

**United States Mediation Update**  
**By Steven K. Andersen<sup>1</sup>**

**Sampling of U.S. Mediation Federal and State Court Decisions**

**CASSEL v. SUPERIOR COURT**, 179 Cal. App. 4th 152 (11/12/09)

In California a client sues attorney for malpractice in the settlement reached in mediation for \$1,250,000. The client argued that the attorney forced him to settle for a lower amount in the mediation. The trial court agreed with the attorney's position that all communications in the mediation are protected as confidential and therefore not admissible. The appellate court reversed by analyzing the type of communications had between the client and attorney. Because the trial was forthcoming the communications were not just for mediation, but also for the trial. The court narrowly construed that there should be a close relationship between the communication and the mediation for the privilege to apply.<sup>2</sup>

**PORTER v. WYNER**, Cal. App. 4th (04/08/10)

The client in a mediation sues their attorney for malpractice based upon a dispute surrounding the payment of attorneys fees. The client understood that the settlement also included for the payment of their attorney's fees. In the malpractice action the attorneys argue that the communications in the mediation should be inadmissible because they were said within the mediation. The lower court agreed with the attorney's position, but the appellate court reversed and held that communications are not privileged when they are within the context of a malpractice claim between the client and their attorney.<sup>3</sup>

**WIMSATT v SUPERIOR COURT**, 152 Cal. App. 4th 137 (06/18/07)

In California Plaintiff's counsel in the case allegedly changed his client's offer from 3.5 million to 1.5 million without the consent of the client. After a settlement the client sued the attorney for legal malpractice stating that the attorney's adjusted claim ruined the overall worth of the claim. The attorney first sought a protective order against discovery of what happened in the mediation. After that the attorney sought to vacate the protective order and instead of have a Writ of Mandate protecting any mediation related discovery. The court granted the writ in part and then discussed the common misunderstanding between

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<sup>2</sup> Carl Ingwolson's Update 2010 – Fifteenth Annual Review of ADR Law, May 5, 2010, p. 6

<sup>3</sup> Id. at 7

confidentiality and privilege. Most communication in mediation is held as confidential, but there are exceptions.<sup>4</sup>

**MOSS V. PARR WADDOUPS BROWN GEE & LOVELESS, 2008 UT App. 405.**

The plaintiffs in the case filed a breach of an agreement made orally within the mediation to pay a large sum of money. The defendants claimed that a separate confidentiality agreement signed by all participants in the mediation precludes the admissibility of an affidavit of the mediator and oral statements made in the mediation. The Utah Court of Appeals overturned the trial court decision which rules that the communications were admissible. Is the difference with this case compared to other California cases might be the existence of a separate confidentiality agreement?<sup>5</sup>

**EEOC V. ABM INDUSTRIES, INC., No. 1:07-cv-01428 (E.D. Cal. , March 3, 2010)**

The defendants petitioned to have plaintiff's counsel sanctioned for not translating or interpreting settlement offers made during the mediation into Spanish. The position that counsel did not participate in good faith was not accepted for various reasons including that the mediation was not court ordered and that the other parties could have also provided someone to fulfill the role of translator during the mediation session.<sup>6</sup>

**TARGUS GROUP INTERNATIONAL v. SHERMAN, No. 08-P-113 (Mass. App. March 5, 2010)**

A Massachusetts appellate court upheld a mediation "agreement in principle". The principle resolution came after months and months of settlement discussions and a full day mediation conference. The parties had put forth their mediation agreement with the anticipation that they would create a more detailed settlement agreement. The parties were unable to complete the more detailed settlement agreement and therefore the original agreement came into question. With the signature of the original agreement the parties executed a binding and effective mediation settlement.<sup>7</sup>

**ESWARAPPA v. SHED INC./KID'S CLUB, No. 06-11169 (D. Mass. February 18, 2010)**

The claimant in an age discrimination mediation session agreed orally to a settlement of the dispute. The next morning the claimant changed her mind and would not sign a prepared mediation settlement document that also included a

<sup>4</sup> Id. at p.4-5

<sup>5</sup> Utah law firm site.

<sup>6</sup> Kevin L. Seat, Mediation News for the 21<sup>st</sup> Century, May 27, 2010

<sup>7</sup> Id.

seven day period to rescind the agreement. The oral agreement was upheld by a federal district court in Massachusetts as an effective mediation settlement. The claimant would have been able to change her consent by signing the settlement document with the seven day period provided for in the agreement.<sup>8</sup>

**MAVERICK H. v. GIVLER**, No. E2009-00253-COA-R3-CV (Tenn. App. February 24, 2010)

Plaintiff in this case was seeking confirmation of paternity for her soon to be 18 year old child from the defendant father. The father did not deny paternity, but denied past child support payments. A trial date was set with the anticipation of a mediation conference happening prior to trial date. The trial date came and the plaintiff did not show. The action was dismissed, but the plaintiff filed a motion to set aside the dismissal and proceed with a new trial. One reason given by plaintiff and her counsel was that they expected the mediation to happen prior to the trial. The mediation had not yet happened and therefore they presumed that the trial date would be rescheduled. In the end the case was dismissed.

**HOUSEBOAT STORE, LLC v. CHRIS-CRAFT CORP.**, No. A09A1815 (Ga. App. March 11, 2010)

The plaintiff in this distribution agreement filed a motion for default judgment against the defendant. The defendant challenged the default motion and filed a motion to dismiss. The trial court dismissed the case for two reasons. One of which was that the parties had not complied with their condition precedent to mediation prior to resolution of their dispute in an adjudicatory process as set forth in their dealer contract. The appellate court affirmed that trial courts decision based upon the requirement to mediate the dispute.

### **Other Mediation Developments**

#### **2009 Statistics in mediation domestically and internationally for AAA and ICDR.**

The American Arbitration Association (AAA) in 2009 administered 2110 mediation cases with 70 of those being classified as international. There has been a growth of usage of international mediation in North American over the past few years. In 2005, the ICDR had 6 mediations, 10 in 2006, 9 in 2007, 7 in 2008 and 9 in 2009 with Canadian participants. There was 1 Mexican participant in a mediation in 2005, none in 2006, 5 in 2007, 1 participant in 2008 and 2 in 2009.<sup>9</sup> International mediation participants from the US during this same period of time have more than double the combined participants from Canada and Mexico each year.

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<sup>8</sup> Id.

<sup>9</sup> AAA/ICDR case statistics provided by Ryan Boyle, VP Statistics & In-House Research



## **ICDR Model Concurrent Arbitration-Mediation Clause**

Some parties prefer not to obligate themselves to mediate as a condition precedent to the filing of arbitration. They could be concerned that early mediation will not allow them sufficient time to understand the case, so making negotiation more perilous. That said, not providing for mediation in the dispute resolution clause may result in a lost opportunity to make clear the parties' preference for a negotiated settlement. With those countervailing concerns in mind, ICDR has developed a model "Concurrent Arbitration-Mediation" Clause. The Clause obligates the parties to mediate, but does so after the initiation of arbitration, when the parties are presumably more informed regarding both the matters in dispute and their respective needs and interests.

The ICDR Model Concurrent Arbitration-Mediation Clause is as follows:

*"Any controversy or claim arising out of or related to this contract, or a breach thereof, shall be resolved by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. Once the demand for arbitration is initiated, the parties agree to attempt to settle any controversy or claim arising out of or relating to this contract or a breach thereof by mediation administered by the International Centre for Dispute Resolution under its International Mediation Rules. Mediation will proceed concurrently with arbitration and shall not be a condition precedent to any stage of the arbitration process."*

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## **Florida Circuit Court Selects AAA as Foreclosure Mediation Program Administrator**

April 12, 2010 – Florida's 17th Judicial Circuit Court has selected the American Arbitration Association to administer its Residential Mortgage Foreclosure Mediation Program (RMFM).

The program was established in accordance with an administrative order issued by the Florida Supreme Court last December, which required mediation as a first step for foreclosure cases involving primary homes. Under the order, each of the state's 20 judicial circuit courts must create an RMFM program.

The 17th Judicial Circuit Court encompasses Broward County in south Florida, with Fort Lauderdale as the county seat. It is Florida's second largest county. The circuit court receives an average of 3,000 home foreclosure case filings every month. Florida has the third highest mortgage delinquency rate in the nation, according to the state Supreme Court. Over 500,000 foreclosure cases were filed in the state last year.

The 17th Judicial Circuit Court's RMFM program will begin on July 1. Under the program, residential mortgage cases will be referred to the AAA. A homeowner who has been notified and agrees to participate in the program will first undergo mortgage foreclosure counseling. Then the homeowner and the lender will begin the mediation process with the goal of reaching an early and mutually agreeable settlement of their dispute.

The lender will pay for the fee, which covers the counseling, mediator's fee, and case administration. The fee structure is based on the assumption that a successful mediation can be accomplished in one session, although a second session may be allowed.

"We are proud that the 17th Judicial Circuit Court of Florida has appointed the AAA to manage the Residential Mortgage Foreclosure Mediation Program," said Albert Orosa, AAA Commercial Division regional vice president. "It encourages us to know that from a foreclosure crisis that has devastated many communities in Florida will come opportunities to reach understanding, save homes, and save families. We are honored that the AAA has been selected and given an opportunity to assist the court to manage this process."

From the *Dispute Resolution Times*, an online publication by the American Arbitration Association: <http://www.adr.org/sp.asp?id=29502>

### **Mediation Program Launched for NH Homeowners Facing Foreclosures**

Jan. 25, 2010 -- New Hampshire's Judicial Office of Mediation and Arbitration (OMA) has launched a free and voluntary mediation program to help borrowers at risk of foreclosure reach an agreement with their lenders in restructuring loans.

Through mediation, qualified homeowners will get a chance to restructure their loans or negotiate other alternatives that would allow them to stay in their homes, while lenders secure a more reliable payment stream. The OMA introduced the program on Jan. 11.

In a letter to banks and mortgage holders, Chief Justice John T. Broderick Jr. said that providing a neutral forum for discussion "may prove quite helpful in cases where borrowers, faced with challenging financial circumstances, are reluctant to meet directly with their lenders, despite the lenders' attempt to work directly with borrowers."

To participate in the mediation program, a homeowner must send an application to the lender and the OMA. The lender will determine whether the borrower is eligible for mediation. The OMA will assign an experienced, trained mediator for every eligible case.

There is no cost to participate in the mediation program, which is funded by grants from the New Hampshire Housing Finance Authority, the New Hampshire Charitable Foundation, and the Oleander Jameson Trust.

From the *Dispute Resolution Times*, an online publication by the American Arbitration Association: <http://www.adr.org/sp.asp?id=29502>

## **U.S. Arbitration Supplementary Update**

### **2009 Statistics in mediation domestically and internationally for AAA and ICDR.**

The AAA handled a total of 113,307 cases in 2009. 14,157 of those were commercial arbitration cases. There was a 19% increase in cases filed online in 2009 with a total of 3,004. The ICDR has another record year in 2009 with 836 international cases filed. It was a 19% percent increase from the 703 cases filed in 2008. 96 of the ICDR cases were initiated online through the organizations online case management system called webfile. It is the eighth straight year that it has had more international case filings that any other institution in the world. There were 147 Canadian participants represented which is almost over a 25% increase from the previous year. There were 36 Mexican participants represented which is over a 75% increase compared to the previous year. Participants from the U.S. more than doubled those from Mexico and Canada.<sup>10</sup>

### **Florida Adopts UNCITRAL Model Law on May 20, 2010**

Florida has taken another step in their effort to brand Florida as a seat for international dispute resolution cases. There are five other states including California and Texas that have also adopted a version of the UNCITRAL Model law. The UNCITRAL model law has long been respected and applauded as an effective vehicle for the resolution of international commercial disputes.

### **AAA Introduces Flexible Fee Schedule Program**

June 1, 2010 -- The American Arbitration Association and the International Centre for Dispute Resolution recently adopted a Flexible Fee Schedule for parties who file arbitration cases involving commercial, construction, international and individually negotiated employment disputes. The schedule was introduced on June 1st after a one-year pilot program designed to offer parties a cost-saving alternative. Under the program, disputants will have greater flexibility through a "pay as you go" schedule. The Standard Fee schedule is still available.

The benefits of the Flexible Fee program include the following:

- The initial filing fee is lower under the pilot program compared with the standard fee.
- Parties make payments in three stages to advance the arbitration.

To learn more about the AAA's arbitration and mediation services, go to <http://www.adr.org>

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<sup>10</sup> AAA/ICDR case statistics provided by Ryan Boyle, VP Statistics & In-House Research



## **AAA - Automobile Industry Special Binding Arbitration Program**

The Consolidated Appropriations Act of 2010 (Public Law 111-117), signed into law by President Obama, includes a provision under which owners of automobile dealerships can use a binding arbitration process administered by the American Arbitration Association to seek reinstatement if their businesses were closed by automobile manufacturers during the implementation of the Emergency Economic Stabilization Act of 2008.

The new law provides a 180-day period for dealerships, manufacturers, and independent arbitrators to conclude dealership claims that their sales-and-service franchises should be restored by their respective manufacturers. The American Arbitration Association will provide the forum for administration of the arbitrations, according to the legislation.

A summary of some of the legislatively required features of the arbitration include:

- The arbitration must be elected by dealerships within 40 days of the date of enactment of the legislation. As a result, dealerships must commence arbitration by January 25, 2010. In addition, the entire dispute must be submitted to the arbitrator within 180 days of enactment of the legislation, or by June 14, 2010.
- The manufacturer and dealership will be permitted to present all relevant information during the arbitration, and the legislation requires that arbitrators consider specific factual matters, among others, such as the dealership's profitability, the manufacturers overall business plan, the dealership's economic viability, whether the dealership met performance objectives in its franchise agreement, and the dealership's experience and length of service.
- Arbitrators will be selected from a list of qualified arbitrators which will be maintained by regional offices of the AAA in the region where the dealership is located. The arbitration will take place in the state where the dealership is located. Electronic and telephonic hearings will be permitted.
- Discovery will be limited to requests for documents specific to the dealership, and no depositions will be permitted.
- Parties will be responsible for their own expenses, fees and costs and shall share equally all other arbitration costs such as arbitrator fees, meeting room charges, and administrative costs. The arbitration will be conducted in the state where the dealership is located.



- The appointed arbitrator will determine if a covered dealership should be added to the covered network of the covered manufacturer. Arbitrators have no authority to award compensatory, punitive, or exemplary damages.

Arbitrations will be administered pursuant to the AAA's Commercial Arbitration Rules, however all provisions of the legislation that are inconsistent with the Commercial Rules shall trump the Commercial Rules. For more specific information about the arbitration process and the requirements of the legislation, click on the links below captioned "Excerpt from the Bill -- Text Pertaining to AAA Arbitration (H. R. 3288-186)" and "AAA Commercial Arbitration Rules."

**That the revised Construction Industry Arbitration Rules (effective Oct. 1, 2009) include a set of procedures for cases where an in-person hearing is not necessary?**

The D-Procedures (Procedures for the Resolution of Disputes through Document Submission) were added to make it easier for parties who do not need in-person hearings. The new section sets forth a basic timeline of events, with arbitrator discretion, to shape the process to meet the needs of a specific case.

These procedures may be applied to any dispute, regardless of the value of the claims. Parties simply need to provide a written agreement to use the procedures. Once the parties waive in-person hearings, the arbitrator shall promptly convene a preliminary management hearing via conference call to establish a schedule and process for the submission of written evidence. Usually, there is an initial simultaneous exchange, followed by a period for responding to the adversary's submission. This process may be varied to allow staggered submissions, depending upon the need of the particular case. A concluding telephone or online conference is optional.

Once the submission of documentation and any conferences are concluded, the arbitrator declares the "hearings" closed. In most cases, a simple award (a concise financial breakdown) will be issued within 14 calendar days from the date the arbitrator closed the "hearings." The goal of these procedures is to provide a fast, easy, and economical means to resolve simple contractual disputes.

From the *Dispute Resolution Times*, an online publication by the American Arbitration Association: <http://www.adr.org/sp.asp?id=29502>

**AAA Revises Procedure for Matching New York No-Fault Claims**

The American Arbitration Association has modified its procedure for matching and consolidating New York State No-Fault auto claims that involve the same injured person.

The procedure covers cases filed by health care providers against insurance companies that have denied their claims for compensation for services provided to people injured in auto accidents, according to William Considine, AAA State Insurance Division vice president and program manager for the Association's New York No-Fault and SUM Programs.

In the past, the AAA's automated procedure matched and consolidated claims by the same provider that involved the same injured person into one case for hearing before an arbitrator if the cases were pending in conciliation at the same time. Considine said that under the revised procedure, the cases are no longer combined into one file. They remain separate and distinct although they are processed together. As in the past, any insurance carrier involved in matched cases will be charged only one case assessment cost covering all the matched cases.

Under the old procedure, a party to consolidated cases sometimes came unprepared to handle all claims in a hearing because the scheduled case might not have originally covered the entirety of claims. In some instances, different attorneys representing the provider on different claims that had been combined in one case continued to each be involved, creating confusion. Combining the cases also created complications in the parties' calculation of attorney fees.

"The new procedure is simpler and more effective, and it reflects industry practices better," said Considine. The revised procedure took effect in July 2009. The AAA will send a letter to parties whose cases have been matched pursuant to the revised procedure.

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From the *Dispute Resolution Times*, an online publication by the American Arbitration Association: <http://www.adr.org/sp.asp?id=29502>

### **AAA, Bahrain Sign Agreement to Establish ADR Center**

Aug. 31, 2009 -- The American Arbitration Association and Bahrain's Ministry of Justice and Islamic Affairs recently signed an operating agreement to establish the Bahrain Chamber for Dispute Resolution (BCDR-AAA).

Bahrain's Justice Minister HE Sheikh Khalid bin Ali bin Abdulla Al Khalifa and AAA President and CEO William K. Slate II signed the agreement in a ceremony held on Aug. 17 at the Bahrain Embassy in London. The new center is scheduled to open later this year.

"The establishment of the Bahrain Chamber for Dispute Resolution, in partnership with the AAA, is a significant step forward, not only for Bahrain, but for the wider region. The BCDR-AAA will provide users, including international legal firms, multinationals and governments contracting in the Gulf and beyond, with a purpose-built solution for the rapid, effective and certain resolution of

commercial disputes," said Sheikh Khalid. He said that while the BCDR-AAA will be based in Bahrain, he expects it to act as a hub for ADR users in the Gulf region.

The Kingdom of Bahrain, an island nation in the Persian Gulf, recently enacted legislation that entrenches the role of the BCDR-AAA in domestic law and establishes Bahrain as a neutral venue for multinational companies seeking to conduct international arbitration.

Bahrain's Ministry of Justice, Economic Development Board and the Directorate of Legal Affairs formed a Special Project Steering Committee to help establish the new ADR center. After conducting an extensive search for a partner and considering all major international ADR providers, the committee unanimously selected the AAA and its international division, the International Centre for Dispute Resolution (ICDR).

"The AAA is delighted to have partnered with the Kingdom of Bahrain in the establishment of the BCDR-AAA. Bahrain holds unique standing within the Gulf region as a center for commercial transactions, particularly within the financial sector. Its regulatory and commercial environments are second to none within the region, and the establishment of this center will once again demonstrate Bahrain's foresight and understanding of the needs of the modern business world. I have no doubt that the BCDR-AAA will soon establish itself as the pre-eminent alternative dispute resolution facility within the Gulf and surrounding region," said Slate.

The BCDR-AAA will administer the arbitration and mediation of commercial cases, including insurance, construction, financial services and energy disputes. Arbitrations and mediations will be conducted in Arabic, English, or any other language required by parties. There will also be a separate ICDR office in Bahrain, working side-by-side with the BCDR.

From the *Dispute Resolution Times*, an online publication by the American Arbitration Association: <http://www.adr.org/sp.asp?id=29502>

### **AAA Announces Moratorium on Consumer Debt Collection Arbitration Cases**

July 27, 2009 -- The American Arbitration Association today announced its decision not to accept new consumer debt collection arbitration cases effective immediately.

The decision was made after evaluation of a recently concluded program in this area showed weaknesses in the consumer debt collection arbitration process. The AAA is calling for reform that will address such weaknesses, beginning with a dialogue involving various groups with interest in the matter.



The Association said the following matters are included in the moratorium:

- Consumer debt collections programs or bulk filings
- Individual case filings in which:
  - The company is the filing party and,
  - The consumer has not agreed to arbitrate at the time of the dispute and,
    - The case involves a credit card bill or,
    - The case involves a telecom bill or,
    - The case involves a consumer finance matter.

The AAA will continue to administer all demands for arbitration filed by consumers against businesses and all other types of consumer arbitrations, according to Richard Naimark, AAA senior vice president. "This policy will be in effect until such time as the AAA determines that adequate and broadly acceptable due process protocols specific to these cases are in place. It is our intention to engage in earnest dialogue with a diversity of interest groups on what constitutes a proper protocol framework for these matters," he said.

The Association emphasized that while the Consumer Due Process Protocol effectively ensures a fair process for most consumer arbitrations, the categories of cases listed above require additional protections, due to, among other things, a high rate of non-participation by consumers. The Consumer Due Process Protocol is a set of principles for a fundamentally fair ADR process created in 1998 by representatives of the bar, government agencies, and consumer and other nonprofit organizations, including the AAA.

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Last week, the AAA recommended the creation of a national policy committee that will address problems in consumer debt collection arbitration during its testimony before the Domestic Policy Subcommittee of the House Oversight and Government Reform Committee. In its recommendations, the AAA identified the areas that need attention from the national policy committee: consumer notification, arbitrator neutrality, pleading and evidentiary standards, respondents' defenses and counterclaims, and arbitrator training and recruitment.

For more information about the AAA's position on debt collection arbitration, go to <http://www.adr.org/sp.asp?id=36427>

From the *Dispute Resolution Times*, an online publication by the American Arbitration Association: <http://www.adr.org/sp.asp?id=29502>

### **AAA Files *Amicus Curiae* Brief in *Stolt-Nielsen***

Sept. 14, 2009 -- The American Arbitration Association has filed an *amicus curiae* brief in the case of *Stolt-Nielsen S.A., et al v. AnimalFeeds International*

*Corp.* , currently pending before the United States Supreme Court, to share the Association's experience in administering class arbitrations.

The Supreme Court has agreed to review *Stolt-Nielsen* , an international maritime case, and to consider whether the Federal Arbitration Act (FAA) permits class action arbitrations to take place where the arbitration agreement is silent on the issue.

"The AAA's brief is filed on behalf of neither party, which is consistent with the neutral position the Association has taken on the subject of class actions and the related question of class action waivers," said Eric P. Tuchmann, the AAA's general counsel. "At the same time, the AAA has administered more class arbitrations than any other organization, and we have invested a substantial amount of time, energy and thought leadership into the subject. For these reasons we thought it very important to share our experience with the Supreme Court and the parties."

The case stems from a class action lawsuit filed by AnimalFeeds in the U.S. District Court for the Eastern District of Pennsylvania, alleging that Stolt-Nielsen violated federal antitrust laws by engaging in a conspiracy to restrain competition in the parcel tanker shipping market. The case was consolidated with similar cases in the District of Connecticut.

Stolt-Nielsen moved to compel arbitration based on the arbitration clause in the agreements, but the court denied the motion. When the 2nd Circuit reversed the district court's ruling, the parties entered into an agreement to arbitrate under certain portions of the AAA's Supplementary Rules for Class Arbitration (Class Rules), which permits the arbitrator to decide whether the case may proceed on a class basis. The AAA, however, did not administer the arbitration.

Stolt-Nielsen argued during the arbitration that class arbitration was precluded because the arbitration clause was silent on the issue. The arbitrators, however, ruled that the parties' agreement allowed arbitration on a classwide basis despite its silence on class arbitration. Stolt-Nielsen petitioned the court to vacate the award, which the district court granted, but the 2nd Circuit reversed. Stolt-Nielsen filed a writ of certiorari for the Supreme Court to decide the issue.

#### AAA Class Rules

In its *amicus* brief filed on Sept. 4, the AAA said it established the Class Rules in response to the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) , which concluded that the arbitrator must first decide whether an arbitration agreement permits class arbitration as an issue of contract interpretation.