The British Columbia Court of Appeals has ruled that an arbitration clause cannot justify a stay of class action proceedings under the 1995 Class Proceedings Act. The ruling is one of the first Canadian decisions dealing with the effectiveness of arbitration clauses in a class action context. (Story on page 54.)

A NAFTA Chapter 11 Tribunal dismissed a U.S. investor's derivative claim against Mexico, inter alia, because the investor did not establish that the Mexican government action constituted a complete and unwarranted repudiation of the applicable regulatory provisions. In so doing, the Tribunal followed the doctrine established in the landmark Waste Management opinion. (Story on page 55.)

The SEC has extended the duration of the NASD regulation allowing arbitrating parties to waive compliance with California's disclosure requirements for arbitrators. (Story on page 43.)

The National Arbitration Forum (NAF) provides summaries of recent cases on arbitration. The case summaries supply guidance on the evolution of current arbitration law and depict interesting recent developments on basic issues. They constitute a comprehensive and informative inventory of recent court rulings on arbitration. (The case summaries begin on page 44.)

Lawyers at the offices of Sherman & Sterling LLP evaluate a recent change in the U.S. model for BITs. The new U.S. BIT framework modifies the scope of protection provided to international investors and alters the manner in which investment disputes will be resolved. (The commentary begins on page 59.)

James Coben, WAMR editor for domestic mediation and Director of Hamline's Dispute Resolution Institute, provides an extensive survey of significant 2004 judicial decisions on mediation. The survey includes cases on a number of basic topics: the enforcement of mediated settlements, confidentiality, compelling mediation, the award of attorney's fees, mediator ethics and malpractice, and the relationship between mediation and arbitration. (The survey on mediation law begins on page 62.)
18, 19, and 29.4 of the New Model BIT allow a Party to the BIT, and the parties to the arbitration, to withhold materials on the grounds, inter alia, that they contain "confidential information the disclosure of which would impede law enforcement, or otherwise be contrary to the public interests, or ... would prejudice the legitimate commercial interests of particular enterprises, public or private" or to withhold information that involve the "essential security interests" of a Party to the BIT. Article 29.4 creates a mechanism pursuant to which a party to the arbitration may challenge the "confidential" designation of certain information before the arbitral tribunal.

MEDIATION LAW

Mediation Law

Mediation Case Law: 2004 in Review

by James R. Coben,
Editor Domestic Mediation, WAMR
Professor of Law and Director,
Hamline University School of Law,
Dispute Resolution Institute

1. "The Enforcement of Mediated Settlements"

State Supreme Courts

Caballero v. Wikse, 92 P.3d 1076 (Idaho 2004) (affirming enforcement of mediated settlement of wrongful discharge claim negotiated by plaintiff’s attorney, having concluded that attorney had express authority to compromise wholly and finally all claims, where evidence showed that: (1) plaintiff’s attorney and mediator made representations regarding plaintiff’s attorney’s authority; (2) plaintiff left the mediation before it ended knowing that ground rules required someone with settlement authority to be present; and 3) plaintiff specifically authorized attorney to make a counterproposal in response to defendant’s most recent offer).

Guthrie v. Guthrie, 594 S.E.2d 356 (Ga. 2004) (affirming that trial court acted erroneously in granting summary judgment denying enforcement of mediated divorce settlement agreement under rules utilized to resolve whether to incorporate a settlement agreement into a final divorce judgment, where husband died during pendency of divorce proceedings but the parties’ agreement contained provisions that were to take effect immediately or shortly after the date the agreement was executed indicating it was not contingent upon issuance of a divorce judgment and in such cases enforcement is evaluated under ordinary rules of contract construction).

NOTE: The decision implicitly affirmed the additional conclusion of the Court of Appeals that summary judgment in favor of enforcement also was inappropriate where allegations of capacity to contract—specifically that a party “had suffered anxiety attacks, had consumed at least four doses of Valium, and was bereft of energy and mental concentration”—raised jury questions about whether there was a meeting of the minds sufficient to create a contract). See Guthrie v. Guthrie, 577 S.E.2d 832 (Ga. App. 2003).

Kryskowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859 (Colo. 2004) (where a member and spokesperson of a neighborhood association refused to sign individually a mediated settlement agreement allegedly ending association opposition to a developer’s construction project, the individual is not bound by the agreement and first amendment right to dissociate from the association makes him immune from suit for tortious interference with contract).


Quote from the Court: “The [appellate] Rule does not provide for remand to the district court where there is a dispute regarding whether a settlement agreement was reached....We disagree with Nielsen that our decision leaves her without a remedy. Her remedy was our resolution of [the first appeal]. If a settlement agreement had been reached and the required stipulation of dismissal filed with this court, Nielsen could then have litigated any dispute that arose regarding the execution of the agreement.”

Sierra Club v. Wayne Weber LLC, ___ N.W.2d ___, No. 03-0654, 2004 WL 2755559 (Iowa, Dec. 3, 2004) (applying error of law standard to affirm trial court decision interpreting and enforcing by way of injunctive relief an oral agreement dictated into the record following mediation of nuisance claim, where parties could not agree on text of proposed consent decree to implement their mediated settlement).

Walker v. Gribble, ___ N.W.2d ___, No. 03-1380, 2004 WL 2534307 (Iowa, Nov. 10, 2004) (affirming trial court enforcement of mediated settlement between former law partners regarding future division of contingency fee recoveries in overtime pay cases, finding no violation of public policy based on professional responsibility rules regarding need for client consent and award of fees in proportion to services performed, where ethical rules provide exception to consent and proportionality requirements when the fee agreements are negotiated as part of a partnership separation agreement; and further concluding that lawyer could not
now renegotiate fees simply because she ended up working more than she anticipated when she finalized the fee agreement in mediation.

**Quote from the Court:** “Uncertainty is a powerful incentive for parties to accept a compromise settlement agreement....Much was uncertain when the parties signed the settlement agreement; such is the very nature of cases taken on a contingency-fee basis. The parties in this case assessed the situation and made their choices regarding the time and effort Walker would have to expend in the future to bring the overtime-pay cases to a successful resolution. They also gave up other claims against each other and each received some benefits. We will not interfere with their agreement—fully performed with the exception of the payment of the fees—simply because one party got the better of the bargain.”

**Federal Circuit Courts**

**George v. McClure,** 87 Fed. Appx. 914, No. 03-1315, 2004 WL 345802 (4th Cir. Feb. 25, 2004) (affirming dismissal of federal claims brought in connection with partnership break-up despite allegation that a related state court action was dismissed only by virtue of fraudulent misrepresentations made during mediation because the state case dismissal based on a mediated settlement had res judicata effect which could be collaterally attacked only on the ground of extrinsic, not intrinsic, fraud).

**Quote from the Court:** “Plaintiff contends that Defendant’s misrepresentations constituted fraud upon the court due to the fact that the misrepresentations were made during the court-ordered mediation. While the mediation was court ordered, the settlement was not. Plaintiff was not required to settle and was entitled to proceed with his suit. Plaintiff, however, elected to settle and with that election voluntarily accepted a certain level of risk that the facts as represented by Defendant may not be accurate. Such risk is inherent in every decision to settle prior to full discovery and does not constitute fraud upon the court.”

**Federal District Court**

**Nwachukwu v. St. Louis University,** No. 03-2845, 2004 WL 2472276 (8th Cir. Nov. 4, 2004) (affirming district court enforcement of final settlement prepared by parties’ counsel, concluding that terms of final settlement were not materially different from terms of handwritten agreement previously signed by plaintiff at the conclusion of mediation, where both agreements provided the same benefits and both provided that plaintiff would resign and execute a release of all claims, even though the final agreement contained “more expansive or additional clauses related to confidentiality, release of liability, disclaimer of fault, nondisparagement, and reinstatement or reemployment”).

**State Courts of Appeal**

**Bunirock v. Terra,** 810 N.E.2d 991 (Ill. App. Ct. 2004) (affirming trial court approval of a mediated settlement reached after four months of negotiation between current and former arts foundation directors, and rejecting contention by directors who voted in the minority against the settlement that court approval was erroneous absent the trial court’s independent inquiry into the fairness, adequacy, and reasonableness of the agreement). appeal denied ___ N.E.2d ___ (Ill. Oct. 06, 2004) (Table No. 98766).

**Quote from the Court:** “An appellate court will not review a consent order because an order entered by consent is no more than a court’s recording of an agreement reached by the parties in settlement of a dispute and is not a judicial determination of their rights.”

**City of Gary v. Conat,** 810 N.E.2d 1112 (Ind. Ct. App. 2004) (enforcing mediated settlement of claims brought by injured motorist against the city despite assertion that agreement was binding only with mayor’s signature, where the city’s attorney at no point before, during, or even after the mediation conference disclaimed authority to represent the city; but refusing to enforce the settlement against individual city employee because he was immune from suit when acting within the scope of employment).

**Quote from the Court:** “Requiring the mayor to attend every mediation conference and to sign the settlement agreement would impede the efficiency and finality of mediation proceedings.”

**In re O.R. v. J.R.,** No. E034376, 2004 WL 585583 (Cal. Ct. App. Mar. 25, 2004) (affirming a visitation order based on the parties’ mediated agreement despite fact that father called the mediator and had the agreement reached in mediation changed without the mother’s knowledge or consent, determining that the mother’s claims of extrinsic fraud and mistake lacked merit because she would have discovered the change if she had chosen to review carefully the agreement before it was signed and subsequently approved by the court).

**Lee v. Wake County,** 598 S.E.2d 427 (N.C. Ct. App. 2004) (reversing Industrial Commission denial of motion to enforce a mediated workers’ compensation settlement, determining that the Commission erred in concluding the County’s agent had no authority to negotiate a binding settlement over $100,000 where the only evidence of such limitation was a County Ordinance adopted after the parties executed the mediated settlement).

**McGraw v. Marchioli,** 812 N.E.2d 1154 (Ind. Ct. App. 2004) (where condominium owners and developer entered into a mediated settlement agreement that contained an ex-
licit condition precedent requiring the developer to procure an additional easement from a third-party neighboring landowner and the developer could have obtained the easement but was unwilling to pay for it and then used two easements created by the agreement, the developer waived its right to challenge enforcement of the settlement for inability to satisfy the condition precedent).

**Texas A & M Univ.- Kingsville v. Lawson**, 127 S.W.3d 866 (Tex. App. 2004) (rejecting the University’s argument that a mediated settlement of an employee’s wrongful termination action was unenforceable due to the failure to obtain approval of the governor, comptroller, and attorney general of Texas when nothing in the appropriation statutes required such approval and the final mediated agreement superseded and extinguished a prior settlement which contained such a requirement; also rejecting the assertion that complying with the agreement and representing the employee as an assistant professor, rather than instructor, would be lying and against public policy when the University failed to show how this was injurious to the public good and it could have avoided the public policy concerns simply by retroactively promoting the employee).

**Walters v. Walters**, 673 N.W.2d 585 (Neb. Ct. App. 2004) (vacating the visitation provisions of a divorce decree as an unlawful delegation of judicial authority, where the decree provided “overnight visitation and other specific visitation details shall be as mediated by [wife’s] counselor and the children’s counselor,” noting that it is the responsibility of the court to determine questions of custody and visitation which cannot be controlled by an agreement or stipulation, and because it is a judicial function that cannot be delegated to a third party).

2. “Confidentiality”

**State Supreme Courts**

**Alabama Dept. of Transp. v. Land Energy Ltd.,** ___So.2d___, No. 1020393, 2004 WL 226094 ( Ala. Feb. 6, 2004) (affirming judgment in favor of mineral rights owner in an inverse condemnation action entered into after unsuccessful court-ordered mediation; determining that tables prepared by state agency and used in the mediation to illustrate the location of coal within the mineral owner’s estate were properly admitted where it appeared the tables were not prepared solely for use in mediation and the tables were provided by the state agency at the conclusion of mediation in response to pre-existing discovery requests).

**In re Estate of Stukey**, 100 P.3d 114 (Mont. 2004) (affirming trial court admissibility of post-mediation letter written by estate’s attorney to attorney for decedent’s daughter seeking to clarify scope of a probate settlement reached in mediation, concluding that the letter, written one week subsequent to the mediation, was not part of the “mediation process” to which statutory confidentiality applied), rehearing denied Nov. 4, 2004.

**Rojas v. Los Angeles County Superior Ct.,** 93 P.3d 260 (Cal. 2004) (affirming denial of tenants’ motions to compel production of material produced by owners and builders in connection with mediation held in prior litigation, concluding that state mediation privilege not only protects substance of the negotiations and communications in furtherance of mediation, but also “raw evidence” exchanged at the mediation, when the evidence was compiled specifically for use in the mediation process).

**Quote for the Court:** “[I]n making its recommendation regarding mediation confidentiality, the [California Law Revision] Commission specifically considered the discoverability of both expert reports and photographs and drafted its proposed confidentiality provisions to preclude discovery of such reports and photographs if they were ‘prepared for the purpose of, in the course of, or pursuant to, a mediation.’ [citation omitted]. These materials also show that the Commission chose language expressly designed to give a mediation participant who takes a photograph for purpose of the mediation ‘control over whether it is used’ in subsequent litigation, even where ‘another photo’ cannot be taken because, for example, ‘a building has been razed or an injury has healed.’”

**Federal District Court**

**Cleveland Constr. Inc., v. Whitehouse Hotel Ltd. Partn.,** No. Civ.A. 01-2666, 2004 WL 385052 (E.D. La., Feb 25, 2004) (denying a nonparty’s motion to quash a subpoena and ordering the production of a settlement agreement reached in mediation with the defendant concerning the same construction project, concluding that a settlement agreement is not shielded from discovery merely because it contains a confidentiality provision if it is otherwise relevant, especially when a protective order can be entered to protect against disclosure of the agreement outside of the litigation).

**State Courts of Appeal**

**Abrams v. Dromy,** No. B167815, 2004 WL 1559666 (Cal. Ct. App. July 12, 2004) (affirming evidentiary rulings in a jury trial on claims of breach of contract and fraud arising out of a mediation agreement, determining that: (1) it was proper to allow references to the identity of the mediator when a key issue in dispute was whether the mediator was serving as a neutral third party or acting as an agent for one of the parties; and (2) evidence of post-mediation demands, including plaintiff’s threatening phone call and defendant’s response not denying liability but claiming to have paid the disputed amount and not wanting to pay twice, is admissible because there was no statutorily protected offer of compromise).

**Quote from the Court:** “No doubt, confidentiality is of utmost importance during mediation in order to foster open sessions whereby the parties feel confident that anything they reveal privately to the mediator cannot be used against
them later during judicial proceedings. However, there is a threat to confidentiality where the parties acknowledge an agreement but dispute whether the mediator acted in a neutral manner or as the agent for either of the parties."

**Alford v. Bryant**, 137 S.W. 3d 916 (Tex. App. 2004) (reversing trial court judgment of legal malpractice against attorney for failure to disclose the risks and benefits of mediated settlement, where the mediator’s outcome determinative testimony was erroneously excluded from trial).

Quote from the Court: “One cannot invoke the jurisdiction of the courts in search of affirmative relief, and yet, on the basis of privilege, deny a party the benefit of evidence that would materially weaken or defeat the claims against her [citation omitted]. Such offensive, rather than defensive, use of a privilege lies outside the intended scope of the privilege.”

**Bridges v. Metromedia Steakhouse Co., L.P.**, 807 N.E.2d 162 (Ind. Ct. App. 2004) (affirming admission at negligence trial of testimony by defendant’s insurance adjuster concerning observations she made during unsuccessful court-ordered mediation of the extent of scarring and redness of plaintiff’s hands, because the adjuster’s personal observations could not be construed as protected nonverbal conduct intended as an assertion).

**Fair v. Bakhtiari**, 19 Cal.Rptr.3d 591 (Cal. Ct. App. 2004) (reversing trial court refusal to enforce mediated settlement and compel arbitration pursuant to its terms because inclusion of the arbitration provision in the settlement was “consistent solely with an intention on the part of the parties for the settlement terms document to be enforceable or binding,” thereby making the settlement admissible based on a statutory exception to inadmissibility where an “agreement provides that it is enforceable or binding or words to that effect”) (emphasis added), review filed Nov. 15, 2004.

**In re Marriage of Malcolm**, No. A104832, 2004 WL 2669309 (Cal. Ct. App. Nov. 23, 2004) (affirming denial of husband’s motion to seek disclosure of mediation communications sought to substantiate allegations of his attorney’s malpractice in the mediation, where state confidentiality statute provides no relevant exception for such disclosure).

Quote from the Court: “The public policy, as expressed by the California Legislature in the mediation statutes, is to ensure absolute confidentiality absent a specific statutory exception. (Foxgate, supra, 26 Cal.4th at p. 17.) The mediation sections are clear and unambiguous and this Court may not create an exception. (Ibid.). . . . In closing, we also note that Husband has made no showing that the lower court’s ruling has prejudiced his substantive rights to pursue a malpractice action.... The property settlement agreement is not confidential as it expressly provides that it is enforceable, and it is part of the public record.... Husband is free to prosecute his malpractice action... using the property settlement agreement and other nonconfidential evidence.”

**In re the Paternity of Emily C.B.**, 677 N.W.2d 732 (Table), 2004 WL 240227 (Wis. Ct. App. Feb. 11, 2004) (affirming transfer of daughter’s primary placement to her mother, determining that a tape of a mediation session from a civil litigation between the father and an older daughter was properly admitted into evidence pursuant to a statute-authorized manifest injustice exception to the general principle of mediation confidentiality and admission was necessary because the mental stability of both parties was the principle issue in dispute).

3. “Duty to Mediate/Court Power to Compel”

**State Supreme Courts**

**Durlach v. Durlach**, 596 S.E.2d 908 (S.C. 2004) (affirming a contempt order against the husband for mismanaging funds of a business transferred to the wife in a divorce decree, noting it was within the court’s discretion to conduct the hearing that resulted in the contempt order without first requiring the parties to mediate when the obligation to mediate disputes prior to hearing was contained in a consent order which applied to an appeal period which had expired one year prior to the contempt hearing).

**Kentucky Farm Bureau Mutual Ins. Co. v. Wright**, 136 S.W.3d 455 (Ky. 2004) (affirming power of trial court to compel mediation of negligence case, including power to order appearance of parties and their adjuster at the mediation with full settlement authority; but granting writ of prohibition and precluding court from ordering that parties would face fines and penalties if the case settled after conclusion of mediation).

Quote from the Court: “Under the trial court’s order, parties who settled after the conclusion of mediation, despite a belief in their right to do so, would be required to face mandatory fines and penalties, a route most reasonable parties would avoid. We conclude that the post-mediation settlement provision imposing additional costs, fines and penalties exceeds trial court discretion and results in irreparable harm without an adequate remedy by appeal.”

**Marcher v. Bonzell**, 323 Mont. 364, No. 03-560, 2004 WL 2384527 (Mont. Oct. 26, 2004) (refusing to dismiss appeal of default judgment in landlord-tenant dispute for alleged failure to participate meaningfully in mandatory appellate mediation, where failure of appellants to appear personally was attributable to miscommunication with counsel, counsel who did appear at the mediation had authority to negotiate on appellants’ behalf, and last best offer in mediation was held open for appellant to consider, and its rejection showed mediation was unsuccessful “because the parties were too far apart in their positions, not because of any failure to meaningfully participate in the process”).
State Court of Appeal

*Kiser v. Kiser*, 595 S.E.2d 816 (Table), 2004 WL 1098730 (N.C. Ct. App. May 18, 2004) (affirming trial court custody award despite failure to schedule statutorily required mediation, where the party challenging the award for failure to mediate had: (1) herself filed a motion for exemption from mediation based on plaintiff’s alleged domestic violence; (2) asserted during trial that she was ready to proceed and did not request mediation; and (3) and did not take issue with the case not being sent to mediation until after the court issued an adverse custody order).

*Quote from the Court:* “[W]hile we recognize it is the better practice of a trial court to affirmatively approve or deny a waiver of mediation for child custody/visitation issues or find that there is good cause to waive mediation on its own, defendant was not prejudiced by the lack of mediation in this case.”

4. “Mediation Sanctions/Attorney’s Fees”

State Supreme Court


Federal District Court


*Quote from the Court:* “Applying the cloak of mediation to the facts of this matter appear inequitable to [defendant] who negotiated settlement of this action and apply confidentiality thereto for the express purpose of avoiding having such settlement amount established as a benchmark in future similar employment cases. Such result highlights the need for exceptions to mediation confidentiality.”

State Courts of Appeal

*Elder v. Islam*, 869 So.2d 600 (Fla. Ct. App. 2004) (affirming the award of a pro rata share of mediation costs to an employee in a successful claim for unpaid wages because the costs were incurred pursuant to a court order to engage in mediation).

*Quote from the Court:* “In closing we note that, since the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions do not currently address mediation costs in any way, we would encourage the drafters thereof to address this issue to avoid these disputes in the future.”

*QC Constr. and Engr., Inc. v. Luan Fu*, No. B160831, 2004 WL 418381 (Cal. Ct. App. Mar. 8, 2004) (affirming the award of $180,000 in attorney’s fees to the prevailing party seller of property despite seller’s failure to demand mediation pursuant to a “no mediation, no attorney fees” clause in the purchase agreement, where the seller did not initiate the underlying action, filed cross-complaints only after cross-complaints were filed against him, and the buyers challenging the award of fees had effectively waived their right to mediation by cross-complaining against the seller).

*Quote from the Court:* “To put it in the vernacular, Fu was dragged into the lawsuit ‘kicking and screaming’ and not as an initiator or willing participant.”

*Schuneman v. Bellrose*, No. A100588, 2004 WL 542237 (Cal. Ct. App. Mar. 19, 2004) (denying wife’s motion for attorney’s fees based on her husband’s alleged failure to participate in good faith in appellate mediation, finding the request “wholly inappropriate” when based on information regarding failed settlement efforts both during and after mediation and on privileged communications between the parties and the mediator, all in violation of mediation confidentiality rules).

5. “Ethics/Malpractice”

State Supreme Court

*In re Hoffman*, 883 So.2d. 425 (La. 2004) (finding professional misconduct warranting three-month suspension from practice of law [conditionally deferred if no further violations], where attorney representing three siblings in a will contest accepted defendants’ mediated settlement offer without informing all siblings about the settlement terms, and then compounded his misconduct by distributing the settlement proceeds in accordance with the wishes of one of his clients and over the expressed objection of another), rehearing denied, Oct. 29, 2004.

State Courts of Appeal

*Aubin v. Barton*, 98 P.3d 126 (Wash. Ct. App. 2004) (reversing trial court judgment of legal malpractice against attorney representing grantee of stock options in a mediation of a marital dissolution action, finding that failure to allow expert witness to testify in lawyer’s defense about whether the stock options were granted primarily for past services rendered or for future services was sufficiently prejudicial to warrant new trial).
6. "Mediation/Arbitration"

State Supreme Court

Kline v. Berg Drywall, Inc., 685 N.W.2d 12 (Minn. 2004) (where a three-stage ADR process contained in a collective bargaining agreement excludes legal counsel from the stage one facilitation and limits legal counsel from communicating directly with the mediator in stage two, the resulting diminution of benefits impermissibly compromises employees’ entitlement to workers’ compensation and warrants grant of a new arbitration hearing to claimant denied benefits for work-related injury).

Quote from the Majority: "An injured worker is immediately disadvantaged, particularly when a trained insurance claims adjuster or an employer with legal training is allowed to participate in a facilitation that can lead to the termination of benefits."

Quote from the Dissent: "Parties may waive their right to counsel in virtually all legal settings, including those having more serious ramifications than a workers’ compensation claim. By virtue of the adoption of the rules of the Fund in the collective bargaining agreement, and the provision in the rules that counsel cannot be present at the facilitation, Kline has waived the right to have counsel present at that stage. . . because Kline’s waiver is part of a private agreement that created the ADR systems, there is no 'state action' and due process issues cannot arise."

Federal Circuit Courts

Brooks v. Cintas Corp., 91 Fed. Appx. 917, No. 03-20719, 2004 WL 57704 (5th Cir. Jan. 12, 2004) (affirming denial of employee’s motion to reconsider an adverse arbitration decision on his discrimination claim, concluding that the employer’s refusal to participate in EEOC mediation was not a waiver of the arbitration provision, but noting that the refusal to mediate might be a breach of the employment agreement that could have been presented to the arbitrator).

Patten Grading & Paving, Inc. v. Skanska USA Building, Inc., 380 F.3d 200 (4th Cir. 2004) (reversing trial court denial of defendant’s motion to compel arbitration and finding no waiver of right to arbitrate where defendant in construction contract dispute voluntarily engaged in the litigation process for over eight months, the parties had conducted discovery, had participated in court-ordered mediation, and had a motion decided before the court).

Quote from the Majority: "Given the comparatively restrained pre-trial activity engaged in by [defendant], the strong policy favoring arbitration, and the heavy burden borne by the non-movant, we cannot conclude that [plaintiff] has made the requisite showing of prejudice."

Quote from the Dissent: "In this case, the court finds that Patten has sufficiently demonstrated that Skanska has waived its right to compel arbitration. This case was filed over eight months ago, and the parties have substantially utilized the court in this case. As stated above, the parties have engaged in discovery, participated in mediation, and had a motion decided before the court. Regardless whether these factors alone would be sufficient for the court to find [defendant] waived its right to compel arbitration, the court finds that because [plaintiff] has thus far expended Five Thousand Eight Hundred Sixty-Two Dollars and Fifty-Two Cents ($5,862.52) to prosecute its case, compelling arbitration would result in actual prejudice to [plaintiff]. This prejudice is highlighted by the fact that [plaintiff] represents to the court it would be required to pay a substantial initial fee to engage the American Arbitration Association. Although the court is aware of the federal policy favoring arbitration, in this case the court finds that denial of [defendant’s] motion to compel arbitration is appropriate based on the facts. . . ."

7. "Miscellaneous"

State Supreme Courts


Quote from the Dissent: "[I]t is this Court’s job to ascertain the legislative intent, whenever possible, from the plain language of the statute; it is not our job to insert into those statutes what the Legislature has chosen to omit. . . . In the present case, the Legislature has chosen not to toll the statute of limitations for an action based on fraud or mistake during the period required for the mandatory mediation prior to filing a petition in the [workers’ compensation court]. . . The required mediation is a relatively short process readily capable of being completed soon after the carrier
denies a demand to re-open and long before the running of the 2-year statute of limitations.”


Federal Circuit Court

Cloutier v. Costco Wholesale Corp., ___F.3d ___, No. 04-1475, 2004 WL 2731496 (1st Cir. Dec. 1, 2004) (declining to address on a limited summary judgment record whether a post-termination offer extended during the EEOC mediation process can ever be a reasonable accommodation, and instead affirming dismissal of employee’s religious discrimination claims on alternate grounds that the only accommodation acceptable to the employee would pose an undue hardship on the employer).

Federal District Courts

Ferrero v. Henderson, 341 F. Supp. 2d 873 (S.D. Ohio 2004) (concluding that a postal service supervisor engaged in a prohibited pattern of retaliatory conduct through his mishandling of a worker’s complaint, including: (1) “holding merely a single brief meaningless mediation session” at which the supervisor made no serious attempt to resolve the employee’s complaints “but instead acted angrily and leered at [the employee]”; and (2) failing to reschedule the mediation “even though the issue that had prevented it from going forward was [the supervisor’s] desire to have a Union representative present—an issue that should have been easily resolved and should not have prevented other mediation efforts from occurring.”)


State Court of Appeal

Nunez v. Resource Warehousing and Consolidation, 775 N.Y.S.2d 310 (N.Y. App. Div. 2004) (reversing trial court denial of motion to restore a personal injury action to the trial calendar, where both parties appeared for mediation in the year after dismissal of the action for failure to prosecute, and the appearance demonstrated plaintiff’s intent not to abandon the litigation).

---

CALENDAR

February 13 – 19, 2005 (Steamboat Springs, CO) — Center for International Legal Studies, International Commercial Arbitration, Mediation, and Dispute Resolution. Venue: Sheraton Resort and Conference Center, Steamboat Springs, Colorado. This conference will focus on contemporary issues such as the availability of arbitral interim measures, and the arbitration of disputes under bilateral and multilateral trade and investment treaties. Contact information: tel: + 43 662 835 399; e-mail: cils@cis.org; website: www.cils.org.

February 28, 2005 (New York City) — USCIB Young Arbitrators’ Forum. Venue: New York Offices of White & Case LLP, 1155 Avenue of the Americas (at West 44th Street), 6:00 p.m. The Young Arbitrators’ Forum is designed to provide young law professionals with the opportunity to hear distinguished practitioners describe their experiences and learn strategies for pursuing careers in international dispute resolution. Contact John Fellas of Hughes Hubbard & Reed LLP at fellas@hugheshubbard.com for more information about speakers and registration. If you would like to reserve a space, contact Judith Levine or Lucy Martinez at White & Case at jlevine@whitecase.com or lucymartinez@whitecase.com.

March 17 – 18, 2005 (Irvine, CA) — Mediating the Litigated Case. Venue: Pepperdine University – Orange County Center, 18111 Von Karman Avenue. A sophisticated six-day program for experienced litigators, in-house counsel, and other practitioners. This program will offer a unique opportunity to learn about the mediation process in a format geared toward civil litigation. For more information, contact: Lori Rushford; e-mail: lori.rushford@pepperdine.edu.

March 30, 2005 (Washington, D.C.) — ITA-ASIL Spring Conference: Arbitration and the Involvement of Non-Parties: Transparency, Intervention, and Appeal. Venue: Loews L’Enfant Plaza Hotel, Washington, D.C. The Spring Conference is presented by ITA's Academic Council and co-sponsored by the American Society of International Law (ASIL). It will take place immediately preceding ASIL's 99th Annual Meeting in Washington, D.C. The conference will explore the variety of demands being made, how various institutions have assessed the public interest and partially opened their processes, how the 2002 Trade Promotion Act and the agreements which have followed it bear on these demands, and how lawyers can approach the practical issues raised by the involvement of nonparties. For more information, contact: Institute for Transnational Arbitration.

June 5-7, 2005 (Charlottesville, VA) — ICC Dispute Resolution Conference. Venue: Boar’s Head Inn, Charlottesville, VA. For more information about the agenda for the conference, contact Nancy M. Thevenin at nthevenin@uscib.org.

June 9-11, 2005 (Malibu, CA) — 18th Annual Summer Professional Skills Program in Dispute Resolution. Straus Institute for Dispute Resolution. Venue: Odell McConnell Law Center, Pepperdine University, Malibu, CA. This professional skills program will allow participants three days of intensive skills instruction and practice in one focused area of expertise. Each program will include lectures, small group discussions, and practice exercises. For further information, contact: Lori Rushford at (310) 506-6342 or (e-mail) Lori.Rushford@pepperdine.edu; website at: http://law.pepperdine.edu/straus/conferences/summer05.

June 16, 2005 (Dallas, Texas) — 16th Annual ITA International Commercial Arbitration Workshop. Venue: Westin Galleria Hotel, Dallas, Texas. For more information, please contact: Institute for Transnational Arbitration, 5201 Democracy Drive, Plano, TX 75024-3561, tel: (972) 244-3400, fax: (972) 244-3401, website: http://www.cailaw.org/ita.