

***ALTERNATIVE DISPUTE RESOLUTION AND LITIGATION
OF AN EMPLOYMENT CLAIM***

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What is Alternative Dispute Resolution?

Alternative Dispute Resolution encompasses several methods utilized in resolving disputes as alternatives to litigation. Some of the reasons for engaging in these alternatives include expediting the proceedings as well as decreasing the costs. Whether the alternatives have succeeded is a matter of opinion, which will be explored below.

Arbitration and mediation are two of the most significant types of alternative dispute resolution. Sometimes employers have plans that require both mediation and arbitration before resorting to litigation, while others have mandatory arbitration programs instead of litigation. It is unlikely that an employer will have a mandatory mediation program, since mediation inherently requires voluntary participation and a willingness to cooperate in order to be successful.

Arbitration Overview

Short Description of Arbitration

Arbitration is a form of dispute resolution where the parties agree to submit their dispute to an appointed arbitrator or panel of arbitrators, using agreed-upon informal rules. Arbitration can be binding or non-binding. One of the most extensive providers of arbitration services is the American Arbitration Association (“AAA”). AAA has special rules that it uses to resolve employment cases. A copy of these rules is attached.

Federal Arbitration Act

Probably the most frequently used statute relating to arbitration is the Federal Arbitration Act (“FAA”). 9 U.S.C. §§ 1-307. The FAA creates federal substantive law governing arbitration pursuant to agreements “involving commerce” and preempts state law or policies. State courts often find themselves bound by the FAA in employment-related matters. *See, e.g., Ayco Co. v. Walton*, 3 A.D.3d 635, 636 (3d Dept. 2004) (“The FAA applies to any contracts involving interstate commerce.”). The FAA does not create a federal common law concerning arbitration agreements; instead, it establishes that arbitration contracts should be enforced or avoided just as any other contract. Federal Arbitration Act Section 2.

Scope of Arbitration Award

The scope of review of an arbitration award is very limited, both at common law and under the FAA. Under the FAA at Section 10 the grounds for vacatur focus on different forms of misconduct that parallel the judicially created “manifest disregard” standard found in many cases. FAA Section 11 establishes the power of reviewing courts

to modify or correct an arbitration award.

Key Issue - Enforceability of Arbitration Clause

The leading case relating to mandatory arbitration of employment claims is Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). Before Gilmer, there was a question as to whether parties could agree to substitute arbitration for litigation of statutory employment claims. In Gilmer, the Supreme Court found no Congressional intent to preclude arbitration of Age Discrimination Employment Act (“ADEA”) claims. The Court also rejected Gilmer’s arguments that arbitration is generally inferior to litigation, including his assertions that arbitration prejudiced claimants due to its more limited discovery and the lack of written arbitral opinions. *Id.*

The next important case was Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), where the Supreme Court held that the FAA applies to nearly all employment arbitration agreements. In Circuit City v. Adams, the employees signed an Employment Agreement which provided that any and all employment-related disputes be submitted for binding arbitration, thereby foreclosing the opportunity to litigate those claims. Nonetheless, the employees filed a lawsuit alleging employment discrimination and violation of California state law. The 9th Circuit Court of Appeals in California held that arbitration cannot be required under the FAA. The United States Supreme Court reversed, holding that only employment contracts involving transportation workers are excluded from the FAA’s reach. *Id.*

All Circuit Courts have held that an employee may be required to arbitrate Title VII claims. The only Circuit that resisted mandatory arbitration was the 9th Circuit, but it has since changed its view. See EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir.2003).

Pre-dispute, as well as dispute-related arbitration clauses will be enforced so long as they are fair. For example, in Darrah v. Friendly’s Ice Cream Corp., plaintiff claimed she experienced retaliation as a result of the violation of the Family and Medical Leave Act, and that the supervisor laughed at her complaint. Darrah at 328 F. Supp.2d 319 (N.D.N.Y. 2004). The court held that the employer’s failure to engage in good faith in its open-door policy precluded arbitration.

Furthermore, it is no defense to enforceability of an agreement that the plaintiff claims that he or she failed to read it. In Gold v. Deutsche Aktiengesellschaft (Deutsche Bank), 365 F.3d 144 (2nd Cir. 2004), the plaintiff claimed he should be permitted to sue for homosexual *quid pro quo* sexual harassment, since he was not given adequate notice of the arbitration agreement. Plaintiff claimed it was one of many forms given to him, and he was not advised that he was signing an arbitration agreement. While the Second Circuit acknowledged that it would have been “better” had the employer explained the content of the arbitration agreement to him, its failure to do so did not invalidate the agreement.

Mediation Overview

Short Description of Mediation

Mediation involves an impartial third party (the “mediator”) who attempts to facilitate a resolution between parties involved in a dispute. Mediation is inherently voluntary – just as settlement is voluntary. Parties who are in dispute still must voluntarily make the choice to settle, and some may choose against settlement despite a suggestion to the contrary of the mediator. Thus, while employers may require that employees satisfy a condition precedent of undergoing mediation before filing a lawsuit, employers may not make actual settlement through mediation mandatory.

Key Issue - Confidentiality

A primary concern among participants in mediation has been whether information disclosed during the mediation process will remain confidential. Case law is divided on this issue, and while a substantial number of cases uphold confidentiality in the mediation context, there exist a comparable number of cases where confidentiality was not upheld.

In In re Bidwell, the Oregon Court of Appeals held that letters exchanged between parties during the course of mediation proceedings were confidential per a state statute which explicitly stated that communications during mediation were confidential, save several delineated exceptions. Bidwell, 21 P.3d 161 (Or. Ct. App. 2001). Other courts have held that, for policy reasons, documents produced during mediation should not be subject to disclosure. *See, e.g., Carson v. Builders Firstsource-Southeast Group, Inc.*, 159 F.Supp.2d 242 (Ind. 2000) (Disclosure of mediation documents could deter employment dispute settlements).

On the other hand, there exists many occasions where courts have refused to uphold confidentiality in the mediation context. Courts have reasoned that information and documents disclosed during mediation should be disclosed on the basis of waiver, consent, interest of justice, and finding that the process was not mediation, to name a few. In Glover v. Torrence, for example, the Court held that the public interest in ensuring the payment of child support justified intrusion into mediation communications. Glover, 723 N.E.2d 924 (Ind. Ct. App. 2000).

Furthermore, the recent case of Hauzinger v. Hauzinger has added to the confusion surrounding the issue of confidentiality in the mediation context. Hauzinger, 43 A.D.3d 1289 (4th Dept. 2007). In that case, a husband and wife attempted mediation, and executed a confidentiality agreement. At that time, neither was represented by counsel. After mediating to no avail and proceeding in court, the mediator was subpoenaed. The mediator moved to quash the subpoena arguing that his testimony would breach the confidentiality agreement. However, the lower court denied the

mediator's motion, and on appeal, the Fourth Department of the New York State Appellate Division also denied the motion to quash. Notably, the Court pointed to the fact that although the Uniform Mediation Act (UMA) would probably require upholding of the confidentiality agreement, New York had not yet adopted the UMA. Therefore, no New York Court was bound to the UMA, and the Fourth Department refused to enforce the confidentiality provision under either the UMA, or general public policy arguments. *Id.*

Key Issue – Enforceability of Settlement Agreement

Enforceability of a mediation agreement is the most litigated mediation issue. Can one be sure that an agreement formed during mediation proceedings will be upheld if it is later challenged? Although parties may come to an agreement during settlement, and may even commit that agreement to writing, sometimes such an agreement will still be unenforceable. For example, in Haghighi v. Russian-American Broadcasting, the Court refused to uphold a written, signed settlement agreement which was procured during mediation proceedings because it failed to contain language required under Minnesota mediation law. Haghighi, 173 F.3d 1086 (8th Cir. 1999) (where the statute required that the settlement agreement to explicitly state that it was binding in order for it to be enforceable).

In other cases, the decision of whether an agreement will be enforceable can hinge on traditional contract defenses including mistake, fairness, fraud or misrepresentation and duress. For example, in D.R. Lakes, Inc. v. Boardman, the seller of a home argued that the purchase price contained in a settlement agreement was missing a credit of \$600,000.00 as a result of a clerical error. D.R. Lakes, 819 So.2d 971 (2002). The Court refused to enforce the agreement as it was, and remanded the case to the lower court to determine whether that missing credit was, in fact, a clerical error. *Id.*

Key Issue – Conditioning of Attorney's Fees Award on Mediation

Many agreements now state that in the event of a dispute, recovery of attorney's fees will only be available if the parties first submit the dispute to a mediator in good faith. This strategy is aimed at resolving the dispute before costly litigation. The issue here is whether this type of agreement is enforceable.

In Frei v. Davey, a California Court weighed in on the issue of whether conditioning attorney's fees on mediation is enforceable. Frei, 124 Cal.App.4th 1506 (2004). In this case, the court enforced the conditional attorney's fees clause, determining that mediation should occur on demand where such a clause exists, or fees will not be available to the prevailing party. *Id.* The court additionally held that late efforts at mediation would not cure the failure to mediate early on.

Review of Miscellaneous Alternative Dispute Resolution Issues

The EEOC and Arbitration Agreements

The Equal Employment Opportunity Commission has never supported arbitration. In 1997, the EEOC issued a policy decision opposing mandatory arbitration agreements, deeming them to be “contrary to the fundamental principles” of employment discrimination law. The EEOC has not revised or withdrawn its 1997 policy statement.

However, as described above, the Supreme Court has disagreed with the EEOC’s position with respect to private arbitration agreements. The Supreme Court has held that it is not fundamentally unfair for an employer to require an employee to engage in arbitration, so long as the agreement itself is fair. *See Gilmer, supra*.

Nonetheless, a private arbitration agreement does not affect the power of the EEOC. The Supreme Court has held that the EEOC is not barred from seeking victim-specific relief in court even if the person on whose behalf the EEOC sues is subject to an agreement to arbitrate. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). The Court found that once a charge is filed, the EEOC is the master of its own case with rights which are not “merely derivative from the individual’s rights”. *Id.* at 290, 297.

While the import of this may not be significant since there are proportionately few cases filed by the EEOC where the claimant has also brought a private suit after filing a charge with the EEOC, *Waffle House* makes it clear that the EEOC has the authority to seek victim-specific relief in court regardless of whether that victim is subject to an arbitration agreement. See, e.g., *EEOC v. Woodmen of the World Life Insurance Society*, 2004 U.S. Dist. LEXIS 16309 (D. Neb. 2004).

Wage and Hour and Title VII Claims Can be Subject to Mandatory Arbitration

In *Finnette v. Friendly’s Ice Cream Corp.*, 319 F. Supp.2d 439 (S.D.N.Y. 2004), the Court rejected the argument that plaintiff’s claims under the FLSA could not be the subject of mandatory arbitration. In addition, the court rejected the argument that the employer’s failure to abide by the arbitration agreement should result in the waiver of the plaintiff’s claims. Instead, the FAA required that the claim be ordered to arbitration. Furthermore, it has been held that pre-dispute arbitration does not violate Title VII. *Desiderio v. National Association of Securities Dealers, Inc.*, 191 F.3d 198 (2nd Cir. 1999).

Authority to Review an Arbitration Decision

Generally, it is exceedingly difficult to vacate or modify an arbitration award. It is improper for a Court to review the record, facts, weigh evidence, or assess credibility of witnesses when presented with an action to vacate an arbitration award. Rather, a court's review is severely limited and may be undertaken only under several narrow statutory or common law grounds. *See Eljer Mfg. v. Kowin Dev. Corp.*, 14 F.3d 1250 (7th Cir. 1994).

According to FAA Section 10, an award is to be vacated only under extremely limited circumstances including 1) a showing of partiality of the arbitrator, 2) refusal of the arbitrator to hear relevant and material evidence, or 3) where an arbitrator exceeds his or her powers. 9 U.S.C. § 10.

In addition to the statutory grounds under which an arbitral award may be vacated, it may also be vacated if the arbitrator exhibited "manifest disregard" of law. *Moorning-Brown v. Bear, Stearns & Co., Inc.*, 2004 U.S. Dist. LEXIS 26279 (S.D.N.Y. 2005). However, a court's review of an award under manifest disregard of the law is "severely limited" and vacatur under this ground will occur "only in the most egregious instances of misapplication of legal principles." *Wallace v. Buttar*, 378 F.3d 182 (2d Cir 2004). Under this ground, the court must find that the arbitrator knew of an applicable legal principle yet refused to apply it.

In sum, as a policy to ensure that arbitration never becomes merely "a preliminary step to judicial resolution," review of an arbitral judgment is extremely deferential." *Engel v. Refco, Inc.*, 193 Misc.2d 91 (New York County 2002); *see also Brown v. Coleman Co. Inc.*, 220 F.3d 1180 (10th Cir. 2000) (noting that the standard of review of an arbitration award is "among the narrowest known to law.").

Case in Point - Judicial/Arbitrator Authority on Miscellaneous Issues

A. Who interprets the AAA Rules?

1. In *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551 (2nd Cir. 1985), the Court held that AAA Rule 51 (now 48) explicitly provides that the presiding arbitrator interprets the AAA rules, and therefore defendant's challenge to the timeliness of the arbitrator's award failed, as the arbitrator had ruled it timely.

B. Authority to Enforce an Untimely Award when no Prejudice Exists

1. In *Appel Corp. v. Katz*, 2005 U.S. Dist. LEXIS 26972 (S.D.N.Y. 2005), the District Court held that it had the discretion to enforce an untimely award if no objection was made prior to entry of the award and there was no showing of prejudice.

2. In *Success Vill. Apts., Inc. v. Amalgamated Local 376*, 380 F.Supp. 2d 95, 98 (D. Conn. 2005), the Court held that despite state regulations requiring issuance of arbitration awards on a specific timetable, there was no basis to set aside an arbitration award where the plaintiff made no showing that it objected to the delay prior

to the issuance of the award.

3. In Hasbro, Inc. v. Catalyst USA, Inc., 367 F.3d 689 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit applied Wisconsin law, and noted that untimely performance of a contractual provision should not result in the harsh penalty of forfeiture unless the parties agree that time is of the essence.

C. Authority to Enforce an Untimely Award when Prejudice Exists and Arbitral Immunity

1. There is a dearth of authority on this issue, but the conventional view is that any untimely award which prejudices a party is a nullity because it exceeds the arbitrator's powers. The other view is that parties are free to litigate an untimely award which prejudices one of them. A case in Connecticut vacated an award issued late by an unbiased arbitrator, but the Court held that the arbitrator would not be held personally liable for any damages resulting from the biased and untimely award because he was protected by arbitral immunity. JLM Marketing v. Bloomer, 2005 Conn. Super. LEXIS 2058 (Ct. Super. 2005). However, in a different California case, the Court held that arbitral immunity might not apply where an untimely award issues. Baar v. Tigerman, 189 Cal. Rptr. 834 (Cal. Ct. App. 1983).

D. Authority to Grant Additional Time

1. In Brandon v. Hines, 439 A.2d 496 (D.C. 1981), the Court held that when an arbitrator in good faith requests additional time, the parties are bound to give it.

E. May an Arbitrator Re-examine A Decision?

1. In Colonila Penn. Insurer Co. v. Omaha Indemnity Company, 943 F.2d 327 331 (3rd Cir. 1991), the Third Circuit held that once an arbitrator issues an award, that arbitrator lacks any power to re-examine that decision; the arbitrator becomes *functus officio* (meaning that once an arbitrator issues an award, his or her duties have been completed and the arbitrator no longer retains legal authority).

Securities Agreements and Arbitration Requirements

For many years, the National Association of Securities Dealers, Inc (“NASD”) required arbitration of all SEC registered brokers’ employment claims.

However, in April of 2007, the NASD Code of Arbitration (the “Code”) was given a major overhaul. The Code of Arbitration was expanded and split up into several additional sections, one of which specifically applies to customers (those who deal with brokers but are not brokers themselves) and another of which specifically applies to brokers (members and associated persons of the NASD).

Additionally, the New York Stock Exchange's former Arbitration Department, as of the enactment of the new Code in April of 2007, merged with the NASD's Dispute Resolution Department to form the Financial Industry Regulatory Authority, also known as "FINRA". Because FINRA encompasses both the NASD and the NYSE, they are both governed by the same rules, namely, the NASD Code of Arbitration.

Under the new Code, customers are not required to arbitrate any claims, but may elect to do so via a signed agreement.

Brokers are now required to arbitrate all claims that arise between them regarding business associated with the NASD or NYSE unless there is an explicit exception in the Code. Claims which are excepted from the arbitration requirement, but may otherwise be arbitrated in the FINRA arbitration forum if otherwise agreed to, include disputes arising out of insurance business activities, statutory employment discrimination claims, and claims involving registered clearing agencies. Class actions claims and shareholder derivative actions are completely prohibited from being arbitrated in the FINRA arbitration forum.

Notably, the Code provides that the Director of Dispute Resolution may decline to permit the use of the FINRA Arbitration forum if the Director determines that the subject matter of the dispute is "inappropriate".

Forcing Non-Signatories to Arbitrate

It is not just the parties who may be required to arbitrate; in certain cases, non-signatories may also be required to arbitrate. However, one caveat should be remembered - although arbitration agreements are broadly construed, this is not the case with respect to construing them to cover claims and parties not intended to be covered in the original agreement. *See Thomson-CSF, S.A., v. Am. Arbitration Assoc.*, 64 F.3d 773 (2nd Cir. 1995).

The rule, then, is that non-signatories may not be bound to accept arbitration except as dictated by some theory under agency or contract law. These theories include:

A. Incorporation By Reference - Under this theory, reference within the arbitration agreement to some other document (or vice versa) may result in the document or parts of it being read as part of the actual arbitration agreement. *See, e.g., Fid. & Guar. Ins. Co. v. West Point Realty, Inc.*, 2002 U.S. Dist. LEXIS 15405.

B. Assumption - This theory involves a party acting in such a manner as to persuade a reasonable person to believe and rely on the fact that the party has actually adopted the obligation to arbitrate. Under this theory, a party who acts as if he or she is bound to arbitrate (although the party may not have signed any agreement) is sometimes held to have waived the ability to proceed to court.

C. Agency - Under this theory, a principal may become bound to an

arbitration agreement by some agent who signed on its behalf. *See Thomson-CSF*, 64 F.3d 773 (2nd Cir. 1995).

D. Piercing the corporate veil or alter ego – This theory presumes that where the corporate relationship between two companies or a company and its principal is so intertwined that it is difficult to distinguish between the two, that one is responsible for the other's acts (including being bound to an arbitration agreement). *See Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 523 F.2d 527 (2nd Cir. 1975). Note that a corporate affiliation is not sufficient to pierce the corporate veil.

E. Estoppel - This theory applies to third party beneficiaries under federal and state law. Federal law also allows this theory to be used for unintended third party beneficiaries. *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, 974 F. Supp. 293 (S.D.N.Y. 1997).

What are Some of the Issues an Employer should Consider in Designing a Mandatory Pre-Dispute Arbitration Program?

Although it is established that pre-dispute arbitration agreements may be enforceable, they will not be enforced if the claimant is unable to vindicate effectively the statutory cause of action in the arbitral forum. *See Desiderio, supra*. Therefore, employers must pay attention to making sure that the remedy is a viable one. This essentially means designing a plan that is fair.

In general, attempts to shift costs to employees have been unsuccessful. If an agreement's substantive provisions are so weighted in favor of the employer as to be flatly unfair, it will be unenforceable as unconscionable. Some of the issues that the courts have considered with respect to unconscionability include cost sharing, exclusion of punitive damages and miscellaneous other favorable provisions relating to employers.

1. Cost Sharing

The U.S. Supreme Court has recognized (in a commercial contract context) that significant arbitration costs could effectively render the arbitration process inaccessible to the employee, thereby making the agreement invalid. *See Green Tree Financial v. Randolph*, 531 U.S. 79 (2000). Furthermore, it has been held that where the cost shifting provisions have the effect of limiting access to arbitration because the employee has to split the costs evenly with the employer, the agreement is unenforceable. *See Circuit City v. Adams*, (on remand), 279 F.3d 889, 894 (9th Cir. 2002). Additionally, in *Cole v. Burns Int'l Security Services*, 105 F. 3d 1465 (D.C. Cir. 1997), the DC Circuit advocated a *per se* rule, invalidating agreements with significant costs, regardless of the individual employee's circumstances.

However, other courts have held to the contrary regarding fee sharing. For example, in *Gruber v. Hornick*, 2003 U.S. Dist LEXIS 8764 (S.D.N.Y. 2003), where the plaintiff argued that the fee sharing provision of an arbitration agreement was excessive

to the employee, the court held that the plaintiff did not adequately demonstrate that she would incur excessive fees and further that that “the party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive ‘bears the burden of showing the likelihood of incurring such costs’”. *See also Ciago v. Ameriquest Mortgage Co.*, 295 F. Supp. 2d 324 (S.D.N.Y. 2003) (refusing to find that the employee could not afford arbitration where the cost could be as little as \$200 and the employee was a homeowner, owned real property and had cash available).

Note that if it is an AAA administered agreement, the issue of cost may be moot. The AAA National Rules for the Resolution of Employment Disputes provide for the allocation of costs depending on whether it is an “employer-promulgated plan” (with the employee responsible only for a \$125 filing fee, and the remaining costs to be borne by the employer) or an individually negotiated employment agreement or contract (governed by a provision that “[u]nless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award”).

2. Exclusion of punitive damages

Employers should be extremely cautious when crafting an arbitration provision which limits or excludes damages, particularly punitive damages. A provision in an agreement which excluded punitive damages was ruled unenforceable and was severed from the arbitration agreement in a D.C. case. *Booker v. Robert Half International, Inc.*, 315 F. Supp. 2d 94 (D.D.C. 2004). *See also Circuit City v. Adams*, 279 F.3d 889 (9th Cir. 2002) (on remand).

3. Other Limitations on Damages

Employers should also be cautious when generally limiting the damages recoverable by the employee pursuant to an arbitration agreement. In *Circuit City v. Adams*, the 9th Circuit Court on remand held that an arbitration agreement was unenforceable, in part because of the limitation on relief available to the employee, which capped back pay at one year and future pay at two years and limited punitive damages to \$5,000. 279 F.3d 889 (9th Cir. 2002) (on remand).

A limitation on attorney’s fees is also disfavored by the courts, and may serve as reason to hold at least part of an arbitration agreement unenforceable. For example, in *Williamson v. Public Storage, Inc.*, the court held that, in an employment dispute, an arbitration provision which may have limited an attorney’s fee award would be unenforceable. *Williamson*, 2004 U.S. Dist. LEXIS 3799 (D. Conn. 2004).

4. Employer Control

Provisions which grant employers considerable control over the identity of the arbitrators risk being ruled unenforceable. For example, in a Fourth Circuit case, the court rejected a mandatory arbitration plan where the employer controlled the identity of the arbitrators available for selection. *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

5. Other Considerations when Designing an Arbitration Agreement

In addition to being aware of the potential hazards the above issues raise, there are various other issues which parties should address in their arbitration agreement that include the timeliness of the arbitration awards, discovery, the number of arbitrators and which rules apply.

The AAA Rules provide that an award shall be issued within 30 days of the close of proceedings. Unless the AAA Rules are adopted by the agreement, an arbitrator may take longer to issue an award. On that note, it is important for parties to determine which rules (including AAA rules), if any, they will adopt into the agreement, and which rules they will not include. Parties should take a close look at each rule and determine a reason to include or forego each one.

While one cannot entirely limit discovery, the employer may want to insert some reasonable provisions about discovery, such as parroting the federal rules of providing that there are some limitations, with discretion to the arbitrator to overrule these limitations.

Additionally, be aware that if the Agreement is silent but the AAA rules apply, the AAA will appoint a single arbitrator.

AAA Arbitration Rules

The AAA has its own rules which govern employment arbitration awards. Some notable rules follow:

AAA Rule 15 – Disclosure: “Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.”

AAA Rule 23 – Confidentiality: “The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.”

AAA Rule 27 - Dispositive Motions: “The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown

substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.”

AAA Rule 30 – Evidence (an excerpt): “The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any party or arbitrator is absent, in default, or has waived the right to be present, however ‘presence’ should not be construed to mandate that the parties and arbitrators must be physically present in the same location.”

AAA Rule 39(a) – The Award: “The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing of the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator. Three additional days are provided if briefs are to be filed or other documents are to be transmitted pursuant to Rule 30.”

Notably, according to AAA Rule 31 - “Applicable Rules of Arbitration”, parties may pick and choose which arbitration rules shall apply and may also modify the AAA Rules by their agreement.

AAA Mediation Procedures

The AAA has also created a set of Mediation Procedures, which are used when parties submit to arbitration under AAA. Some notable provisions follow:

AAA Mediation Procedure M-7(i) - Duties and Responsibilities of the Mediator: “The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome.”

AAA Mediation Procedure M-11 - No Stenographic Record: “There shall be no stenographic record of the mediation process.”

AAA Mediation Procedure M-16 – Expenses: “All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.”

The Uniform Mediation Act

The Uniform Mediation Act (the “UMA”) was drafted and approved by the American Bar Association (“ABA”) in 2001 and amended in 2003, and provides uniform rules for mediation that address issues such as confidentiality and privilege, for example.

The UMA has been adopted by several states, including Washington, D.C., Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington. In 2008, Idaho and New York began reviewing the UMA for possible adoption.

Comparing and Contrasting Arbitration, Mediation and Litigation

Time Spent Until Resolution

It is a misconception that arbitration is definitively quicker than litigation; this is not necessarily true. Some point out that arbitration does not involve discovery, and thus time spent until resolution is greatly reduced. However, with arbitration, there may or may not be significant discovery. For example, the AAA’s Rules reserve to the assigned arbitrator the authority to determine methods of discovery. The Rules expressly contemplate that such discovery may take place “*by way of deposition, interrogatory, document production, or otherwise*”. AAA Rule 9. Furthermore, JAMS, a leading provider of alternative dispute resolution services, enacted Rules which provide that the parties are to exchange relevant documents and each side has the right to one deposition with additional discovery as the arbitrator deems necessary.

Many times mediation will save lots of time (and money), where it results in an agreement. However, where it does not, the time spent is essentially tacked onto the time spent in the subsequent litigation or arbitration. On the other hand, generally, costs of mediation can be limited because the time involved in it can be limited by agreement of the parties

It is also important to note that when considering the speed of resolution, one should consider that there is no “docket” for arbitration or mediation, meaning that one does not have to await their “day in Court,” and proceedings generally get started more quickly.

Costs

It is also a misconception that arbitration is definitively less expensive than litigation. Again, this misconception may spring from the idea that arbitration does not

involve discovery, when in reality it does involve discovery, as discussed above.

Additionally, with litigation, the parties do not pay for the Judge's time, but for arbitration and mediation, both the arbitrator(s) and mediator are paid on an hourly or daily basis. Obviously, the longer the mediation or arbitration proceeds, the higher the costs will be.

Furthermore, it is less likely that the arbitrators will limit the number of days an arbitration will last, whereas, a judge will many times set general time limits. It is more likely that the arbitration will proceed to the end, where an arbitrator renders an ultimate decision after all arguments by each party are set forth, since the arbitrators are not bound to spend time to consider a summary judgment motion. As a result, it is often difficult to dispose of the case early on. Many times, arbitrators will only consider a motion for summary judgment after some discovery has ensued. On the other hand, judges in court are bound to consider and make a decision upon motions for summary judgment and motions to dismiss. A fair amount of the time, these motions succeed, resulting in a decision from the Court early on, without proceeding through all discovery, a trial, etc.

Settlement is not necessarily more likely in an arbitration action. In litigation, there are several natural junctures in the lawsuit to discuss settlement. Most cases settle pretrial. There are not necessarily the same opportunities for settlement during arbitration. Furthermore, when mediation attempts result in settlement, the costs are almost always substantially lower than those of litigation or arbitration. However, for mediation that does not result in settlement, parties are left with several options, two of which are to arbitrate or to litigate. The point here is that, while mediation that results in settlement may be much less costly than arbitration or litigation that results in a decision, mediation that does *not* result in a settlement leaves the parties where they started, except less the money they spent on the unsuccessful mediation. On the other hand, at the end of litigation or arbitration, the parties know they will either have a settlement, or a decision.

Damages

Another common misconception is that damages are lower in arbitration; this is not necessarily true. For example, statistics from 2004 show that the median monetary award for successful claimants in arbitration was \$100,000.00, while it was \$95,554.00 in Court. *Employment Arbitration: What Does the Data Show?* The National Workrights Institute, November 14, 2004, available at www.workrights.org. See also "Big Awards Counter-Perception of Arbitration", New York Law Journal, August 22, 2002.

Furthermore, in litigation an incorrect result can be corrected on appeal. On the other hand, in arbitration there is limited access to judicial appeal from an arbitration award. This is a big problem for employers faced with a large damage award. For example, in New York an arbitration award may not be reversed because it is incorrect or the wrong legal principles were applied. Moreover, although there may be rules that prohibit awarding punitive damages, the FAA may preempt those rules, allowing arbitrators to award them despite the state law. See, Garrity v. Lyle Stewart, Inc., 40

N.Y.2d 354 (1976) (holding that the power to issue punitive damages in New York is limited to judicial tribunals and may not be exercised by arbitrators), but see Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

In mediation, this issue does not arise. Mediation does not result in any adverse determination or damage award, because monies change hands only upon a mutual agreement by the parties.

Expertise

One issue that is frequently overlooked is the fact that in mediation and arbitration, the parties are generally able to choose who facilitates mediation or who will make the decision in an arbitrated dispute. For example, parties may designate a manager of a construction firm or an architect, or a construction attorney for a dispute which involves construction. In Court, however, those same parties end up the assigned judge, whether that judge has ever handled a construction matter or not.

Privacy

A final issue which is important but sometimes overlooked is that in court, the proceedings and papers are generally open to the public. However, in mediation and arbitration, the pleadings and proceedings are generally private and, therefore, arbitration and mediation are more likely to avoid media or other public attention.

When Should You Choose Arbitration Instead of Litigation?

It is important to recognize that mediation and arbitration are not mutually exclusive. Furthermore, mediation and litigation are not mutually exclusive. In other words, the parties can mediate, and if it does not result in a settlement, then the parties can proceed to arbitration or litigation. However, this is not true for litigation and arbitration. One cannot engage in binding arbitration, and then proceed to litigation. The parties must pick either binding arbitration or litigation.

It is not always easy to make a determination between litigation and arbitration. It depends upon the facts and issues in the case. It follows that mandatory arbitration agreements may not provide an employer with the flexibility necessary to make this choice. In significant cases, a mandatory arbitration agreement may create the potential for an award without the opportunity to review it.

The following is a sampling of some issues which should be addressed in making this determination:

Discovery

Employers should ask whether there are issues that need complex discovery. Discovery is guaranteed in litigation but not in arbitration. For example, in a harassment

case, it may be necessary and important to ascertain the plaintiff's prior emotional state and any damages. This would likely require reviewing extensive psychological records and related discovery. Medical and psychological records may always be requested through litigation, which provides defined avenues for discovery. However, there is no guarantee of being able to discover medical or psychological records in arbitration, because discovery is at the discretion of each individual arbitrator on a case by case basis, and any abuse of discretion is unreviewable.

Venue

Employers should review what the likely venue will be. In litigation, employers will know what to expect from various judges. Arbitration panels differ regionally. Management attorneys often prefer federal court to state court. If the likely venue for litigation is state court, then arbitration may be a choice to consider.

Motion Practice

Employers should ascertain whether a case against them is likely to be resolved on summary judgment motion or dismissed on a motion to dismiss. If that is the case, then litigation is the best alternative. Arbitration does not guarantee that the arbitrator will hear such motions.

Potential Damages and Binding Decisions

If the potential damages against the employer are small, then arbitration may be an appropriate choice, because in this instance the employer does not risk being stuck with a high damages award against it which is not reviewable. On the other hand, when the damages are potentially high against the employer, it may be more wise to litigate the claim, since a high damage award may be appealed as of right.

Interesting Statistics

A California law passed in 2002 required arbitration firms that do business in the state to publish court results on their web site. One of the three main arbitration forums, the National Arbitration Forum, began posting records soon after. It has been reported that businesses initiate the legal actions in the National Arbitration Forum in nearly all the cases. Of the 34,000 cases filed, only 118 cases were filed by consumers. In the 19,300 cases that were decided during the time period, consumers prevailed only 4% of the time, while businesses won 94% of the time. However, approximately 99% of the cases filed by businesses were collection cases.

In another study made possible due to the California law passed in 2002, many interesting 2003 arbitration statistics were revealed. *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure*, California Dispute Resolution Institute, August 2004.

Among the notable statistics: The median arbitrator fee was \$870; greater than 28% of arbitration matters were decided by the arbitrators while greater than 32% of arbitration cases were settled.

FINRA also releases statistics to the public. Their statistics for December 2007 reveal that the turnaround time for an arbitration matter was 13.9 months, while it was 3.7 months for mediation. Their statistics also show that 82% of mediation cases closed in December 2007 were settled, while only 57% of arbitration cases closed in 2007 were settled, and 21% were decided by the arbitrators.

The Future of ADR

In 2007, two Senate Democrats introduced the Arbitration Fairness Act of 2007. That Act would make arbitration clauses unenforceable. “*Arbitration can be a fair and efficient way to handle disputes, but only when it is entered into knowingly and voluntarily by both parties*”, Senator Russ Feingold (D. Wis.) said in July when introducing the bill. Similar legislation was introduced in the House of Representatives earlier this year.

On May 29, 2007, the United States Supreme Court granted a petition for a *writ of certiorari* in Hall St. Assoc., LLC v. Mattel, Inc. to decide the issue of whether a federal court can enforce a clause in an arbitration agreement that provides for more a expansive review of an arbitration award than is otherwise provided in Sections 10 and 11 of the Federal Arbitration Act. Hall St. Assoc., 127 S. Ct. 2875. The issue had caused a split in the Circuits.

In Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204 (2006), the United States Supreme Court held that under the Federal Arbitration Act, where a party challenges the validity of a contract as a whole -- but not specifically its arbitration provision -- the challenge must be considered by the arbitrator, not a court. See Harmon v. Ivy Walk, Inc., 2006 N.Y. Misc. LEXIS 3028 (N.Y. County Supreme Court, October 2006).

In Preston v. Ferrer, 2008 U.S. LEXIS 2011, the Supreme Court reviewed the question of whether the FAA preempts a California statute requiring administrative adjudication of the validity of talent agency contracts, particularly where the parties had expressly contracted to arbitration. The Supreme Court reversed the lower court’s decision, and held that the FAA superseded the California statute, and therefore the issue of whether the talent contract was valid should be decided by an arbitrator, not an administrative agency. *Id.*

The law surrounding Class Action arbitration is continuing to develop. The FAA states that all arbitration agreements are valid, but is silent as to class arbitration. Notably, absent specific authority in the applicable arbitration agreement or rules, courts generally have been held to have no authority to order consolidation of arbitration proceedings, or class wide arbitration. See generally, Govt. of the UK v. Boeing Company, 998 F.2d 68,

74 (2nd Cir. 1993).

The decision in Green Tree Financial Corp. v. Bazzle suggests that the FAA does not preclude class arbitration, even if the arbitration agreement does not specifically provide for it. Green Tree, 539 U.S. 444 (2003). The Court further suggested that parties could limit the availability of class arbitration within the arbitration agreement. However, recent court decisions have come out on each side of this issue, making the future unclear.

For example, several courts have held that a ban on class action arbitration is unenforceable as unconscionable. *See, e.g.*, Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005) (where the Court held that class action waivers in arbitration agreements may be unenforceable as unconscionable); Gentry v. Superior Court, 42 Cal. 4th 443 (2007); Dale v. Comcast Corp., 498 F.3d 1216 (11th Cir. 2007). Other courts have held the opposite, namely that waiver of class action arbitration would be enforceable. *See* Gay v. CreditInform, 511 F.3d 369 (3^d Cir. 2007) (where the Court upheld an arbitration agreement waiving class action).

Currently, the AAA is promulgating rules addressing class action in arbitration which should be effective October 8, 2008.