# Was That Mediation or Arbitration?
# Two New California Cases Beg the Question Again

RUTH V. GLICK

RUTH V. GLICK

*MS. GLICK IS A FULL-TIME ARBITRATOR AND MEDIATOR WITH MORE THAN 20 YEARS EXPERIENCE AS DISPUTE RESOLVER IN BOTH HER BUSINESS AND LEGAL CAREERS. SHE IS A MEMBER OF THE BUSINESS LAW ADR COMMITTEE AND PRESIDENT-ELECT OF THE MEDIATION SOCIETY OF SAN FRANCISCO. VISIT RUTHGLICK.COM FOR MORE INFORMATION.*

Two new California appellate cases that involved parties using both mediation and arbitration procedures revisit the issue of whether parties agreed to the same dispute resolution processes. (See Glick, *Was It Mediation or Arbitration? Be Sure Everyone is on the Same Page,* Business Law News, Issue 2, 2006.)

The first case, *Lindsay v. Lewandowski,* (2006) 139 Cal.App.4th 1618, presented a confusing dispute resolution contract that the court found unenforceable for lack of agreement. The second case, *Morgan Phillips, Inc. v. JAMS/ENDISPUTE,* (2006 Cal. App.) Lexis 911, held that a neutral, who acted as a mediator, although empowered to be the arbitrator, was not immune from liability when he withdrew from the case. Even though the two cases dealt with separate legal issues, their dispute resolution clauses, while dissimilar, both included mediation/arbitration hybrid processes. The result in both cases was that the parties were not of the same mind as to what dispute resolution procedure they had bargained for in their agreement.

In *Lindsay v. Lewandoski,* the parties signed a stipulation for settlement following a private mediation which provided for resolution of a "dispute as to the term of the settlement" by "returning to the mediator for final resolution," or in another version, "returning to the mediator to resolve any further dispute by binding arbitration." In addition, it provided for disputes by the related corporate entities to be determined by "binding arbitration" but resolution of payment terms by "binding mediation."

The court said it could not tell what the parties meant when they provided for "binding mediation" of the payment dispute, but did determine that it was clear that the parties did not regard binding mediation as the equivalent of binding arbitration. Because the contract had a material term that was uncertain, the court refused to enforce it, stating that all material terms of the dispute resolution procedure must be clearly agreed upon by the parties to be enforceable, citing *Weddington Productions v. Flick* (1998) 60 Cal.App.4th 793, 811. (*Lindsay v. Lewandowski, supra* 139 Cal.App.4th at p. 1623.)

The court further reasoned that the term "binding mediation" was not recognized in rules governing contractual arbitration (Code Civ. Proc., §§ 1280 et seq), contractual mediation (Evid. Code, §§ 1115 et seq.), or court connected mediation programs (Cal. Rules of Court, rule 1620 et seq.) It did not discourage parties who agree in clear and certain written terms to a mediation/arbitration hybrid procedure where the mediator can be authorized to render a binding decision in a dispute arising out of a settlement. But the court added "whether or not this arbitrator (nee mediator) may consider facts presented to him or her during the mediation would also have to be specified in such agreement." (*Lindsay v. Lewandowski, supra* 139 Cal.App.4th at p. 1625.)

The other new case, *Morgan Phillips, Inc. v. JAMS/ENDISPUTE,* tackled the quasi-judicial immunity issue of an arbitrator who withdraws from a case without explanation. Here the neutral was empowered to resolve any dispute arising out of a mediated settlement between a Retailer and Supplier by binding arbitration. After hearing the evidence in an arbitration-type hearing, the neutral continued the hearing for six weeks, instructing the Supplier to prepare rebuttal evidence and the Retailer to prepare an updated damage analysis. He also told the parties that if they could not settle the dispute before the next scheduled arbitration session, he would exercise his authority as arbitrator to render a binding decision.

When the arbitration reconvened, the parties presented the evidence as requested. The neutral then separated the parties into different rooms and apparently resumed the mediation by meeting with each side individually to try to resolve the case over the course of several hours. He then announced that he was withdrawing as arbitrator without giving an explanation and thereafter declined to issue a binding arbitration award. Morgan Phillips claimed that the neutral's conduct was part of a plan to coerce it into an unfavorable settlement, particularly because the company was in financial distress. It sued for breach of contract, negligent breach of duty to provide binding arbitration services, and a in a separate claim against JAMS, for unfair competition and false advertising. The trial sustained a demurrer on the grounds that the action was barred by the doctrine of arbitral immunity.

The question posed to the appellate court was whether arbitrators are immune from liability when they withdraw from a case. Relying on *Barr v. Tigerman* (1983) 140 Cal.App.3d 979, 983-985, the court held that immunity does not apply to an arbitrator's breach of

contract by failing to make any decision at all. The court read literally the agreement to conduct a binding arbitration, finding that the neutral's abandonment of the arbitration and continuation of the mediation constituted non-performance and was a narrow exception to the common law doctrine of arbitral immunity.

Interestingly, the court noted that this case was at the pleading stage before a full evidentiary picture has been developed, adding that if a neutral arbitrator were to state that the reason for withdrawal was because of a conflict of interest or a substantial doubt of their ability to be fair and impartial, he or she would have legal justification for immunity. (See Code Civ. Proc., §§ 1281.9, subd. (a); 170.1, subd. (a)(6)(B); Standard 6, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Appendix to Cal. Rule of Ct. (West Ann. Code 2005, Vol. 23, Pt. 4, p. 572), which require arbitrators to withdraw if they cannot maintain their impartiality. Therefore, an arbitrator's decision to withdraw based on ethical standards is, according to the court, integral to the arbitral function and covered by arbitral immunity.

Drafters of ADR clauses must now consider all the ramifications these new cases present. If a combination of dispute resolution procedures are to be used in the event of a dispute, provide language that clearly communicates the scope and breadth of the parties' agreement. This is particularly true when one neutral is to serve as both mediator and arbitrator.

The dicta in *Lindsay v. Lewandowski,* suggests that parties ought to think about whether facts presented in the mediation could be considered by the neutral making an arbitral decision. But mediation confidentiality statutes, Evidence Code section 1115 et seq. might not permit an arbitrator to accept evidence presented in a mediation for deliberation in an arbitral decision.

Consider also whether the neutral, acting as mediator and then arbitrator, may revert to a facilitative role before making binding adjudicative decision. If a binding arbitration decision had been provided in the *Morgan Phillips v. Jams/Endispute* case, one of the parties might still have alleged coercion and breach of contract, because the agreement apparently called only for arbitration of disputes arising out of the settlement agreement and not continued mediation.

These cases again demonstrate what happens when a dispute resolution agreement is unclear about the process. Drafters of customized dispute resolution agreements must make sure that their clauses exhibit informed consent and knowing waivers. Everyone must be on the same page regarding the dispute resolution mechanism well before any dispute arises. As these new cases once again display, afterwards is too late. ■

*Continued from page 2 . . . Message from the Editor*

to pick up email, that my client had sent all of the documents he had brought to me, along with some documents I had created, to another attorney.

I was only slightly less chagrinned to learn that this other attorney was not stealing away my new client, but was counsel for a potential investor the client had found. I would have preferred to have made initial contact myself, without having had several half-written agreements sent out to investor's counsel.

As I was sitting reading my other emails, an email came in from the investor's attorney: "Nina Yablok??? The same Nina Yablok with whom I served on the Business Law Section's Education Committee?" Note to the Young 'Uns: The Business Law News Editorial Board used to be called the Education Committee.

Well, I wrote back that not only was it the same person, but I was still lurking around the Business Law Section and was now about to embark on another year as Editor-in-Chief of the Business Law News, a fact my client didn't know, until then. And suddenly my client was wide-eyed with wonder and amazement that his little sole proprietor attorney was the Editor-in-Chief of the Business Law News (whatever that was) and was known and apparently respected by the investor's counsel.

I would hate to suggest that this sort of "PR" is the reason why attorneys should volunteer for Business Law Section Committees, and especially for the Business Law News Editorial Board. But… it couldn't hurt.

So with that coincidence, I started out in September of 2005. I didn't know then that the client I was working with would get funding and the work would seriously erode my available time, and along with that, some of my plans for the 2005-2006 Business Law News year.

Notwithstanding my time constraints, this year has seen some great articles, and a continued tradition of excellence in legal publications from the Business Law News Board. I would like to thank all of the Editorial Board members for doing a truly bang up job this year. And of course, thanks always goes to Megan Lynch, our indefatigable staff person, and to Susan Orloff, who holds the whole Section together.

This year we also started using the Beta version of the Bar's online workroom with some success. Perhaps I will be invited to write an article about it in an upcoming edition of the BLN.

The 2006-2007 year's Editor-in-Chief will be David Pike. I think the next few years are going to present a challenge to the Business Law News. As more and more attorneys become truly electronically focused for their legal research and communica-