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Arbitration or Stipulation: Playing Word Games in the Federal Courts - DDI Seamless Cylinder Int'l v. Gen. Fire Extinguisher Corp.

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Arbitration or Stipulation: Playing Word Games in the Federal Courts

DDI Seamless Cylinder Int'l. v. Gen. Fire Extinguisher Corp.[1]

I. INTRODUCTION

In both its private and more recently, public (court-annexed) forms, arbitration has proven to be an effective tool in fighting the explosion of litigation. In certain contexts, however, some dispute has arisen as to who can actually be an arbitrator.[2] *DDI Seamless Cylinder* provides an excellent example of this newly disputed area in the framework of the federal courts.

II. FACTS AND HOLDING

The plaintiff, DDI Seamless Cylinder International Incorporated ("DDI"), is a manufacturer of metal cylinders used in the making of fire extinguishers.[3] In 1989, DDI entered into a contract with the defendant, General Fire Extinguisher Corporation ("General Fire"), to supply it with cylinders for the manufacture of the extinguishers themselves.[4] However, after DDI tooled for production and started producing the cylinders, General Fire repudiated the contract.[5] After the repudiation, DDI brought suit in federal district court for breach of contract seeking damages of more than $400,000.[6] However, due to the district court's crowded docket, the parties agreed to have the case tried before a federal magistrate, Judge Bobrick.[7] Settlement talks ensued and after protracted efforts to resolve their differences out of court, the parties agreed to appoint Judge Bobrick to arbitrate the dispute.[8] Judge Bobrick agreed to act as an arbitrator, and on April 6, 1992, he issued an order establishing the procedure for settling the

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1. 14 F.3d 1163 (7th Cir. 1994).

2. *See, e.g.*, Kirk Johnson, *Public Judges as Private Contractors: A Legal Frontier*, N.Y. TIMES, Dec. 10, 1993, at D20 (discussing Connecticut's program of authorizing public state court judges to double as private arbitrators).

3. *DDI Seamless Cylinder Int'l*, 14 F.3d at 1163.

4. *Id.* at 1164.

5. *Id.* General Fire claimed that the cylinders were defective and, as Judge Posner points out, General Fire claimed that "the fire extinguisher market has been on a slide downward and frankly, the market is no longer here." *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

case.[9] An auditor would determine the losses of DDI and if any disputes arose as to these losses, Judge Bobrick, as arbitrator, would decide these issues.[10]

The auditor's report was submitted to Judge Bobrick in his role as magistrate judge.[11] After hearings regarding the objections to the auditor's report were held before Judge Bobrick, the judge issued a document captioned "Judgment," which stated that the defendant owed the plaintiff $124,860.[12] If the defendant failed to pay the judgment by the specified date, liquidated damages in the amount of $150 per day were to be levied against the defendant and payable to the plaintiff for each day the judgment remained unpaid.[13] General Fire appealed from this order, apparently[14] claiming that the parties had no power to appoint a magistrate judge to arbitrate their dispute.[15]

On appeal to the Seventh Circuit Court of Appeals, Chief Judge Posner found that arbitration was not within a federal magistrate's required duties.[16] Thus, finding that the magistrate could not have acted as an arbitrator, the court stated that one way to view what the parties and the judge did in this case is that both parties agreed to a stipulated, non-appealable procedure.[17] Therefore, the court held that this was not an arbitration *per se*, but rather an agreed upon informal procedure that had the misnomer of "arbitration."[18] When viewed as an informal procedure, the court found the procedure was not improper, merely mislabeled, and affirmed the magistrate's resolution.[19] In so finding, the court held that although these parties were bound to their agreement utilizing an alternative procedure to resolve their dispute, when two litigants agree to arbitrate their

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9. *Id.*

10. *Id.* The procedure agreed upon first required Judge Bobrick to decide the damages issues upon conclusion of the audit; next, the final determination of the actual losses was to be reported to the court. Then the parties were to enter a stipulation and order for payment of the losses. Following such payment, the parties were to enter a stipulation to dismiss the lawsuit with prejudice and without legal costs and fees. *Id.* at 1164-65.

11. *Id.* at 1165. The auditor's report found that DDI had sustained a net loss of $38,000. *Id.*

12. *Id.* In its entirety, the "Judgment" stated that "Defendant shall pay the sum of $124,860 to the Plaintiff and its attorney within 10 days from the date of this Order. In the event of the failure of the Defendant to pay this amount within the time provided, Plaintiff shall have liquidated damages in the amount of one hundred and fifty ($150.00) per day each day the payment [sic] remains unpaid." *Id.*

13. *Id.*

14. Even after close questioning at oral argument, the Court of Appeals was uncertain exactly what relief defendant sought. *Id.*

15. *Id.* Further, the defendant claimed that the "Judgment" issued by the magistrate should, therefore, be treated as if it were an ordinary civil judgment rather than an arbitrator's award. Consequently, this judgment should be reversed because the magistrate's findings of fact with regard to DDI's damages were clearly erroneous, or alternatively because General Fire had a right to an evidentiary hearing. DDI argued that the appeal was frivolous because both parties waived their right to appeal. *Id.*

16. *Id.* (citing 28 U.S.C § 636 (1988)).

17. *Id.* at 1166.

18. *Id.*

19. *Id.*

dispute, it is not within the judicial power of a federal judge or magistrate to act as an arbitrator for that dispute.[20]

III. LEGAL HISTORY

A. ADR and Arbitration in the Federal Courts

Since the Federal Rules of Civil Procedure ("FRCP") were adopted a half-century ago, the caseload of the federal court system has increased dramatically.[21] The number of cases filed in federal courts grew from 33,591 in 1938 to 217,879 in 1990.[22] Due to this explosion of litigation, the development of alternative dispute resolution ("ADR") has received added attention.[23] Over the last few years, federal district judges have utilized ADR to address this problem.[24] Some of the ADR methods employed by the district courts have included court-annexed arbitration,[25] summary jury trials,[26] mediation[27] and early-neutral evaluation.[28] Moreover, the availability of private dispute resolution providers, ranging from mediators to rent-a-judge programs,[29] where the parties bypass the court system altogether, has also helped reduce the federal court caseload.[30]

Arbitration in particular has helped to alleviate the expanding federal case docket.[31] Arbitration is a private means of dispute resolution that uses neutral third parties to review particular disputed claims and render binding decisions.[32] Arbitration has been used in England and the United States for centuries.[33] In

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20. *Id.*

21. Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991).

22. *Id.*

23. *See* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION and LAWYERS 1 (1987).

24. Dayton, *supra* note 21, at 891.

25. *See* 28 U.S.C. §§ 651-658 (1988).

26. *See* Dayton, *supra* note 21, at 891 n.13. A total of 13 federal district courts have local rules or standing orders permitting summary jury trials in certain cases. *Id.*

27. At least five federal district courts have local rules permitting mandatory mediation. *Id.*

28. *Id.* at 912.

29. However, in private ADR, such as rent-a-judge programs, there is a concern that private dispute resolution providers are wooing away public judges with the lure of higher salaries that the public sector cannot offer. This has been seen by some as counterproductive to the judicial system. *See* Johnson, *supra* note 2, at D20; *see, e.g., Exploring the Issues in Private Judging*, JUDICATURE, Jan./Feb. 1994, at 203 (discussing various issues regarding private judging).

30. Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993).

31. Arbitration in both its private and public (court-annexed) forms has helped in this respect. *Cf.* Dayton, *supra* note 21, at 76.

32. G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 U.C.L.A. L. REV. 623 (1988).

33. RISKIN & WESTBROOK, *supra* note 23, at 121 (citing Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 854-855 (1961)).

1925 Congress enacted the United States Arbitration Act, more commonly known as the Uniform Arbitration Act, and today almost every state has enacted some form of arbitration legislation.[34] The Supreme Court has also given its approval to arbitration by repeatedly enforcing agreements to arbitrate, even in cases involving anti-trust or other statutory claims.[35] Arbitration has enjoyed wide acceptance in a number of contexts; most notably, in the resolution of construction, insurance, and labor-management disputes.[36]

Arbitration possesses characteristics that differ from traditional adjudication in many respects.[37] The most notable advantage of arbitration, as compared to adjudication, is the rapid, relatively inexpensive, and efficient resolution of a dispute.[38] Other purported benefits of arbitration are that it: provides a private forum that avoids unwelcome publicity, preserves the good will between the parties, allows the use of an arbitrator with specialized expertise in the subject matter of the dispute,[39] and gives the parties freedom from being bound by established legal rules of law in resolving the dispute.[40] Moreover, unless otherwise agreed upon, arbitration is normally not appealable.[41] Additionally, in many instances, traditional adjudication can be altered to resemble the more abbreviated arbitration-type procedure if the parties agree to certain stipulated procedures.[42]

As mentioned above, publicly-provided, court-annexed arbitration has been used in recent years as an alternative to private arbitration in order to relieve

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34. John V. O'Hara, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a "Better Way"?* 136 U. PA. L. REV. 1723, 1728 (1988) (noting that every state except Vermont has adopted arbitration legislation closely resembling the Uniform Arbitration Act).

35. *Id.* at 1728 (citing Southland v. Keating, 465 U.S. 1 (1984); Perry v. Thomas, 482 U.S. 483 (1987); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985)).

36. RISKIN & WESTBROOK, *supra* note 23, at 122. In 1985 alone, 3735 cases involving claims totaling $646 million were filed in the construction industry. *Id.*

37. *See, e.g.*, RISKIN & WESTBROOK, *supra* note 23, 120-55 (noting general procedural aspects of arbitration). However, this section of the Note will not concentrate on the specific procedural differences between arbitration and adjudication.

38. *See* O'Hara, *supra* note 34, at 1731.

39. *Id.* at 1740. Although this has been noted as a benefit of arbitration, the use of an expert may also prove detrimental. Arbitrators that are familiar with an industry's practice may also have "deeply ingrained beliefs and prejudices," thus perhaps losing the benefit of impartiality. Also, if a non-expert is used, they might bring a fresh approach to a problem. *Id.*

40. *Id.*

41. *DDI Seamless Cylinder Int'l*, 14 F.3d at 1166.

42. The parties can agree to various stipulated procedures in order to expedite the resolution of their dispute. *See, e.g.*. Brotherhood Shipping Co. v. St. Paul Fire & Marine Ins. Co., 985 F.2d 323, 327 (7th Cir. 1993) (parties agreeing to waive right to present oral testimony and instead treat the summary judgment proceeding as the trial on the merits); Planned Parenthood Ass'n./Chicago Area v. Chicago Transit Auth., 767 F.2d 1225, 1228 n.3 (7th Cir. 1985) (parties agreeing that the hearing on preliminary injunction shall be deemed the trial on the merits as well); United Auto Workers v. Randall Div. of Textron Inc., 5 F.3d 224, 227 (7th Cir. 1993); Peterson v. Lindner, 765 F.2d 698, 700 (7th Cir. 1985) (parties agreeing to trial on stipulated facts).

federal judicial caseloads.[43] It is by far the most widespread form of mandatory ADR used in the federal courts.[44] As with normal, private arbitration, "[t]he aims of court-annexed arbitration are to reduce the cost of litigation, to facilitate speedy disposition of claims, and to reduce the overall number of cases going to trial."[45] Using these criteria, court-annexed arbitration has generally been successful in its goals.[46]

Even though federal court-annexed arbitration is mandatory, there are inherent differences between public and private ADR in addition to the above-stated attributes of court-annexed arbitration that purport to justify its existence.[47] There are barriers to the voluntary use of private ADR that are not present with public court-annexed arbitration.[48] These include a party's hesitancy or apprehension to suggest ADR because doing so may suggest that their case is weak; this is otherwise known as "signaling."[49] Furthermore, the asymmetric ability of the parties to bear the costs of delay is another barrier.[50] In other words, "[o]ne of the primary reasons that parties might not enter into an ADR agreement even when it can produce private benefits is that the delay associated with trial is frequently advantageous to one side. . . ."[51] Another barrier to voluntary ADR are the lawyer-client conflicts of interest that can develop in respect to fees.[52] Because of these barriers to private ADR[53] and the inherent advantages of arbitration,[54] publicly provided ADR such as court-annexed arbitration is said to be not only a justifiable but a preferable alternative.[55]

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43. *See* Bernstein, *supra* note 30. In 1978, Congress authorized the creation of the first three federal district court-annexed arbitration programs. *Id.* The programs required parties to participate in a mandatory court-annexed arbitration hearing as a precondition to obtaining a trial. *Id.* Litigants unhappy with the arbitration result could ask for trial *de novo* subject to certain penalties in some districts. *Id.*; *See, e.g.*, A. Leo Levin & Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985).

44. *See* Dayton, *supra* note 21, at 898. At least ten federal district courts now have some form of mandatory court-annexed arbitration on a consistent basis. *Id.* Most districts' programs are modeled after either the Eastern District of Pennsylvania or the Northern District of California which are the two oldest arbitration programs currently operating in the federal courts. *Id.* at 900. For procedural details regarding the programs see *Id.* at 900-04 and Bernstein, *supra* note 30, at 2177-186.

45. Dayton, *supra* note 21.

46. *See*, Levin & Golash, *supra* note 43, at 33-36; Dayton, *supra* note 21, at 904.

47. *See*, Bernstein, *supra* note 30.

48. Bernstein, *supra* note 30, at 2189-97.

49. *Id.* at 2191-93.

50. *Id.* at 2191-94.

51. *Id.* Moreover, the party who is better able to bear the cost of delay is usually unwilling to give up this strategic advantage. *Id.*

52. *Id.* at 2195. "A lawyer paid on an hourly basis has a strong incentive to encourage his client to request a trial since most legal fees are earned during discovery and trial." *Id.*

53. *Id.* at 2196. Another argument for court mandated ADR is the nature of tort claims. In the tort context, the parties rarely have the opportunity to bargain before the dispute arises, and, therefore, delay almost always favors the defendant. *Id.*

54. *See*, Bernstein, *supra* note 30.

55. *Id.*

As previously mentioned, federal district judges have implemented ADR programs to help reduce their caseload.[56] The authority by which federal district judges effect the various ADR procedures typically comes through local rules promulgated by the district where the judge sits.[57] The authority for these local rules arises from FRCP Rule 16 or Rule 83 or under the doctrine of "inherent judicial authority."[58]

Prior to amendment in 1993, Rule 16(c)(7), in particular, invited the parties to a lawsuit to consider "the use of extrajudicial procedures to resolve the dispute."[59] Advocates of ADR in federal courts contend that pre-amended Rule 16 authorizes federal district courts to implement mandatory ADR procedures.[60] There is also case law to that effect.[61] However, some critics, including Judge Richard Posner,[62] posit that Rule 16 gives no authority to implement such ADR procedures.[63]

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56. *See, e.g., supra* notes 25-28.

57. Dayton, *supra* note 21, at 932.

58. *Id.* "Inherent judicial authority" seems to have no set definition. However, it implies the inherent power of the court to exercise their discretion in regulating the practice of law in their court.

59. Fed. R. Civ. P. 16(c)(7) (1983) provides that "[t]he participants at any [pretrial] conference under this rule may consider and take action with respect to the possibility of settlement or *the use of extrajudicial procedures to resolve the dispute.*" (Emphasis added).

60. *See* Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818 (1988) (stating that Rule 16 was amended in 1983 with the unmistakable purpose of encouraging ADR as a significant part of the judicial process).

61. *See, e.g.*, Home Owner Funding Corp. of America v. Century Bank, 695 F.Supp. 1343, 1347 n.3 (D. Mass. 1988) (indicating the court has the authority to order a summary jury trial under Rule 16); Federal Reserve Bank of Minneapolis v. Carey-Canada, 123 F.R.D. 603 (D. Minn. 1988) (court has authority to compel participation in summary jury proceedings); Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988) (citing Rule 16 as basis for compelling participation in summary jury trial); Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 599 (S.D. Ohio 1987) (indicating Rule 16 gives the court authority to conduct summary jury trials) (citing Dayton, *supra* note 20, at 932, n.188).

62. *See* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366 (1986). Judge Posner states:

> I can also find nothing in rule 16 (pretrial conference) to suggest that judges are authorized to convene juries to assist in settlement. It is true that rule 16(c)(7) permits the participants in the pretrial conference to "consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." But the Advisory Committee's note to the 1983 amendment which added this subsection does not mention summary jury trial or authorize any special procedure for encouraging settlement.

Id. at 385. However, Posner later concedes that "[o]f course not everything not expressly authorized by the federal rules is therefore forbidden to federal judges." *Id.* at 386.

63. *See, e.g.*, Note, *Limits of Judicial Authority in Pretrial Settlement Under Rule 16 of the Federal Rules of Civil Procedure*, 2 OHIO ST. J. on DISP. RESOL. 311, 330 (1987); Dayton, *supra* note 21, at 932-37.

Most ADR procedures are authorized and implemented through local rules in accordance with Rule 83[64] of the FRCP.[65] Rule 83 permits federal district courts to promulgate local rules governing their practice as long as these rules are not inconsistent with other rules of the FRCP.[66] Because Rule 83 states that the local rules must merely be consistent with the other federal rules, Rule 83 gives the federal district courts broad discretion to fashion local rules and promulgate orders to implement ADR procedures as they see fit.[67]

In a few districts, ADR procedures are imposed on parties by court order.[68] This practice is usually justified under Rule 83 or under the doctrine of "inherent judicial authority".[69] While these orders are not subject to the rule-making procedures of Rule 83, they must be consistent with both the Federal Rules and the local rules of that district court.[70]

B. Federal Magistrate Judges

"Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable."[71] Although others do not share the same zeal regarding the proper function of federal magistrate judges,[72] it is conceded that magistrate judges have indeed lessened the workload of federal district judges.[73] Federal magistrate judges were first introduced into the federal court system following enactment of the Federal Magistrates Act of 1968.[74] Magistrates were instituted to meet the demands of an overwhelmed federal docket, however, district courts have utilized magistrates in less traditional capacities.[75] For example, magistrates

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64. Fed. R. Civ. P. 83 provides in pertinent part: "Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules."

65. *See* Dayton, *supra* note 21, at 937.

66. *See supra* note 65.

67. *See* Dayton, *supra* note 21, at 937.

68. *Id.* at 944.

69. *See supra* note 59; *see also, e.g.,* McKay v. Ashland Oil Co., 120 F.R.D. 43, 48 (E.D. Ky. 1988) ("mandatory summary jury trials would seem to be within the inherent power of the court"); Federal Reserve Bank of Minneapolis v. Carey-Canada, 123 F.R.D. 603, 604 (D. Minn. 1988) ("the court possesses the authority to compel participation and attendance in a summary jury trial").

70. *See* Dayton, *supra* note 21, at 944.

71. Government of the Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989), *cert. denied,* 495 U.S. 949 (1990).

72. Most of the controversy regarding the proper role of magistrates is their expanding judicial power with regard to Article III of the Constitution. *See, e.g.,* Raymond P. Bolanos, Note, *Magistrates and Felony Voir Dire: A Threat to Fundamental Fairness?,* 40 HASTINGS L.J. 827 (1989); Brendan L. Shannon, Note, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer,* 33 WM. & MARY L. REV. 253 (1991).

73. *Cf.* Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters,* 137 U. PA. L. REV. 2215, 2216 (1989); Bolanos, *supra* note 72, at n.48.

74. 28 U.S.C. §§ 631-639 (1988).

75. *See* Bolanos, *supra* note 72, at 839.

now exercise many of the same powers as federal district judges, such as: deciding motions, hearing evidence, instructing juries, and rendering decisions in certain civil and criminal cases.[76] It should be noted that any judgments entered by a magistrate are appealable to the applicable court of appeals.[77]

The empowerment of federal magistrate judges comes from federal statute.[78] The duties of magistrates are also found in federal statute.[79] Congress has authorized both full-time and part-time magistrates.[80] While acting in their judicial capacities, full-time magistrates "may not engage in the practice of law, and may not engage in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers."[81] Moreover, "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."[82] In summary, because of the increasing federal caseload, federal magistrate judges perform an essential function in the courts that is considered indispensable in modern federal jurisprudence.[83]

IV. THE INSTANT DECISION

In *DDI Seamless Cylinder*,[84] the Seventh Circuit Court of Appeals addressed (1) whether a federal magistrate judge could be an arbitrator; (2) whether the "arbitration" consented to by the parties could alternatively be described as a stipulated procedure; and (3) whether liquidated damages could be imposed on General Fire in the event of default on the judgment.[85] Chief Judge Richard Posner, writing for the three-judge panel, first noted that General Fire was correct in stating that arbitration is not in the job description of a federal judge, including a magistrate judge.[86] Further, the court stated that federal statutes authorizing arbitration do not "appear" to authorize the appointment of judges or magistrates as arbitrators.[87] Moreover, it was noted that when parties consent to proceed before a magistrate judge, the magistrate is authorized only to "order the entry of judgement in the case" and not to make an arbitration award.[88] The court stated

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76. *See* Shannon, *supra* note 72, at 253.
77. 28 U.S.C. § 636(c) (1988).
78. *See supra* note 74.
79. 28 U.S.C §§ 632, 636 (1988).
80. 28 U.S.C. § 632 (1988).
81. 28 U.S.C § 632(a) (1988). Different rules of conduct apply to part-time federal magistrate judges. 28 U.S.C § 632(b) (1988).
82. 28 U.S.C. § 636(b)(3) (1988).
83. *See, e.g., supra* note 73.
84. 14 F.3d 1163 (7th Cir. 1994)
85. *Id.* at 1165-68.
86. *Id.* at 1165.
87. *Id.*
88. *Id.* (citing 28 U.S.C. § 636(c)(1) (1988)).

that an arbitration award must be confirmed by the district court to be enforceable.[89] Therefore, judges acting as arbitrators could present the novel scenario where one judge issues an arbitration award and the winner presents that award to another judge for an order of confirmation.[90] The court envisioned an even more curious procedure where, on day one, a magistrate would, while wearing his judges's hat, encourage the parties to submit their dispute to arbitration; on day two, while wearing his arbitrator's hat, the magistrate would arbitrate the parties' dispute; and on day three, while wearing his judge's hat once more, the magistrate would finally confirm the arbitration award.[91]

In finding that the procedure used in the lower court was not an arbitration, the court stated there was an alternative characterization of the procedure the magistrate judge and the parties employed in the instant case.[92] It was that the parties stipulated to an abbreviated, informal procedure which falls within a magistrate's inherent judicial capacity.[93] Further, the court noted that one way to describe the framework of the underlying decision is that the parties agreed: (1) that the judge would make a decision on the record consisting of an auditor's report plus the parties' objections from oral argument, and (2) that they would not appeal the magistrate's decision.[94] The court noted the parties could have also agreed to binding arbitration, albeit before an arbitrator rather than a judge.[95] It was then indicated that the magistrate did indeed have authority to decide the so characterized stipulated procedure which was merely mislabeled as arbitration.[96]

Judge Posner noted that one of the significant differences between arbitration and adjudication is that unless the parties provide otherwise, an arbitrator's award is generally not appealable,[97] but is subject only to limited judicial review.[98] The court went on to state that because the parties agreed not to appeal the magistrate's decision, General Fire was without recourse except for the

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89. *Id.*

90. *Id.* Although Judge Posner conceded this was an ingenious idea and since ADR was "all the rage these days -- since at least one state (Connecticut) already authorizes its judges to moonlight as arbitrators, . . . the day may not be distant when federal judges will be recommissioned (or issued supplementary commissions) as arbitrators. But it has not arrived." *Id.*

91. *Id.* at 1165-66. Further, the court noted an order emanating from such a procedure would be void as if a "judge issued an order directing President Clinton to go on a pilgrimage to Mecca"; thus having no legal effect. *Id.* at 1166.

92. *Id.* at 1166.

93. *Id.* The court noted that stipulated procedures had been used by parties before in the Circuit. *See, e.g., supra*, note 42.

94. *DDI Seamless Cylinder*, 14 F.3d at 1166.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* Under the federal arbitration code, a party can seek to vacate an award by showing that it is based on fraud, arbitrator's conflict of interest, the arbitrator exceeded the terms of his reference, or that his award is too indefinite to enforce. *Id.* (citing 9 U.S.C. § 10(a) (1947)); Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117, 120 (2nd Cir. 1991).

determination of the magistrate judge's authority which the court had previously decided.[99]

Next, the court commented on the liquidated damages provision of the magistrate's order which established that General Fire was to pay $150 for each day the judgment was late in payment.[100] The opinion noted it was unusual to have such a provision in a final order since a plaintiff who obtains a judgment is already entitled to post-judgment interest by way of statute.[101] Regardless, the court found that General Fire had forfeited any challenge to the magistrate's authority regarding the liquidated damages because the issue was not properly briefed on appeal.[102]

Finally, the court stated that although it preferred the alternative characterization of the magistrate's order as a stipulated procedure instead of an arbitration, it would not pretend that its characterization was the actual intent of the parties.[103] The court stated that perhaps the parties and the magistrate really did intend for him to step out of his judicial role and become an arbitrator.[104] However, the court stated, "[o]n balance we think it slightly more plausible to suppose that the parties and the magistrate judge were agreeing to an abbreviated judicial procedure rather than an unauthorized arbitral one. But only slightly."[105] In conclusion, the court noted that the judgment was affirmed and that "General Fire had better hurry up and pay [the judgement] because it's growing by $150 every day . . . ."[106]

V. COMMENT

A. The Instant Case

The court in *DDI Seamless Cylinder* was correct in its holding that the judgment should be affirmed. However, the court's reasoning was faulty. The court should have held that the parties were free to stipulate to an arbitration in its traditional sense and that the federal magistrate judge was free to arbitrate their dispute as such.

In finding the magistrate had no power to arbitrate, Judge Posner stated that arbitration was not in the job description of a federal judge or magistrate.[107]

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99. *DDI Seamless Cylinder*, 14 F.3d at 1167.

100. *Id.* Because the liquidated damages issue is not pertinent to the main thrust of this Note, limited discussion is warranted.

101. 28 U.S.C. § 1961 provides that a party is entitled to the current T-bill rate (currently about 3 percent per annum). *Id.* Further, the liquidated damages provision imposed a penalty of 43.8 percent per annum. *Id.*

102. *Id.* at 1168.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1165.

Further, he noted that federal statutes authorizing arbitration do not "appear" to authorize the appointment of federal judges or magistrates as arbitrators.[108] Judge Posner also stated that "it is suggestive that when the consent of the parties to proceed before a magistrate judge is required he is authorized to 'order the entry of judgement in the case'[109] -- not to make an arbitration award."[110] As discussed below, these points are faulty at best in attempting to disqualify the magistrate's authority to arbitrate the case in that the court is construeing these statutes in an overly restrictive manner.

Merely because arbitration is not within a federal magistrate's job description does not necessarily prohibit a magistrate from arbitrating a dispute. The same argument holds true regarding the federal arbitration statutes not "appearing," as stated by the court, to authorize magistrates to arbitrate disputes.[111] The court negatively inferred from the statutes, underlying a magistrate's duties, that unless stated magistrates can not act as arbitrators. More simply put, the court inferred that if the statutes do not specifically state you are able to arbitrate the dispute then you shall not be able to do so. This negative inferential reading does not make sense in light of the fact that Congress has authorized the use of both arbitration and magistrates to alleviate the burden of federal judges and their dockets.[112] This reading of the statutes seems unduly restrictive, unfounded and of little merit. Moreover, the court's reading of the statute is that a magistrate judge is authorized only to order entry of a judgment, and not an arbitration award; this does not necessarily prohibit the magistrate from issuing such an award. Once again, this appears to be a negative inferential reading of the applicable statute which seems counter to true Congressional intent.[113]

To justify the procedure below, Judge Posner stated it was a stipulated procedure and not an arbitration.[114] Here, it seems the court was involved in a game of semantics. The court circumvented the arbitration issue by describing what the parties agreed to as a stipulated procedure. The court's purported descriptions of the procedural framework in the instant case was a matter of form over substance. The parties agreed to an arbitration with the magistrate as an arbitrator; the parties did not agree to a "stipulated procedure" as described by the court. The court's actions in the instant case are analogous to a court rewriting a contract for two parties. It also appears odd that the court endorsed a stipulated procedure but rejected the very same format under the alternative label of arbitration.

The court should have held that regardless of the proceeding's label, the parties stipulated to the procedure as an arbitration *per se* and not some different

108. *Id.*
109. *See supra*, note 88.
110. *DDI Seamless Cylinder Int'l*, 14 F.3d at 1165 (citing 28 U.S.C. 636(c)(1)(1988)).
111. 9 U.S.C. §§ 1 et. seq. (1947) and 28 U.S.C. §§ 651 et. seq. (1947).
112. *See, e.g., supra*, notes 26, 31, 32, 75-77.
113. It seems the court is trying to draw legislative intent from the text of the statute.
114. *DDI Seamless Cylinder Int'l.*, 14 F.3d at 1166.

procedure as the court described. Both parties agreed to the procedural framework that was to be utilized and exactly how the magistrate was to decide the case.[115] Further, it should be noted that similar parties have previously utilized various stipulated procedures in the Seventh Circuit.[116] Due to these considerations, the court should have let the instant parties call the proceeding whatever they wanted--even arbitration because that word by itself does not possess any independent legal significance.[117] A possible explanation of the court's decision is Judge Posner's predisposed hostility towards ADR in general.[118]

Moreover, if the court wanted to take a hard-line stance regarding the procedure used, it should not have allowed the decision to stand. It should have then held that the parties agreed to arbitrate their dispute and should not have created a different animal under the auspices of adjudication. However, it is obvious the court was indeed aware of the equities involved because of its endorsement of the so-called stipulated procedure and the fact that the parties agreed not to appeal the magistrate's decision. Regardless, if the court was to take such a narrow view, it should not have let equity undercut its conservative interpretation of the law. The court would have accepted the procedure had it been stipulated to as non-arbitral, but it rejected the same framework because it was called arbitration. Therefore, since the court adopted the stipulated procedure which was in substance an arbitration, this would lead one to ask the question: what is the difference? Answer: there is none.

B. Court-Provided Arbitration

The instant case provides a basic framework for a possible new type of federal court-connected alternative dispute resolution. In what this Note has defined "court-provided arbitration," the federal court, not private parties, would provide an arbitration forum by which parties could resolve disputes.[119]

Authority for this type of ADR procedure exists pursuant to Rule 83[120] or Rule 16[121] of the Federal Rules of Civil Procedure. As discussed earlier, both of these rules have allowed federal courts to implement court-connected ADR programs in the past.[122] However, as proposed, because this procedure would

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115. *Id.* at 1164.

116. *See supra*, note 42.

117. In other words, merely labeling a proceeding "arbitration" does not connote a strict legal procedure where deviation is forbidden.

118. *See supra*, note 62 (suggesting J. Posner is hostile to ADR procedures).

119. Although this Note will not delve into the specific details regarding the exact procedure of such a program, it will attempt to set forth a general framework in how it might operate and its accompanying attributes. Moreover, such an ADR program could be mandatory much like some court-annexed arbitration. However, for this note's purposes, it will be assumed to be voluntary.

120. *See supra*, note 64.

121. *See supra*, note 59.

122. *See supra*, notes 60-61, 65.

be voluntary, the chances that a party would challenge the decision on grounds of authority would likely be reduced.

This procedure would operate much like ordinary arbitration except for the fact that a magistrate,[123] and not a third party, would act as arbitrator. The parties could elect to opt-in to such a program as soon as the pleadings have been filed or at the pre-trial conference. The pre-trial conference would seem more plausible as judges might attempt to persuade likely case candidates to pursue such an avenue. After the case had been assigned to the program, the parties would then brief the issues and later present oral arguments to the magistrate. Subsequent to argument the magistrate would render a non-appealable decision, similar to private arbitration.[124]

There are many attributes of implementing such a publicly-provided arbitration program. With court-provided arbitration, most of arbitration's inherent benefits would be present. Most notably, the rapid, relatively inexpensive and efficient resolution of the dispute would be attained. Litigation often times is protracted and expensive, and would be avoided. On the other hand, a potential disadvantage could be that a magistrate would be the arbitrator and not a specialist in a particular field. Although this might be considered a shortcoming to this proposal, it has been said that using an expert may sometimes prove detrimental in arbitration.[125] Among other disadvantages noted is that the arbitrator might have deeply ingrained beliefs and prejudices regarding some industry practices that would not be present with a non-expert.[126] Further, by utilizing an experienced decision-maker such as a magistrate, it is possible that final decisions would be better reasoned than those rendered by an expert in the parties' particular field who is not experienced in dispute resolution.

In addition, because this type of arbitration is directly connected to the court, the aforementioned deficiencies associated with private ADR would be absent.[127] Specifically, there would be no "signalling" to the other party regarding the supposed weakness of one's case. Also, the lawyer-client conflicts of interest regarding fees would be minimized. Further, the chances that a party will attempt to delay the resolution of their dispute simply because they are able to bear the accompanying costs would be greatly reduced due to the voluntary nature of court-provided arbitration.

Another possible benefit of this program would be the retention of qualified decision makers in the public sector. Because private arbitration has taken some judges into the private sector,[128] offering a publicly-provided alternative with the same benefits as private arbitration may reduce the demand for such private

123. A magistrate, instead of a federal district judge, would be preferable because of the aforementioned heavy caseloads of federal district judges.

124. The decision of the arbitrator/magistrate could be appealable in the same instances as an arbitrator's decision is subject to limited judicial review. *See* 9 U.S.C § 10(a) (1947).

125. *See supra*, note 39.

126. *Id.*

127. *See supra*, notes 48-53 and accompanying text.

128. *See supra*, note 29.

arbitration. Thus, there would be less demand for judges in the private sector, preserving them for the public sector.

An additional benefit of court-provided arbitration would be an added air of legitimacy to its results. By having a federal magistrate, empowered by Congress, resolve issues instead of using a third party picked by the parties to arbitrate the dispute, this will aid the legitimacy of the final results of such a program. These decisions would be contrasted with the sometimes capricious ones that parties may feel are handed down by private arbitrators.

Because the federal judges or magistrates could have a hand in funnelling cases towards court-provided arbitration, certain types of cases could be encouraged to be resolved through this process. Common tort and contract-related suits based on similar facts, such as the instant case, would be better suited for resolution in this type of program due to their frequent results. On the other hand, cases having potential public policy or Constitutional implications could be encouraged to stay within the traditional adjudication process. This would have the effect of keeping public law out of the hands of private parties.[129] In addition, by taking more private disputes off the docket, like any ADR program, this would give indigent litigants better access to the courts.[130] By the same token, indigent litigants utilizing this program would be provided an inexpensive method to resolve disputes as contrasted with traditional, often expensive, adjudication. In summary:

> [w]hile arbitration . . . may be initiated and completed outside the judicial framework, some of the most promising devices, such as court-annexed arbitration, [the] summary jury trial, and the various processes of judge-assisted settlement, are all ADR processes within the judicial system. The issue thus is not competition between courts and ADR, but rather what process of dispute resolution is best for each individual dispute.[131]

The ADR program submitted above tries to do just that: channel specific disputes so as to offer the best resolution for that particular case. It is also offered for the purpose of proposing yet another form of court-connected alternative dispute resolution that may ease the burden of the federal dockets. Although this program as set forth above is not fully developed, it has merit, is a valid proposal, and is worthy of further inquiry.

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129. *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

130. *Id.* at 674.

131. *See* McKay, *supra*, note 60 at 822.

VI. CONCLUSION

Although the case was ultimately decided correctly, the court's reasoning is faulty and its analysis is less than convincing. The court seems to be playing a game of semantics that suggests form over substance. Regardless, the case helps lay a basic framework for a proposed type of court-connected arbitration. This type of ADR program or some variance thereof, may prove to be a viable option to future parties in resolving their disputes.

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