

# STATE OF THE LAW IN ADR<sup>1</sup>

*By: Mary A. Bedikian, JD*  
*Professor of Law and Director, ADR Program*  
*Michigan State University College of Law*

*With Introduction and Commentary*  
*By: Alan M. Kanter, Esq.*  
*2005-2006 Chairperson, ADR Section*  
*State Bar of Michigan*

## I. INTRODUCTION

The State of the Law in ADR Survey period<sup>2</sup> generated several important cases, in particular cases dealing with the enforcement of arbitration agreements. The Michigan Supreme Court issued one important opinion addressing the Domestic Relations Arbitration Act.<sup>3</sup> The Michigan Court of Appeals published seven opinions.<sup>4</sup> The United States Supreme Court issued one important opinion addressing and resolving important questions relative to arbitrability.<sup>5</sup> The Sixth Circuit Court of Appeals published two opinions, one involving arbitrability and the second relating to adhesion contracts and unconscionability. Several of these decisions represent important clarifications in ADR jurisprudence. The majority of decisions, however, come as no surprise. The appellate decisions are well-analyzed and clear in their import, offering useful guidelines for ADR practitioners and neutrals. From this tapestry of cases, there is a single resounding theme – both the Michigan Court of Appeals and the Sixth Circuit Court of Appeals continue to articulate a liberal policy favoring mediation and arbitration as effective alternatives to the traditional adjudicatory process.

## II. ARBITRABILITY

---

<sup>1</sup> An expanded version of this outline will be published by Wayne State University Law Review in September 2006, in a special series titled, “Survey of Michigan Law.”

<sup>2</sup> The *Survey* period covers cases decided from June 1, 2004 through May, 2005. One case, *Alticor, Inc. v National Union Fire Insurance Co. of Pittsburgh*, 411 F3d 669 (6<sup>th</sup> Cir 2005), falls outside the *Survey* period, but is discussed in this outline. Two other major decisions are included in this outline – a United States Supreme Court decision respecting arbitrability, and a Michigan Supreme Court decision construing the Domestic Relations Arbitration Act.

<sup>3</sup> *Miller v Miller*, 474 Mich 27, 707 NW2d 341 (2005).

<sup>4</sup> The Michigan Court of Appeals also issued over 70 unpublished decisions involving either mediation or arbitration. Of these, 23 are noteworthy. Selected unpublished cases appear in the APPENDIX, attached to this outline.

<sup>5</sup> *Buckeye Check Cashing, Inc v Cardegna*, 126 S Ct 1204, 2006.

Earlier this year, the United States Supreme Court issued an important decision involving arbitrability. In *Buckeye Check Cashing, Inc v Cardegna (Buckeye)*, Supreme Court finally issued a clear and concise statement relative to who determines the question of the validity of a contract (whether under Federal or State law) where the contract contains an arbitration clause. In 1967, the United States Supreme Court established a doctrine which permitted courts to address and decide challenges to the formation of various contracts, clauses independent of other provisions in the agreement such as an arbitration clause itself. Specifically, the Supreme Court held that since the plaintiff in the case under review only objected to the arbitration clause, and not the contract in which the clause was contained, as a whole, there was no requirement that the arbitration clause issues be referred to the arbitrator or arbitration panel for determination.<sup>6</sup> However, it was not until 1995 that the Supreme Court confronted and answered the question about who decides arbitrability questions in the absence of a clear and unmistakable finding that the parties agreed to submit the question of arbitrability to arbitration. In *First Options*, the United States Supreme Court explained that the law treats silence or ambiguity relative to the question of the appropriate party to decide arbitrability differently from the way it treats silence or ambiguity about a question of whether a particular dispute is within the scope of a valid arbitration agreement. As to the latter question, *First Options* held that where a valid arbitration agreement exists, any doubts about what will be included in it will be resolved in favor of arbitration. With respect to the question focusing on who should decide questions of arbitrability, however, the court reversed the pre-existing presumption and held that unless the parties, by the terms of their arbitration agreement, specifically invest authority in the arbitrator to determine issues of arbitrability, it is presumed that the parties intended that the courts decide the issue.<sup>7</sup>

The issue of deciding whether a dispute is arbitrable was previously addressed by the United States Supreme Court, which held that if the arbitration agreement comes within the scope of the Federal Arbitration Act (“FAA”) the court must apply Federal substantive law to determine the question of arbitrability.<sup>8</sup> However, the remaining major roadblock to a clear understanding of when the Federal Arbitration Act would apply to the arbitrability determination was not resolved until the Supreme Court’s ruling in *Allied Bruce Terminex Companies, Inc. and Terminex International Company v. Dobson*.<sup>9</sup> In *Allied Bruce Terminex*, the opinion clarified that the Federal Arbitration Act applies to all written arbitration provisions contained in a contract involving any transaction in which interstate commerce was involved. Preemption of State law arbitration by the Federal Arbitration Act had first appeared in United States Supreme Court decisions beginning in the mid-1960s. However, in *Allied Bruce Terminex*, the U.S. Supreme Court enforced an arbitration provision in a residential termite treatment

---

<sup>6</sup> *Prima Paint Corp Flood and Conklin Mfg*, 388 US 395 (1967).

<sup>7</sup> *First Options of Chicago, Inc v Kaplan*, 514 US 938 (1995).

<sup>8</sup> *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985).

<sup>9</sup> 115 S Ct 834 (1995).

contract between a pest control company and an Alabama homeowner, effectively overruling an Alabama Statute which would have voided the arbitration clause. In order to reach that result, the Supreme Court found the necessary interstate commerce connection by virtue of the fact that many chemicals used by the pest control company in the treatment of termites had been shipped from an out-of-state location to the local company in Alabama. Thus, the Supreme Court held that the FAA would preempt the field in every case that could be reached by the commerce clause and as a result, to the extent that the FAA was applicable, it would preempt State laws to the extent that they were not consistent with the Act.

However, it was not until *Buckeye* that the Supreme Court identified three distinct types of challenges to arbitration agreements in Federal Arbitration Act cases. The first type challenged specifically the validity of the portion of the contract regarding agreement to arbitrate; the second type challenged the contract as a whole, either on a ground that directly affects the entire agreement (*i.e.*, the agreement was procured as a result of fraud or misrepresentation, etc.) or on the ground that the legality of one of the contract provisions rendered the entire contract invalid; and the third type of challenge being whether any agreement between the alleged obligor and obligee was ever created and concluded (focusing on issues such as whether the alleged obligor ever executed the contract containing the arbitration clause, whether the person signing the contract with the arbitration clause lacked authority to bind the alleged principal and/or whether the person executing the contract lacked the mental capacity to assent as a matter of law).

As a result of the Supreme Court's opinion in the *Buckeye* case, it is now clear that the question of who decides whether or not the dispute will be arbitrated depends upon the type of challenge made to arbitration agreements in cases to which the Federal Arbitration Act applies. Specifically, it was made clear that challenges which go to the validity of the portion of the agreement requiring arbitration only are for the court to decide (*i.e.*, whether the arbitration clause portion of the contract was procured as a result of fraud, misrepresentation, or some other inappropriate conduct) and by implication, the question of whether an agreement within the scope of the Federal Arbitration Act was ever concluded between the parties (such as an issue dealing with whether or not the alleged obligor ever signed the contract or had authority to do so) are to be determined by the court. However, any and all challenges to the contract as a whole, whether on grounds that affect the entire agreement or on grounds that the legality of a portion of the agreement render the entire contract invalid, are to be determined by the arbitrator (or arbitration panel) to which the case has been assigned.<sup>10</sup>

---

<sup>10</sup> While the court did not address specifically the third issue as to whether the person signing had authority or lacked the mental capacity to enter into a valid and enforceable contract, a number of federal courts have addressed those types of issues and by implication, therefore, it would appear that questions falling within the scope of that category are to be determined by the court and not the arbitrator.

During this survey period, the Michigan courts also addressed arbitrability issues in a variety of contexts. A short summary follows.

⇒ *Fromm v Meemic Ins Co*, 264 Mich App 302, 690 NW2d 528 (2004) – The insureds, husband and wife, alleged that an automobile accident caused the wife to have a miscarriage. The parties' insurance policy contained an arbitration clause. When the insurance company disputed the miscarriage as a compensable injury under the terms of the policy, the insureds invoked arbitration. The insurance company failed to participate in the selection of the arbitrator, instead asserting that the policy's terms precluded arbitration with respect to disagreements concerning coverage.

The insureds then filed a complaint in which they claimed that by failing to participate in the arbitration process, the insurance company was in breach of the policy. Defendant insurer responded by filing a counterclaim for declaratory relief, alleging that the insured wife did not suffer bodily injury that resulted in death, serious impairment of body function, or permanent serious disfigurement, requisite thresholds to trigger the obligation to pay. The trial court granted the insurer's motion for summary disposition, agreeing with the insurer that even if the miscarriage was caused by the accident, the insured wife had not sustained a serious impairment of an important body function, since the miscarriage did not affect her general ability to lead a normal life.

In a split opinion, the Michigan Court of Appeals reversed, holding that an arbitrator must decide whether the plaintiff has suffered a compensable injury. The appellate court began its analysis by observing that under Michigan law, questions pertaining to the actual existence of an arbitration agreement are to be resolved by courts, not arbitrators. *Huntington Woods v Ajax Paving Industries, Inc*, 196 Mich App 71, 492 NW2d 463 (1991). The important rule in arbitration is to deduce the intentions of the parties, specifically whether parties intended for certain disputes to be arbitrated. In Michigan, intent for arbitration purposes is measured by a three-part test. "To ascertain the arbitrability of an issue, a court must consider whether there is an arbitration provision in the parties' contract, whether the dispute issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *Id.* Conflicts should be resolved in favor of arbitration.

Here, the court of appeals soundly rejected the insurer's argument, *i.e.*, that Fromm's injury was not sufficiently serious to fall outside the coverage limitation. According to the appellate court, the term "coverage" referred to the formation and existence of the contract and not to whether the issue of the miscarriage was a compensable injury. To decide otherwise would render the arbitration clause a virtual nullity, since the insurer could easily avoid arbitration

merely by raising a coverage question. Furthermore, this construction “simply reinforces the court’s role as gatekeeper to the arbitration process and leaves the actual resolution of particular disputes with the arbitrator – just as the parties intended. This interpretation leaves the arbitration provision intact and avoids the improper bifurcation of judicial responsibilities between courts and arbitrators.” *Fromm*, 264 Mich App at 308, 690 NW2d 532 at 532.

The court of appeals stressed two additional points. First, bifurcating disputes defeats the underlying purpose of arbitration, which is to resolve claims quickly and efficiently. Invoking litigation at the outset splits the decision-making function unnecessarily between several fora. Moreover, parties cannot through contract assign new roles for public institutions. In other words, parties cannot delegate a new function to the courts that is not provided by court rule or statute. This would undermine another feature of arbitration – finality of resolution.

⇒ *Alticor, Inc v National Union Fire Ins Co of Pittsburgh*, 411 F3d 669 (6<sup>th</sup> Cir 2005) – National Union Fire Insurance Company (“National Union”) issued a general liability insurance policy to Alticor. The policy limited National Union’s liability of ‘each occurrence.’ The parties also had an ancillary agreement, referred to as a Premium Payment Agreement, which defined Alticor’s obligations and responsibilities in making payments to National Union. This agreement contained an arbitration clause providing that any dispute ‘arising out of or relating to’ the Premium Payment Agreement would be subject to binding arbitration. There was no similar arbitration provision in the actual insurance policy. After a dispute arose regarding the meaning of the term ‘occurrence,’ National Union moved to compel arbitration. The district court denied National Union’s motion to compel, and an appeal followed.

The issue before the Sixth Circuit was whether the meaning of the term ‘occurrence’ in the insurance policy actually ‘arises out of or relates to’ the Premium Payment Agreement. Although the appellate court recognized the FAA’s liberal federal policy favoring arbitration agreements, the court of appeals also emphasized that the FAA requires courts to enforce privately negotiated arbitration agreements as any other contract, in accordance with its terms. Here, the insurance policy defined the substantive rights and duties of the parties to the agreement. In contrast, the ancillary agreement discussed the mechanics and the formalities of the premium payment. National Union effectively narrowed the types of disputes to be submitted to arbitration by drafting the ancillary agreement’s arbitration provision to encompass only those disputes arising from the ancillary agreement. Since the Premium Payment Agreement only referred to payment procedures but not any substantive issues, the controversy was not arbitrable.

- **Practice Pointer:** The result in this case illustrates the limits of the federal policy favoring arbitration, and confirms that a court is not likely to peer into the mindset of contracting parties to locate the requisite “*intent*.” Intent is construed from the drafted documents, unless otherwise ambiguous. Practitioners should exercise great care in crafting multiple agreements to ensure that ADR provisions, if inserted, mean what the parties intend.

### III. ENFORCEABILITY OF AGREEMENTS TO ARBITRATE

Michigan courts continue to carefully evaluate agreements to arbitrate that are compulsory in nature.

- ⇒ *Walker v Ryan’s Family Steak Houses, Inc*, 400 F3d 30 (6<sup>th</sup> Cir. 2005): Former employees filed a complaint against Ryan’s Family Steak Houses, Inc, (“Ryan’s”) asserting violations of the Fair Labor Standards Act, specifically that the employer failed to pay them the minimum wage and/or one and one half their regular rate for hours worked in excess of 40. In response, Ryan’s argued that the employees were seeking relief in the wrong forum. Since the employees had executed arbitration agreements during their job application process, or shortly after being hired, they were bound to arbitrate all employment-related claims, including those of a statutory nature.

The district court denied Ryan’s motion, concluding that there was inadequate consideration for the arbitration agreement, the agreements included “*hallmarks*” of unconscionability, and finally, the affected employees did not “*knowingly and voluntarily*” waive their constitutional to a jury trial. The Sixth Circuit Court of Appeals affirmed.

The appellate court began its analysis by rejecting Ryan’s argument that state laws other than Tennessee, which is where the agreements were executed and performed, applied, since other plaintiffs from other states opted-in to the litigation after suit commenced. Relying on Supreme Court precedent, *Phillips Petroleum Co v Shutts*, 472 US 797, 105 S Ct 2965, 86 L Ed 2d 628 (1985), the Sixth Circuit stated that Ryan’s failed to show that Tennessee law conflicted with other jurisdictions connected to the suit, a prerequisite for finding constitutional prejudice.

The Sixth Circuit reserved its more prescient analysis for the balance of plaintiffs’ arguments, specifically lack of consideration, knowing and voluntary waiver, mutuality and unconscionable adhesion contracts. First, with respect to the consideration required to bind plaintiffs’ promise to arbitrate, the appellate court, invoking *Floss*, concluded that since the rules and procedures of arbitration

under which the plaintiffs operated could be altered after execution with or without notice, including the rule that allows a plaintiff to opt for the earlier promulgated rules that existed at the time of arbitration agreement execution, plaintiffs were not obligated to arbitrate their claims. The escape clause negatives any consideration that plaintiffs might otherwise receive from EDSI. Furthermore, the promise to consider an application, but not necessarily employ the applicant, standing alone, is generally not enough to construe the arbitration agreement as a binding contract.

With respect to the knowing and voluntary waiver to file suit in federal court, the Sixth Circuit relied on its earlier decision of *Morrison v Circuit City Stores, Inc*, 317 F3d 646 (6<sup>th</sup> Cir 2003), in which the appellate court articulated a test for such a waiver. According to *Morrison*, to determine whether a plaintiff has knowingly and voluntarily waived his or her right to pursue employment claims in federal court, the following factors are considered:

- (1) plaintiff's experience, background, and education;
- (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer;
- (3) the clarity of the waiver;
- (4) consideration of the waiver; and,
- (5) the totality of the circumstances.

Here, the circumstances strongly suggested that plaintiffs did not meet the above requirements. Many of the plaintiffs had not completed high school, thus they lacked the sophistication to comprehend the nature of that which they signed. Also, the hiring process was fairly schizophrenic. Some plaintiffs were hired on the spot after a brief interview; others were subjected to a more elaborate process. For those involved in a shorter interview process, the agreements were hurriedly presented, often with little information, or misleading information.

Next, on the subject of mutual assent, the Sixth Circuit held that the arbitration agreement did not result from a meeting of the minds. Although the appellate court acknowledged that this required an objective analysis, plaintiffs were not necessarily provided with a copy of the rules of arbitration when they executed their agreements. Moreover, the information provided to employees, and prospective employees, regarding arbitration was misleading. These factors conspired to move the agreements outside the scope of plaintiffs' "reasonable expectations."

Moreover, even though the agreements stated that plaintiffs had the right to consult with an attorney, in reality, they had no such right. Plaintiffs were

required to sign during the interview process, or forego consideration of their application. Given the socio-economic backgrounds of most plaintiffs, this was the functional equivalent of no right at all.

The final point addressed by the Sixth Circuit pertained to unconscionability, and what is commonly referred to as “*effective vindication of rights*.” Translated, this means that a party who is required to arbitrate must be able to access arbitration, and must be able to secure the same type of relief that would otherwise be available if the claim were litigated. Here, the Sixth Circuit focused on the nature of the arbitration panel. Under the process established by EDSI, three separate pools of arbitrators, along with biographical information with respect to each candidate, were provided to the parties upon notification that a claim had been filed. These pools were created by EDSI, with assistance from an external administrative agency. The first of the pools consisted of supervisors and managers from another EDSI signatory company, the second consisted of employees from another signatory, and the third was comprised of attorneys, retired judges, and other “competent legal profession persons not associated with either party.” Relying on *Floss*, the appellate court held that this selection process was flawed.

- **Practice Pointer:** Courts generally *will* uphold arbitration agreements, even those that are mandated by the employer as a condition of hire, or a condition of retention, as long as certain requirements are met. These requirements include notice, access to the forum, and the ability to participate in the selection of the arbitrator (not controlled by the employer), and the ability to participate fully in the arbitration (*e.g.*, presenting witnesses, cross-examining witnesses, securing discovery). See [www.adr.org](http://www.adr.org) – American Arbitration Association’s National Rules for the Resolution of Employment Disputes, which includes a summary of due process protocols employers should review before crafting arbitration clauses.

⇒ *Shadeh v Circuit City Stores*, 334 F Supp 2d 938 (WD Ky 2004) – Shadeh began employment with Circuit City in 1996. At time of hire, he signed an employment agreement that contained an arbitration clause, specifying that the rules of the National Arbitration and Mediation Service would apply in the event of a dispute. The arbitration clause contained an opt-out provision, which Shadeh did not sign. Subsequently, Shadeh filed suit in Kentucky district court, alleging race discrimination, disparate treatment, wrongful discharge, and retaliation. He argued that the Dispute Resolution Agreement (DRA) was not fair, and thus not binding.

The federal district court upheld the arbitration agreement, soundly rejecting the employee's argument that the DRA was unconscionable due to the unequal bargaining positions of the parties. Under the DRA, which provided resolution of all types of disputes including those that sound in Title VII, an employee could access the arbitral forum by paying a \$75 filing fee. Each party participated in the selection of the arbitrator, and each party was entitled to discovery. The arbitrator was required to follow the substantive law, and was given the discretion to award any remedy deemed appropriate, including any remedies available under law.

The DRA required Circuit City to pay the arbitrator's fees and costs of arbitration, unless the arbitrator assessed such fees against the employee. In this instance, the employee's financial responsibility was capped at either \$500, or three percent of the annual compensation, whichever was greater. These terms, taken as a whole, rendered the DRA conscionable, thus enforceable.

#### IV. ARBITRAL AWARDS

As a general proposition in arbitration, awards rendered by arbitrators are final and binding, subject to limited judicial review under both Michigan and federal law. *See Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 393 NW2d 811 (1986); *see also Armco Employees Independent Federation, Inc v Armco Steel Co*, 65 F3d 492 (6<sup>th</sup> Cir 1995). As the following summary illustrates, courts continue to give arbitrators free rein to fashion a resolution, unless in doing so an arbitrator exceeds the four corners of the contract, and engages in a manifest disregard of the law.

##### A. Enforcement

⇒ *Service Employees International Union, Local 466M v City of Saginaw*, 263 Mich App 656, 689 NW2d 521 (2004) – Plaintiff was a member of the union, and worked for the City of Saginaw (“employer”) as a tax auditor. When a new position of tax specialist was created, plaintiff applied for consideration. The position ultimately was awarded to an external candidate. Through the grievance machinery, plaintiff grieved, asserting that the employer did not properly consider her seniority. An arbitration hearing was conducted, and the arbitrator's award directed that the employer award the position to the plaintiff, and to pay her for the interim period the difference in pay between that position and her current position commencing with the time that the other applicant began employment.

The employer initially complied with the arbitrator's award and then reorganized plaintiff's department. In this reorganization, plaintiff's duties were altered, essentially placing plaintiff into the same role she had prior to the arbitrator's award. The employer re-hired the external candidate to assume the

position of tax manager. Duties attendant to this position were the original duties of the tax specialist. Plaintiff initiated suit in circuit court, seeking specific performance and a declaratory judgment, alleging that, in violation of the arbitral award “defendant failed and refused to install [her] in the position of Income Tax Specialist.” The trial court granted the employer’s motion for summary disposition, concluding that it did not have jurisdiction to expand or amend the award.

On appeal, the court of appeals agreed with the trial court. Relying on *Armco Employees Independent Federation, Inc v Armco Steel Co*, the appellate court stated that there is one fact-finder in arbitration, and that is the arbitrator. Thus, it falls within the province of the arbitrator to determine if the defendant complied with both the letter and the spirit of the original award. Essentially, the court of appeals indicated that the allegations in the complaint constituted the basis of a new grievance, which by virtue of the parties’ collective bargaining agreement, could be processed as a separate and new arbitration.

### ***B. Vacatur***

⇒ *Police Officers Association of Michigan v Ottawa County Sheriff*, 264 Mich App 133, 694 NW2d 757 (2004) – In this case, the Michigan Court of Appeals decided the question of whether an arbitrator’s decision to refuse to consider the union’s last best offer on the right to arbitrate pending grievances, occurring after contract expiration, constituted grounds for award vacatur.

The collective bargaining agreement between the Police Officers Association of Michigan (POAM) and the Ottawa County Sheriff (employer) expired on December 31, 1999. On June 5, 2000, POAM filed a petition on behalf of the sheriff’s deputies, seeking arbitration of fourteen disputed issues.

The arbitration panel conducted a pre-hearing conference and identified these issues to be economic. The panel also identified “retroactivity” as an issue. Subsequent to the pre-hearing, the panel accepted the employers’ offer of settlement, but noted that other issues remained open. The arbitration panel conducted a hearing on the unresolved issues. At this hearing, POAM raised the issue of the employer’s unwillingness to arbitrate grievances that occurred after the expiration of the collective bargaining agreement. In its majority opinion and award, released in February 2002, the panel declined to consider POAM’s last best offer concerning the right to retroactively arbitrate grievances because, “the Act and the rules prohibit a consideration of the arbitration-related issues at a time near or at the scheduled arbitration hearing.” *Id.* at 135, 689 NW2d at 759. On appeal, the trial court granted the employer’s motion for summary disposition.

On reconsideration, the Michigan Court of Appeals reversed and remanded, explaining that the plain language of MICH. COMP. LAWS ANN. § 423.238 provides that the arbitration panel shall identify the economic issues in dispute at or before the conclusion of the hearing. Nothing in this language requires the issues to be determined before the hearing. Indeed, the use of the disjunctive “or” indicates that the Legislature intended for arbitration panels to determine the economic issues either at the hearing, or before the conclusion of the hearing.

## V. CASE EVALUATION UNDER MCR 2.403

In Michigan, a court may order parties to submit their dispute to case evaluation under Michigan Court Rule 2.403. Case evaluation in this instance is not voluntary. Any civil dispute involving money damages or division of property qualifies for the case evaluation process. MCR 2.403(A) (1).

In 1994, the Michigan Court of Appeals held that the language of MCR 2.403 (at least as then in effect)<sup>11</sup> precluded the awarding of mediation sanctions when a matter was resolved by arbitration. *St George Greek Orthodox Church v Laupmanis Assoc*, 204 Mich App 278, 514 NW2d 516 (1994). The underlying rationale was that the language in the court rule “proceeds to trial” did not apply to arbitration since arbitration does not constitute a trial.

The following case presents an interesting judicial construction of case evaluation.

⇒ *Cusumano v Velger*, 264 Mich App 234, 690 NW2d 309 (2004) – In this case, the parties rejected a case evaluation recommendation, subsequent to which they agreed to arbitrate. Both the court order and the arbitration agreement provided that mediation sanctions would apply. The arbitrators held for the defendants. On application for sanctions, the trial court denied the request, stating that under MCR 3.403(O) (7), an arbitration award must be unanimous.

The court of appeals reversed the trial court’s determination, stating that by requiring the arbitration decision to be unanimous, the trial court inappropriately treated the arbitration decision as a case evaluation award rather than a resolution of the case. Under MCR 2.403, a “verdict” does not need to be unanimous for sanctions to apply. “An award by two of the arbitrators is a fully valid decision with as much force as a unanimous award for all purposes, including the application of mediation sanctions.” *Id.* The fact that the arbitrators did not discuss mediation sanctions in their award was

---

<sup>11</sup> In the current version of MCR 2.403(O) (1), the phrase, “proceeds to trial” has been replaced with the phrase, “proceeds to verdict.”

inconsequential, since the arbitrators' mandate was simply to resolve the case on the merits, which they did. Under MCR 3.602(M), arbitrator's compensation is a taxable cost in an action, and may be recovered as case evaluation sanctions. This rule applies even though the court order provided as an initial matter that each party would pay their own arbitrator, and each would share equally in the payment of the neutral arbitrator. Nothing in the statute precludes a prevailing party from seeking reimbursement of such payment after the arbitrators render their final decision.

## VI. DOMESTIC RELATIONS ARBITRATION

The Michigan Supreme Court issued an opinion in the case of *Miller v. Miller* (see footnote 2). While the case ostensibly is to be interpreted as applying only to arbitrations coming within the scope of Domestic Relations Arbitration Act, its conclusions run somewhat afoul of a number of Michigan cases falling within the scope of the Uniform Arbitration Act (of which the Domestic Relations Arbitration Act is a part). In *Miller*, the parties in the Circuit Court stipulated to have the case arbitrated pursuant to the Domestic Relations Arbitration Act. The arbitration ended up being a facilitative mediation proceeding, and not a traditional arbitration proceeding in both form and substance.

The Court of Appeals reversed the trial court's approval of the arbitration relying on that portion of the Domestic Relations Arbitration Act requiring formality, holding that in the absence of formality, plaintiff's rights were prejudiced. While the Supreme Court pointed out that the Domestic Relations Arbitration Act nowhere defines the words "hear" or "hearing," nor does it require specific procedures be followed, the Michigan Supreme Court declined to consider earlier Michigan case law requiring that an arbitration proceeding must meet minimum standards of due process as articulated by the United States Supreme Court in a series of cases assuring non-waiver of substantive rights and remedies and that the arbitration procedures are fair so that available rights and remedies may be vindicated.<sup>12</sup> Notwithstanding the existence of the earlier cases (all of which were concerned with the protection of statutory rights) it would appear that for the time being a domestic relations arbitration need not follow any specifically articulated procedural requirements in the absence of an agreement between the parties requiring the same.

The Michigan Court of Appeals also addressed the Domestic Relations Arbitration Act in two separate decisions involving custody issues.

---

<sup>12</sup> See *Renny v Port Huron Hosp.*, 427 Mich 415, 398 NW2d 327 (1986); *Cole v. Burns Int'l Security Services*, 105 F3d 1465 (DC Cir 1997); see also *Rembert v Ryan's Family Steak Houses, Inc.*, 235 Mich App 118, 596 NW2d 208 (1999).

⇒ *MacIntyre v MacIntyre*, 264 Mich App 690, 692 NW2d 411 (2005) – In *MacIntyre*, the parties agreed to binding arbitration<sup>13</sup> under the Domestic Relations Arbitration Act to resolve various issues, including child custody. After conducting a “best interests’ analysis,” the arbitrator awarded sole physical custody to plaintiff husband. Defendant wife subsequently appealed, seeking vacatur of the portion of the award pertaining to custody, and seeking a *de novo* hearing pursuant to MICH. COMP. LAWS ANN. § 600.5080. The trial court reviewed the record, and entered judgment consistent with the arbitrator’s award. On further appeal, the defendant wife claimed that the trial court was required to conduct a *de novo* hearing, and that by reviewing the record of the prior proceeding, the trial court did not fulfill its statutory mandate.

In reviewing the trial court’s determination *de novo*, the Michigan Court of Appeals agreed. Citing to *Harvey v Harvey*, 470 Mich 186, 680 NW2d 835 (2004), the appellate court stated, “regardless of the type of alternative dispute resolution that parties use, the Child Custody Act requires the circuit court to determine independently what custodial placement is in the best interests of the children.” 264 Mich App at 696-97, 692 NW2d at 415. (Author’s emphasis). The Child Custody Act governs all custody proceedings, whether conducted under the auspices of a court or an arbitrator. Thus, when parties to a domestic relations dispute agree to proceed under the DRAA, “the court [must] satisfy itself concerning the best interests of the children.” *Id* at 696-97, 692 NW2d at 415.

To be sure, the court of appeals acknowledged the scarcity of the case law under the DRAA, enacted in 2001. Nonetheless, the appellate court made clear, consistent with *Harvey*, that it is the circuit court that has the ultimate power to determine the best interests of the child. Such matters, which involve “difficult and Solomon-like decisions,” require “a full and fair hearing by a judge.”<sup>14</sup>

⇒ *Bayati v Bayati*, 264 Mich App 595, 691 NW2d 812 (2004) – The parties in *Bayati* were married in Iran. Defendant ex-wife gave birth to twin boys. The parties subsequently separated, and plaintiff ex-husband filed for divorce. After the divorce, the trial court entered several temporary custody orders and later entered a consent order for binding arbitration. The award granted the parties joint legal custody of the children, but gave Defendant ex-wife sole physical

---

<sup>13</sup> This author posits that binding arbitration is an oxymoron. Arbitration by definition is binding. To avoid confusion, the author uses the terminology employed in the court’s opinion.

<sup>14</sup> Subsequent to this decision, Leave to Appeal was filed with the Michigan Supreme Court. In lieu of granting leave, the Michigan Supreme Court reversed in part, further clarifying the requirement of a formal hearing. MICH. COMP. LAWS ANN. § 600.5080(2) requires a “review” of the child custody decision. The parties’ agreements may not waive the availability of an evidentiary hearing if the circuit court determines that a hearing is essential to exercise its independent duty under the Child Custody Act. Thus, if, as here, the circuit court is able to determine independently what custodial placement is in the best interests of the children, an evidentiary hearing is not required. *MacIntyre v MacIntyre*, 472 Mich 882, 693 NW2d 823 (2005).

custody and permitted her to remove the children to California. Plaintiff ex-husband moved to vacate the award, which was denied by the trial court.

The primary issue before the court of appeals was whether the trial court erred in failing to independently evaluate the best interests of the children regarding the custody award. The appellate court responded in the affirmative. A trial court must make an independent assessment of the best interests of the child – this task cannot be delegated to a referee or an arbitrator.

*Bayati*, however, presented two additional issues of note. First, plaintiff husband argued that under the terms of the arbitration agreement, the arbitrator lacked the authority to decide a change in domicile for the children born of the marriage. Even though the consent order was specific as to arbitrable issues, it also included a catchall paragraph.<sup>15</sup> The Michigan Court of Appeals held that the consent order did not contain any restriction applicable to domicile. Indeed, the order clearly stated that the parties could raise any other issue. Since arbitration is generally recognized as a matter of contract, terms contained within an arbitration agreement must be enforced in the same way as terms in ordinary contracts.

Plaintiff husband's second issue was arbitral bias. Plaintiff husband claimed that demonstrated bias against Middle Eastern men and bias against him personally because he permitted the defendant wife to file a late motion to amend the arbitration award. This assertion was specifically directed at language in the arbitrator's award as follows:

“With regard to plaintiff, the arbitrator is convinced that he will take no positive action to create or maintain a good relationship between the minor children and defendant. His testimony reflects antagonism, an aura of male dominance as is historic in European or Middle Eastern cultures, and plaintiff's general *laissez-faire* [sic] attitude toward his obligations, in general, and to defendant in particular.”

Although the court of appeals questioned the wisdom of the characterizations used, the court concluded that the comment did not rise to the level of true bias. “While we must be cognizant of ethnic stereotyping, we cannot let our caution blind us to actual historic tradition.” 264 Mich App at 601, 691 NW2d at 816. In other words, the arbitrator recognized a feature of conduct endemic to various cultures that were undeniably true. Merely stating such truths do not rise to actual bias. For awards to be overturned on the basis of bias, the partiality or bias “*must be certain and direct, not remote, uncertain or speculative.*” *Id.* The

---

<sup>15</sup> Paragraph G stated, “Any other issues properly raised by the parties which would otherwise be within the jurisdiction of the circuit court”.

arbitrator's commentary in this case was simply too speculative or vague, and thus insufficient to justify vacatur under Michigan law.

## VII. CONCLUSION

This year's decisions as a whole have solidified or refined areas of ADR jurisprudence, and offered clarity in areas previously dominated by murky decision-making. First, the Sixth Circuit Court of Appeals issued a strong warning to employers who seek to craft mandatory arbitration agreements (*Walker*). To be enforceable, such agreements must be both procedurally and substantively conscionable. Practitioners here should not assume that a reviewing court will excise the offending provision(s). If glaringly void of due process, the agreements simply will not be enforced.

Second, Michigan courts continue to demonstrate their strong support of arbitration by refusing to disturb arbitral agreements entered into at arms length, without a showing of factors that would otherwise vitiate consent (*Shadeh*). Third, in terms of award enforcement, Michigan courts also continue to take the position that the arbitrator, not the court, is the exclusive fact-finder. Only in the most egregious of circumstances will an arbitral award be overturned (*City of Saginaw*).

Next, in the area of court-annexed mediation, the Michigan Court of Appeals offered strict guidelines in terms of sanctions, specifically, how sanctions are calculated, when they may be sought, and how to get around the special nuances of the case evaluation rule (*Cusumano*). And finally, the Michigan Court of Appeals sharpened its construction of the Child Custody Act – independent assessments are required, and such assessments remain within the purview of the circuit courts (*MacIntyre* and *Bayati*). All in all, this year's decisions provide practitioners with a useful toolbox to ably represent clients in ADR, and to further the primary goal of justice in ADR.

## APPENDIX

The following is a selected summary of unpublished cases covering the *Survey* period. Some cases include multiple holdings but the author has highlighted only those cases and holdings that primarily clarify existing law, or reinforce the law in areas of ADR jurisprudence where case law is scant.

- ✚ *Allstate Ins Co v Davis-Buyck*, unpublished opinion per curiam of the Court of Appeals, decided January 4, 2005 (Docket No 250490) 2005 WL 17847 (Mich App) (Trial court's decision to re-open an arbitration proceeding after an award was rendered reversed, where the re-opening occurred simply because a party discovered an unresolved issue. In Michigan, public policy favors the finality of arbitration awards, and once an arbitrator's award is rendered, it generally cannot be re-examined).
- ✚ *American Federation of State, County, and Municipal Employees Council 25, Local 2724 v Marquette County Road Comm'n*, unpublished opinion per curiam of the Court of Appeals, decided January 4, 2005 (Docket No 250490); 2004 WL 2951955. (Trial court's decision which vacated an arbitrator's award affirmed where the arbitrator found just cause for grievant's termination under the employer's drug and alcohol consumption policy, but nonetheless proceeded to modify the discipline imposed by management. Once an arbitrator determines that just cause exists, he has no authority to modify the discipline imposed. The arbitrator exceeded his authority). **Note:** Strong dissent (Borrello, J), challenging the majority's conclusion that the arbitrator found just cause to discipline the grievant. In labor arbitration, the arbitrator, and not the courts, interprets and applies the agreement. The decision of the majority was an attempt to review the merits of the underlying claim. This goes against the presumption that an award, once rendered, is within the scope of the arbitrator's authority.
- ✚ *Brandon Associates v Castle Management*, unpublished opinion per curiam of the Court of Appeals, decided November 18, 2004 (Docket No 247192); 2004 WL 2624758. (Trial court's decision granting defendants' summary disposition reversed where the plaintiff in litigation was not a party to an earlier arbitration, thus the twin doctrines of *res judicata* and *collateral estoppel* did not apply).
- ✚ *Capitol City Lodge 141 Fraternal Order of Police v Eaton County Board of Comm'rs*, unpublished opinion per curiam of the Court of Appeals, decided June 17, 2004 (Docket No 246570); 2004 WL 1366039. (Trial court's decision to enforce arbitral award affirmed where the arbitrator, in construing the parties' collective bargaining agreement, went outside the four corners of the contract, and considered past practices to address an ambiguity. "[R]eview of an arbitration award is *"narrowly circumscribed"* and limited to determining whether the

arbitration award exceed the arbitrator's contractual authority." The arbitrator acted within his prescribed contractual powers).

- ✚ *City of Detroit v Detroit Lieutenants' and Sergeants' Ass'n*, unpublished opinion per curiam of the Court of Appeals, decided February 17, 2005 (Docket No 250424); 2005 WL 387647. (Trial court's decision not to enforce arbitral award reversed and remanded where arbitrator considered evidence that was not presented at the arbitration hearing but which was authorized by the Master Agreement governing his authority. Moreover, the trial court erred in vacating the award on the basis of public policy. "Michigan has a limited public policy exception to the general rule of judicial deference to arbitrator's award." Citation omitted. "The public policy exception is construed narrowly and authorizes vacating an arbitrator's award where it "would violate some explicit public policy that is well-defined and dominant, . . . ascertained by reference to the laws and legal precedent and not from general considerations of supposed public interest." Thus, an officer who engages in prohibitive behavior during the course of his employment does not run afoul of the public policy exception unless the law prohibits his reinstatement).
- ✚ *Fritz v Rader*, unpublished opinion per curiam of the Court of Appeals, decided November 30, 2004 (Docket No 250201); 2004 WL 2726054. (Trial court's decision to enter judgment on a mediation award reversed where defendant's conditional acceptance of the mediation evaluation should have been treated as a rejection and where the mediation evaluation left unresolved a material factual issue between the parties).
- ✚ *Gesing v City of Warren*, unpublished opinion per curiam of the Court of Appeals, decided June 22, 2004 (Docket No 244501); 2004 WL 1392285. (Trial court's decision granting defendant summary disposition of plaintiff's Whistleblowers' Protection Act claim affirmed where plaintiff was not able to demonstrate that his termination was actually triggered by testimony he was to provide in an Act 312 proceeding. Plaintiff cited no authority that such a proceeding constituted a report to a public body under MICH. COMP. LAWS ANN. § 1.361(d)).
- ✚ *Ironwood Area Schools v Ironwood Educ Ass'n*, unpublished opinion per curiam of the Court of Appeals, decided December 16, 2004 (Docket No 249686); 2004 WL 2913587. (Trial court's decision granting plaintiffs' summary disposition reversed where such ruling exceeded the court's permissible scope of review. "It is well-settled that arbitration is a favored means of resolving labor disputes and that courts refrain from reviewing the merits of an arbitration award when considering its enforcement. To that extent, judicial review of an arbitrator's decision is very limited; a court may not review an arbitrator's factual findings or decision on the merits").

- ✚ *Lawrence M. Clarke, Inc v SMRT, LLC*, unpublished opinion per curiam of the Court of Appeals, decided May 3, 2005 (Docket No 250671); 2005 WL 1027068. (Trial court's decision refusing to award pre-judgment interest proper. Relying on *Holloway Constr Co v Oakland County Bd of Rd Comm'rs*, 450 Mich 608, 543 NW2d 923 (1996), the court of appeals stated that the decision whether to award pre-award interest as an element of damages is within the arbitrator's province. As to the issue of post-award interest, the trial court erred when it calculated such interest at the rate of five percent under MICH. COMP. LAWS ANN. § 438.7. In Michigan, post-award or post-judgment interest is governed by MICH. COMP. LAWS ANN. § 600.6013(6) and (8)).
  
- ✚ *Leonard v Art Van Furniture, Inc*, unpublished opinion per curiam of the Court of Appeals, decided June 8, 2004 (Docket No 243139); 2004 WL 1254330. (Trial court's decision denying defendant's motion to arbitrate and for summary disposition reversed where the employee, once hired by defendant, was bound to arbitrate all employment disputes). **Note:** The Michigan Court of Appeals also rejected plaintiff's characterization that the parties' pre-dispute arbitration agreement was not statutory but rather common law. Since the language in the agreement contained reference to enforceability, as required by Michigan law, the agreement was statutory, thus not unilaterally revocable.
  
- ✚ *Leone v Mika Systems, Inc*, unpublished opinion per curiam of the Court of Appeals, decided November 23, 2004 (Docket No 249963); 2004 WL 2674216. (Trial court's portion of decision holding that a 180-day contractual limitation period was invalid as a matter of law reversed where the parties by contract stipulated to a shorter limitation period and such shortened limitation period was reasonable).
  
- ✚ *Melvindale-Northern Allen Park Public Schools v AFSCME Local 1523*, unpublished opinion per curiam of the Court of Appeals, decided October 28, 2004 (Docket No 248880); 2004 WL 2413367. (Award of arbitrator reinstating grievant to his former position affirmed where the arbitrator determined plaintiff had discriminated in the application of disciplinary procedures for violation of substance abuse policy by retaining one employee but firing grievant. Such an award does not violate the public policy exception doctrine. For an award to contravene public policy, the arbitrator's award must mandate illegal conduct or require plaintiff to act unlawfully, and here it did neither).
  
- ✚ *Prose v Sun and Ski Marina*, unpublished opinion per curiam of the Court of Appeals, decided December 9, 2004 (Docket No 245823); 2004 WL 2827197. (Trial court's decision to award mediation sanctions reversed and remanded for evidentiary hearing where when challenged with respect to its decision, failed to

conduct an evidentiary hearing with respect to the amount of attorney fees and failed to explain its ruling).

- ✚ *Real Estate One, Inc v American Arbitration Assn*, unpublished opinion per curiam of the Court of Appeals, decided February 1, 2005 (Docket No 249970); 2005 WL 233554. (Award of sanctions imposed by trial court affirmed where defendant failed to comply with multiple orders to appear to show cause hearings – even though AAA was not a proper party and may have been entitled to quasi-judicial immunity as a sponsoring organization of arbitrations. The potential cloak of immunity does not shield a party who violates [seemingly flagrantly] court orders to appear).
  
- ✚ *Robinson v Daimler Chrysler Corp*, unpublished opinion per curiam of the Court of Appeals, decided June 22, 2004 (Docket No 247752); 2004 WL 1393768. Reversed a circuit court order granting summary disposition in favor of defendants, holding that a party who raises arbitration as an affirmative defense in a responsive pleading without first filing a motion for summary disposition, and who actively engages in litigation through discovery, pretrial and mediation, has effectively waived the right to invoke arbitration.
  
- ✚ *Studio B Architects, Inc v Metaldyne*, unpublished opinion per curiam of the Court of Appeals, decided October 12, 2004 (Docket No 248017); 2004 WL 2291348. (Trial court's decision affirmed where the arbitrator, and not the courts, decided the application of contractual defenses, such as contractual limitation periods, statutes of limitation and laches).
  
- ✚ *Thumb Electric Cooperative of Michigan v Walker*, unpublished opinion per curiam of the Court of Appeals, decided September 28, 2004 (Docket No 247523); 2004 WL 2177130. (Trial court's decision denying defendant's motion for post-judgment interest on an arbitration award affirmed where the arbitration panel did not award interest. When parties provide for arbitration, the decision to award interest falls within the discretion of the arbitrator. A circuit court cannot usurp this jurisdiction).
  
- ✚ *TI Group Automotive Systems Inc v Millennium Industries Corp*, unpublished opinion per curiam of the Court of Appeals, decided January 11, 2005 (Docket No 250538); 2005 WL 50189. (Trial court's decision not to review arbitral transcript to determine whether the arbitrator exceeded his powers affirmed. First, the transcript was not presented to the trial court for consideration. Second, the lower court's ruling is consistent with Michigan law, specifically, *DAIIE v Gavin*, 416 Mich 407, 331 NW2d 418 (1982), which held that for an award to be overturned, it must be clearly evident from the face of the award that, through a material or substantial error of law, the arbitrator was led to an

incorrect conclusion). *See also Welsh v Welsh*, unpublished opinion per curiam of the Court of Appeals, decided February 15, 2005 (Docket No 250716); 2005 WL 356638. (Arbitrator did not exceed his authority where a portion of the award granted relief that would typically not be granted in a court of law, and the award did not contravene the controlling principles of law. “[T]he fact that the relief granted in an arbitration award could not be granted by a court of law or equity is not grounds for vacating the award.” MICH. COMP. LAW ANN. § 600.5081(3)).

- ✚ *Township of Clay v Montville*, unpublished opinion per curiam of the Court of Appeals, decided June 17, 2004 (Docket No 248293); 2004 WL 1366063. (Award affirmed where arbitrator ruled that the demotion grievant received under the progressive disciplinary provision of the collective bargaining agreement was excessive, notwithstanding the fact that grievant had committed the infraction for which he was charged. The collective bargaining agreement provided the arbitrator with sufficient latitude to determine that while an employee is guilty of violating an express provision of the contract, such a violation is not just cause for the discipline imposed, and the arbitrator may impose a less severe penalty).
- ✚ *Ultimate Precision, Inc v International Marketing Consultants, Inc*, unpublished opinion per curiam of the Court of Appeals, decided June 15, 2004 (Docket No 246606); 2004 WL 1335902. (Trial court’s decision denying plaintiff’s motion to vacate arbitral award and confirming the award affirmed where arbitrator acted properly in construing ambiguous language, since a determination of the parties’ intent involves questions of fact that is not subject to appellate review).
- ✚ *Willis v Stevens*, unpublished opinion per curiam of the Court of Appeals, decided October 19, 2004 (Docket No 254656); 2004 WL 2348256. (Trial court’s decision granting plaintiff’s motion for change of custody affirmed where trial court did not abuse its discretion in changing custody of the parties’ minor children from defendant to plaintiff. Under Michigan law, even when parties stipulate to use arbitration to resolve custody issues, they cannot similarly by stipulation limit a trial court’s authority to review custody determinations, since to do so would “nullify the protections of the Child Custody Act and relieve the circuit court of its statutorily imposed responsibilities.” (Citing to *Harvey v Harvey*, 470 Mich 186, 680 NW2d 835 (2004)).
- ✚ *Wold Architects and Engineers, Inc v Strat*, unpublished opinion per curiam of the Court of Appeals, decided June 17, 2004 (Docket No 246874); 2004 WL 1366060. (Trial court’s decision to enforce an arbitration agreement was error, as the agreement lacked the requisite statutory language of enforceability. This failure essentially converts the agreement to common law, entitling the plaintiff to

unilaterally revoke consent to arbitrate. “Statutory arbitration provisions . . . are irrevocable except by mutual consent”).

- ✚ *Zurkowski v Valentine*, unpublished opinion per curiam of the Court of Appeals, decided April 7, 2005 (Docket No 251471); 2005 WL 782685. (Trial court’s decision to enforce award affirmed where the arbitration panel considered the evidence submitted by plaintiff but failed to give it the weight plaintiff claimed it deserved. “[W]hile a refusal to hear material evidence is a basis for review, a refusal to give weight to evidence is not.”).