwaivable statutory rights, because of an arbitration award based on legal error, the trial court does not err in vacating the award. Language in arbitration agreement indicating that employee was relinquishing not only the right to go to court but also to access administrative remedies was reasonably susceptible to a lawful interpretation, and not unconscionable."

Pearson Dental Supplies, Inc. v. Superior Court (Turcios) -

Case available at [Pearson](#)

(When is the ADR clause severable/modifiable by a court?—ed)

“Where agreement requires only AAA arbitrators and procedure, a change in AAA policy preventing AAA arbitrators from resolving the dispute does not preclude other arbitrators from doing the same. (Wash. App.)

//Nail v. Consolidated Resources Health Care Fund I//2010 WL 961590 (Mar. 18, 2010)

“Ellen Schimpf was admitted to Alderwood Manor, a nursing home operated by Consolidated Resource Health Care Fund I (“Alderwood”). Upon admission, Schimpf signed an arbitration agreement stating that in the event of a dispute, AAA arbitrators would resolve the dispute using applicable AAA rules of procedure. Prior to Schimpf’s entering the agreement, however, AAA had issued a healthcare policy statement. The statement provided that the AAA would no longer accept cases involving individual patients without a post-dispute agreement to arbitrate. Schimpf later passed away after falling from her bed and sustaining a head injury. Joyce Nail, personal representative of Schimpf’s estate, sued Alderwood in state court alleging negligence and wrongful death. Nail moved to oppose arbitration in light of the AAA’s policy statement and the absence of a post-dispute agreement between Schimpf and Alderwood. The trial court granted the motion. Alderwood appealed to the Court of Appeals of Washington. The Court reversed. Citing to precedent and public policy in favor of enforcing arbitration agreements, the Court held that although the AAA statement precluded AAA arbitrators from resolving the dispute, it did not preclude other arbitrators from doing the same. This determination was made upon an ordinary meaning comparison of the terms “procedure” and “policy.” The Court found that since the agreement between Schimpf and Alderwood was solely concerned with AAA procedure, the trial court committed reversible error by not appointing alternative arbitrators when the AAA’s policy caused the parties’ method of arbitrator selection to fail.”

Case available at [Schimpf](#)

(If one wants to “ensure” an award is not public, should a confidential settlement agreement be negotiated?—ed)

“Motion to confirm arbitration award not rendered moot, by satisfaction of award prior to confirmation. (Hawaii App.)

//Mikelson v. United Services Auto. Ass'n//2010 WL 1054881 (Mar. 24, 2010)

“Matthew Mickelson contracted with United Services Automobile Association for an insurance policy. The policy contained an arbitration clause. After being injured in a motorcycle accident, Mickelson submitted the matter to arbitration. The arbitrator found for Mickelson. USAA issued a check to Mickelson for the awarded amount, and Mickelson filed a motion to confirm the arbitration award in state court. The trial court granted the motion. USAA appealed to the Intermediate Court of Appeals of Hawaii. The Court affirmed. USAA argued that since they had already paid the awarded amount, the court did not have jurisdiction to grant a motion to confirm because the matter was moot. The Court disagreed, holding that a party is entitled to a motion to confirm, regardless of the awarded amount being satisfied.”

Case is available at [Mickelson](#)

(Be careful on what you say in postponement requests!—ed)

“Party seeking postponement of hearing following withdraw of counsel, must retain new representation within a reasonable time. (Md. App.)

//Letke Sec. Contractors, Inc. v. United States Sur. Co.//2010 WL 1172938 (Mar. 29, 2010).

“A dispute arose between Latke Security Contractors Incorporated (Latke) and United States Surety Company (USSC). The parties submitted the dispute to binding arbitration. Prior to the arbitration hearing, Latke’s counsel withdrew. The arbitrator granted Latke’s request to postpone the hearing pending retention of counsel. Responding to an inquiry seven weeks later, Latke’s owner verified that she would either obtain representation or represent Latke herself. However, less than a week before the hearing, she again requested a postponement claiming Latke’s new counsel needed time to review the case. The arbitrator denied the request reasoning that Latke’s failure to retain an attorney in a reasonable time did not justify postponement. Following the hearing, the arbitrator rendered an award favoring USSC. Latke asked the trial court to vacate the award arguing that the arbitrator’s refusal to postpone the hearing was prejudicial. The trial court confirmed the award. Latke appealed to the Court of Special Appeals of Maryland. The Court affirmed. The Court reasoned that Latke’s owner agreed to represent Latke with or without counsel, that she received adequate notice of the hearing, and that she was given reasonable time to retain representation.”

Case is available at [Latke](#)

(When a court orders remand back to arbitration, which panel has jurisdiction in the matter—the original panel or a new panel?—ed)

“On remand to the lower court with order to vacate award, a lower court is not precluded from remanding the issue back to arbitration (1st Cir. (Mass)).

Kashner Davidson Securities Corp. v. Mscisz//2010 WL 1241532 (Apr. 1, 2010)

“Kashner Davidson Securities Corp. employed Steven Mscisz, Mark Mscisz, and Lynda Mscisz as securities brokers. The employment contracts contained arbitration agreements. A dispute arose and the parties submitted the matter to arbitration. The arbitrator found for Kashner. Kashner sought to have the arbitration award confirmed in federal court. The court confirmed the award, and the Mscisz’s appealed. The appellate court reversed and remanded the case to the lower court with instructions for the lower court to vacate the award. The lower court vacated the award, but also remanded the issue back to arbitration. The Mscisz’s appealed to the United States Court of Appeals, First Circuit. The Court affirmed. The Mscisz’s argued that the lower court acted beyond the scope of the remand order because the remand gave instructions to vacate the order, without mentioning sending the matter back to arbitration. The Court disagreed, reasoning that the remand did not prohibit the lower court from sending the matter back to arbitration after vacating the initial award.”

Case is available at [Kashner](#) Opinion number 09-1356.

(Confidentiality of mediation does not extend (in)to a criminal matter?—ed)

“Evidence from mediation of a civil claim was admissible in a subsequent criminal action. (Me.)

//State v. Tracy// 2010 WL 1076222 (Mar. 25, 2010)

“Deane Tracy, a police officer, and his wife Sarah purchased a vehicle from Ken and Melissa Curtis. The parties agreed that the Tracys would make installment payments until the vehicle was paid in full. After the Tracy’s failed to make payments the Curtises brought a small claims action for the unpaid balance. In mediation, the parties were \$500 apart on the amount of the outstanding payments. The Curtises agreed to accept the Tracy’s estimate of the outstanding balance if they could show documentation of payments. The Tracy’s were unable to produce the

documentation and no settlement was reached. In the subsequent small claims court proceeding, the Tracys entered into evidence an altered bill of sale, which indicated that the vehicle had been paid in full. Several months later, the Tracys were charged with forgery. Over the Tracy's objection, the trial court admitted evidence from the mediation. The Tracys were subsequently convicted. Deane Tracy appealed to the Supreme Court of Maine. The Court affirmed. Tracy argued that communications from the small claims mediation were confidential and could not be admitted into evidence. The Court disagreed. The Court held that evidence from the civil mediation was admissible in a subsequent criminal trial so long as the evidence was not offered for "any substantive issue in dispute between the parties." The evidence from mediation was not offered on the small claims action and was therefore admissible in the subsequent criminal trial. The Court reasoned, 'although the parties are free to posture and bargain during civil mediation, they may not use that mediation as a shield behind which to act in furtherance of a crime.'"

(Unconscionability "in the news!"—ed)

Pokorny v. Quixtar, Decided: 04/20/10, No. 08-15880
Circuit Judge Schroeder for the Court; Circuit Judge Berzon, and District Judge Strom

"The binding and non-binding conciliation portions of an alternative dispute resolution agreement are unenforceable if they are substantively and procedurally unconscionable under California law. Plaintiffs worked as individual distributors, referred to as "Independent Business Owners" ("IBOs"), for defendant Quixtar Inc. Each IBO signed, and plaintiffs now challenge, an agreement that included a mandatory alternative dispute resolution ("ADR") clause. The district court found the ADR clause to be unconscionable under California law. Quixtar appealed, maintaining that California law should not have been applied, and that the ADR provisions were conscionable. The Ninth Circuit held that California law, not Michigan law, applied because the plaintiffs were California residents, and California has a substantial interest in their case. Next, the Ninth Circuit held the arbitration agreement was procedurally unconscionable since Quixtar, who drafted the agreement, had superior bargaining strength, and the IBOs, when presented with the clause, had to "take it or leave it without the opportunity for meaningful negotiation." Further, the Ninth Circuit reasoned that the IBOs were not given a fair opportunity to review the ADR processes before signing. Finally, the Ninth Circuit held that the ADR provisions were substantively unconscionable because the provisions were one-sided, had a 'harsh effect'

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on the IBOs, and omitted any sense of bilaterality. The Ninth Circuit found that the IBOs did not have an opportunity to challenge the Rules of Conduct, were liable for defendant's attorney fees if their claim was denied, and the statute of limitation clause lacked mutuality. AFFIRMED.”

Case is available at [Pokorny](#)

(Waiver of arbitration?—ed)

U.S. 10th Circuit Court of Appeals, April 19, 2010

[Hill v. Ricoh Americas Corp., No. 09-3182](#)

In an action alleging that plaintiff was terminated from his position in violation of the Sarbanes-Oxley Act, and Kansas common law prohibiting retaliatory discharge, the denial of defendant's motion to compel arbitration is reversed where 1) defendant was not required by Fed. R. Civ. P. 8(c)(1) to demand arbitration in its answer; 2) defendant did not demand arbitration until four months after answering the complaint, but that length of time in itself did not establish waiver; and 3) the parties' retention bonus agreement did not supersede the arbitration clause in the initial employment agreement. Case is available at [Hill](#)

And, the US Supreme Court on April 26, 2010, heard arguments (*Rent-a-Center v. Jackson*) on who decides if an arbitration clause is unconscionable. See [Unconscionability](#)

The UNCITRAL Arbitration Rules are under revision and there may be an opportunity for comment—contact ADR Tips editor for further info.

Future Speaking Topics Include—

- Seattle South Sound & Puget Sound NCMA Chapters NCMA Chapters, 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.”
- South Florida 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