ABA Section on Dispute Resolution's Arbitration Committee E-Newsletter

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Co-Chairs: Dana Welch & Louis F. Burke **Editor: Adam R. Martin**

Supreme Court Hears Cases on Class Action Waivers Under the NLRA.

Ed. Note: The Arbitration Committee is producing the June issue of the ABA Section on Dispute Resolution's Just Resolutions e-newsletter.

We have decided to focus on the circuit split over the NLRB's position that class action waivers are unenforceable under the National Labor Relations Act. Karl Bayer's article, below, provides an introduction and a preview of the Committee's upcoming issue of Just Resolutions. Look for the full issue from the ABA in June 2017.

By: Karl Bayer

On January 13th, the United States Supreme Court granted certiorari in *NLRB v. Murphy Oil USA.*, 808 F.3d 1013 (5th Cir. 2015), *Epic Systems Corp. v. Lewis*, 823 F. 3d 1147 (7th Cir. 2016); and *Ernst & Young, et al. v. Morris*, 834 F. 3d 975 (9th Cir. 2016). The three cases previously decided by the nation's Fifth, Seventh, and Ninth Circuit Courts of Appeal are split on the issue of whether class and collective action waivers included in an employer's arbitration agreement are lawful under Section 8(a)(1) of the National Labor Relations Act ("NLRA").

The *Murphy Oil* case is not the first time the NLRB and the Fifth Circuit have been at odds over the issue. In 2013, the Fifth Circuit overturned the NLRB's decision in *D.R. Horton, Inc. v. NLRB*, 737 F. 3d 344 (5th Cir. 2013), and held that class arbitration waivers are enforceable under the Federal Arbitration Act ("FAA"). The NLRB did not accept the appellate court's judgment, however, and struck down a similar dispute resolution plan in *Murphy Oil* the following year. After the Fifth Circuit once again overturned the NLRB in *Murphy Oil*, the court reaffirmed its position in *Citigroup Technology, Inc. v. NLRB*, No. 15-60856 (5th Cir., Dec. 8, 2016.)

Last May, a unanimous Seventh Circuit panel came to the opposite conclusion in *Lewis v. Epic Systems Corp.* and ruled that a mandatory class waiver included in an employer's arbitration agreement violated the NLRA. According to the

Member Spotlight: Stephanie Cohen

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This issue in the Arbitration Committee Member Spotlight, we are proud to hear from Stephanie Cohen, a full-time arbitrator of international and domestic commercial disputes, based in New York City.
http://www.cohenarbitration.com/

1. How did you get into the dispute resolution field?

After graduating law school in Canada and qualifying for the Ontario bar, I applied to a handful of British and American firms with international arbitration practices in Paris, where I had studied as an exchange student during law school. Though I had no previous exposure to international arbitration, I learned about the field while exploring what type of litigation work I might be able to pursue overseas. Ultimately, because my future husband and I were trying to coordinate living in the same city, I joined White & Case's international arbitration and litigation practice in New York and was admitted to the New York bar. Within two months at White & Case, I was passing my first post-it notes at an evidentiary hearing and was completely hooked!

Stephanie Cohen, Cont.

2. What roles do you currently play in the dispute resolution field—e.g., domestic arbitrator, international arbitrator, mediator, lawyer representing clients in these processes, other?

I have been practicing exclusively as an arbitrator for the past five years, primarily serving in the role of tribunal chair or sole arbitrator. While international commercial disputes are my bread and butter, I also arbitrate domestic cases.

3. How did you begin your career as an arbitrator?

When I was still an associate at White & Case, I was appointed by the International Chamber of Commerce (the ICC) to act as the sole arbitrator in a $90,000 dispute over a contract for helicopter parts. About four or five years earlier, a fellow Canadian had encouraged me to become involved with ICC Canada (which is tasked with proposing Canadian nationals to the ICC when the institution must make an appointment), and that first appointment came upon the nomination of ICC Canada. Being appointed at that stage of my career got me thinking about untapped opportunities for an experienced—but younger—international arbitration practitioner. Later, after a decade at White & Case, I determined to start my own international arbitration practice. I assumed that I would work primarily as counsel and that more arbitrator appointments would come with time. But as luck would have it, about two weeks after I left the firm, I was appointed as the sole arbitrator in another ICC arbitration. It was then that I decided to take a leap of faith and to focus exclusively on building a practice as an arbitrator.

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court, the NLRA provision at issue was not in conflict with the federal policy favoring arbitration under the FAA. A few months after the Seventh Circuit's decision in *Epic Systems*, the Ninth Circuit Court of Appeals issued a similar holding in *Morris v. Ernst & Young*.

Due to a widening split among the circuit courts, it was only a matter of time before the Supreme Court weighed in on the issue. In addition to the now consolidated cases that will be heard by the nation's high court, an Eighth Circuit panel sided with the Fifth Circuit last June and ruled that an employer's collective action waiver included in a mandatory agreement to arbitrate did not violate the NLRA in *Cellular Sales of Missouri, LLC v. NLRB*, 824 F. 3d 772 (8th Cir. 2016). In 2013, the Second Circuit also sided with the Fifth Circuit in *Sutherland v. Ernst & Young*, 726 F. 3d 290 (2nd Cir. 2013). Similarly, the Eleventh Circuit cited *D.R. Horton, Inc.* when it ruled that the Fair Labor Standards Act does not prohibit an employer from including a collective action waiver in an arbitration agreement in *Walthour v. Chipio Windshield Repair, LLC*, 745 F. 3d 1326 (11th Cir. 2014).

On January 26th, the NLRB Office of General Counsel issued a memorandum directing the agency's regional offices to informally settle any pending cases involving employers who maintain arbitration agreements that bar workers from engaging in class or collective action in response to the Supreme Court's decision to hear *Murphy Oil*. It also appears that the NLRB has unofficially suspended the processing of *Murphy Oil*-type cases at the Board level pending the high court's decision. Although oral argument has not yet been scheduled in *Murphy Oil*, it is clear the Supreme Court's holding will have a far-reaching impact on employers across the United States.

***Karl Bayer** is an experienced mediator, arbitrator, court master, and technical advisor in Austin, Texas. http://www.karlbayer.com/*

Arbitration Institute - SAVE THE DATE!!!!

The Tenth Annual ABA Arbitration Training Institute will be held on June 15 and 16, 2017 in Chicago at the ABA Headquarters. This program will feature leading arbitrators and advocates in plenary sessions on all aspects of the arbitral process. It is the *essential* annual update for all arbitrators and advocates. Small, facilitated breakout sessions will follow each of the plenaries to allow participants to exchange ideas and learn from each other. Concurrent sessions on securities, employment, construction and health care (new this year) arbitration will allow participants to delve more deeply into each of these substantive areas.

The Arbitration Training Institute is sponsored by the American Bar Association Sections of Dispute Resolution, Litigation, Labor and Employment Law, and the ABA Forum on Construction Law, as well as the American Arbitration Association, JAMS and the College of Commercial Arbitrators. ACE and CLE credit will be offered. **Register here:** http://ambar.org/arb2017.

BINDING MEDIATION – AN ARBITRATION ALTERNATIVE – Part II

By: Peter G. Merrill

In my prior article published in the December 2016 issue of the Arbitration Committee E-Newsletter,[1] I explained that Binding Mediation is a valid and recognized alternative dispute resolution (ADR) process that offers the parties involved in a dispute an inexpensive, expeditious and simple ADR process that will provide them with a final and binding resolution to their dispute.

As we all know, parties are free to specify any dispute resolution process that they wish to include in a contract as long as it is not contrary to law. If they wish to agree to settle all disputes by flipping a coin, as long as both parties understand what they are agreeing to and write it into their contract, that is their specified method of dispute resolution. Basically, "courts enforce contracts as they are written."

Prior to selecting Binding Mediation, the parties should have a full understanding of the advantages,–disadvantages, and enforcement differences of utilizing Binding Mediation as opposed to utilizing Binding Arbitration to settle disputes. It is difficult to specify if something is an advantage or a disadvantage as some people may view the same issue differently in Binding Mediation. As Binding Mediation is a more unstructured process without specific rules to follow, some people would find this advantageous while others would prefer a more structured ADR process such as Binding Arbitration with its specific rules and procedures. As my firm, Construction Dispute Resolution Services, LLC (CDRS) has handled several Binding Mediations over the years; I can only present you with my opinions and observations related to the Binding Mediation Process as compared to Binding Arbitration.

Binding Mediation is a Simplified ADR Process

Many arbitrations are conducted according to the Federal Arbitration Act (FAA) and follow its rules and procedures along with the possible use of state arbitration acts, uniform arbitration acts, rules of civil procedures, international arbitration treaties, etc. An arbitrator may use a specified set of arbitration rules and procedures that is provided by an arbitration provider such as CDRS, AAA, JAMS, etc. In utilizing Binding Mediation, there are generally very few specific Binding Mediation rules and procedures or none at all. There is generally no formal discovery, depositions, subpoenas, etc. that you would see in arbitration. There should be no need for pre-arbitration conference calls where the arbitrator is required to oversee the establishment and development of a discovery schedule or to handle other discovery disputes. The mediator may use rules and procedures of an ADR provider but generally the mediator is on their own to establish the Binding Mediation Process that they deem appropriate for each Binding Mediation case. Certainly the parties can establish some rules and procedures with the mediator prior to commencing the Binding Mediation process, however, in the interest of keeping the process to be simple and cost-effective, the rules to follow are usually kept to a minimum.

[1] http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/dec_vol2ed1.authcheckdam.pdf

Stephanie Cohen, Cont.

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4. What knowledge, experience and/or skills are essential for a successful arbitrator?

A deep command of arbitration law and procedure is vital to meeting parties' expectations. It lends the arbitrator confidence to adapt the process to the specific needs of the parties (without sacrificing enforceability or succumbing to due process paranoia), allows the arbitrator to anticipate potential impasses, and facilitates prompt and decisive action when thorny issues do arise. Diligence and diplomacy are required in equal measure.

5. Do you specialize in a particular subject matter or field? If so, how did you become involved in that field.

I specialize in international commercial arbitration, but not in any particular subject matter or industry. I have significant arbitration experience with large, complex commercial disputes, including cases arising from the construction and oil and gas industries, but have been appointed in a wide range of disputes, ranging, for example, from matters involving intellectual property to maritime disputes.

6. In your opinion, what is the most important issue in arbitration today?

While efficiency challenges continue to demand our attention and innovation, in many ways, lack of diversity, particularly in the selection of arbitrators, is a deeper systemic crack. I am fortunate to have experienced first-hand how influential (and successful) the arbitral institutions can be in promoting diversity and creating opportunities for new entrants to the arbitrator pool to showcase their experience and build their reputations. But we cannot rely exclusively on the institutions and I am hopeful that recent calls for improved ethnic, gender, and generational diversity among arbitrators, including the Equal Representation in Arbitration Pledge, will inspire all of us to make greater efforts to promote the visibility and appointment of talented and diverse colleagues.

7. Is there anything else you would like to tell the readers about yourself?

I have served as an arbitrator under the ICC, ICDR, UNCITRAL, AAA Commercial, and Society of Maritime Arbitrators' rules, and am among the first thirty emergency arbitrators appointed by the ICC. I am a member of the ICDR/AAA International Panel of Arbitrators.

Binding Mediation is Less Costly

In addition to the cost of the Binding Mediation process being less with respect to the fees and costs of the mediator, the legal costs of the parties should be greatly reduced as the preparation by attorneys should be reduced as compared with the costs of preparing for and participating in an arbitration proceeding. In Binding Mediation, there are generally very few, if any, pre-mediation submissions or exhibits sent to the mediator to review prior to the Binding Mediation session.

Binding Mediation is Faster

Without a formal discovery process, Binding Mediation sessions can be promptly scheduled with the agreement of the parties. We had one dispute that developed on a Friday afternoon, and, with the cooperation and agreement of the parties, the Binding Mediation session was held on the following Monday morning. In Binding Mediation, the mediator renders his or her decision at the conclusion of the Binding Mediation session and writes up the Mediation Settlement Agreement for the parties' signatures. Arbitration awards usually take longer as the arbitrator is allowed up to 30 days from the conclusion of the arbitration process to render the award.

Binding Mediation and Arbitration Enforcement

Should a party to an arbitration not follow or comply with the terms of an arbitration award, the opposing party can request an Enforcement Order from the court. A Mediation Agreement that is the result of the Binding Mediation process is a contract and is enforceable though a breach of contract action through the courts.

Other Considerations

The mediator usually does not have the same disclosure requirements as an arbitrator. Keep in mind that in utilizing Binding Mediation, you most likely will lose the ability to subpoena. Ex-Parte discussions with the parties is not allowed in the arbitration process; however, it is allowed in Binding Mediation as the mediator deems it to be appropriate. Only those who are trained mediators and arbitrators should conduct Binding Mediations. If you are serving as the mediator rendering a final and binding decision, you lose "Arbitral Immunity" as is generally afforded to arbitrators.

Summary

Binding Mediation certainly has advantages over the arbitration process; however, it should only be specified in a contract when the parties are fully aware of the advantages and disadvantages of selecting Binding Mediation over Arbitration to settle a dispute. Parties can specify the use of Binding Mediation for lesser value disputes and Binding Arbitration for disputes above that specified value. If litigation or arbitration is specified in a contract, after a dispute develops, the parties can mutually agree to switch their dispute resolution process to Binding Mediation especially if the parties wish to utilize a less costly, more expeditious and simpler ADR process to settle their dispute. Parties specify Arbitration to avoid the more costly and lengthy litigation process. Likewise, parties can specify Binding Mediation to avoid the more costly and lengthy arbitration process.

Peter G. Merrill *is the President and CEO of Construction Dispute Resolution Services, LLC. who is widely recognized as the largest exclusive provider of construction ADR in the USA as they have Construction ADR Specialists located in all 50 states, Washington DC and in several foreign countries. Mr. Merrill serves on the Steering Committee of the New Mexico State Bar Association Dispute Resolution Committee and chairs the Arbitration Subcommittee. He also serves on the Executive Board of the National Association of Home Builders. CDRS website: http://www.constructiondisputes-cdrs.com/*

Next Meeting

Next Arbitration Committee Meeting: In person! 7 am, Thursday, April 20 at the DR Section Program in San Francisco. Check the DR Section Spring Program for location.

Join the Arbitration Committee for cocktails and dinner: Osha Thai, San Francisco. 6:00, April 20. $123 per person. RSVP to Dana Welch at dana@welchadr.com

E-Newsletter

The Committee is continually seeking short articles, case notes, news and recent developments, information about proposed or pending relevant legislation, and interviews, as well as information about relevant upcoming events. Articles should be **100-300 words**, concise, and on a timely topic. We also welcome links to longer articles or publications that members may have written.

Please include a suggested title for your article at the top of the page and try to keep citations to a minimum. Feel free to include either a link to your professional profile or a short professional bio (70-80 words). Please send submissions as an e-mail attachment in **Word format** by **July 14, 2016** to Adam Martin at arm3f@virginia.edu