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Enforceability of an Agreement to Submit to a Non-Arbitral Form of Dispute Resolution: The Rise of Mediation and Neutral Fact-Finding - Annapolis Professional Firefighters Local 1926 v. City of Annapolis, The

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The Enforceability of an Agreement to Submit to a Non-Arbitral Form of Dispute Resolution: The Rise of Mediation and Neutral Fact-Finding

Annapolis Professional Firefighters Local 1926 v. City of Annapolis[1]

I. INTRODUCTION

Agreements between employers and unions frequently specify a form of alternate dispute resolution to be utilized in the event of a future dispute. *Annapolis* addresses the issue of the enforceability of a written agreement to submit future disputes to some form of non-arbitral resolution such as mediation or neutral-fact finding.

II. FACTS AND HOLDING

The dispute between the Annapolis Professional Firefighters Local 1926 ("Union") and the City of Annapolis ("City") developed in April 1993, during negotiations to form a new labor contract.[2] The prior contract, effective from July 1, 1990 until June 30, 1993, was governed by a clause that specified automatic renewal absent a new agreement.[3] The prior contract further provided that a party could only modify the agreement by notifying the other party at least 120 days prior to June 30, 1993.[4] If notice seeking modification was made within the proper time, the contract specified that both sides would negotiate the proposed changes.[5] Article 28 of the contract provided:

> If after a reasonable period of negotiations over the terms of an agreement, a dispute exists between the City and the Union, the parties may mutually agree that an impasse has been reached; except that if such dispute exists as of May 1, 1993 an impasse shall be deemed to have been reached. Whenever an impasse has been reached, the dispute shall be submitted to mediation. If the parties are unable to agree to a mediator the Division of Mediation and Conciliation shall be required to provide a mediator. The parties hereto agree, that should the

1. 642 A.2d 889 (Md. Ct. Spec. App. 1994).
2. *Id.* at 891.
3. *Id.* Article 27 of the contract specified that it would "automatically be renewed from year to year hereafter unless a successor to this agreement is executed by the parties hereto." *Id.*
4. *Id.*
5. *Id.*

mediator recommend the process of fact-finding, that process shall be used in an advisory manner.[6]

During negotiations over a new contract in April 1993, the City, for the first time, insisted that captains and lieutenants were "supervisory personnel" and, therefore, barred by Chapter 3.32 of the Annapolis City Code from being members of the same bargaining unit as the non-supervisory firefighters.[7] The Annapolis City Code allows city employees to form a union, with the exclusive right to represent all employees in collective bargaining negotiation, if a majority of the employees in the "appropriate unit"[8] wish to form a union.[9] Section 3.32.050 C specifies that a unit will not be appropriate "if it includes both supervisory and nonsupervisory personnel."[10] Section 3.32.070 B of the City Code states that any dispute as to whether the City or a union has committed an unfair labor practice is to be resolved by the State Mediation and Conciliation Service.[11] The City proposed to the Union that the lieutenants could remain in the bargaining unit until October 1993, during which time a third party would decide the question of their supervisory status; but the captains would be removed from the unit immediately.[12] The Union rejected the City's proposal and the collective bargaining agreement expired without a new agreement being reached.[13] The City stated that the collective bargaining agreement had expired, that the parties were at an impasse, and that both captains and lieutenants would thereafter be excluded from the bargaining unit.[14] In doing so, the City ignored the automatic extension provision.[15]

The Union filed a complaint for unfair labor practices with the Division of Labor and Industry.[16] The Union noted that twenty-five percent of the unit were captains or lieutenants and that by eliminating such officers from the Union, the

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6. *Id.*

7. *Id.* at 892.

8. Annapolis City Code § 3.32.010 defines "appropriate unit" as: "a group of employees recognized as appropriate for representation, using such criteria as similarity of job duties, skills, wages, educational requirements, supervision, hours of work, job location and working conditions, by an employee organization."

9. Annapolis City Code § 3.32.050 B.

10. Annapolis City Code § 3.32.050 C.

11. *Annapolis*, 642 A.2d at 889. The State Mediation and Conciliation Service was a statutorily created unit within the State Division of Labor and Industry. The Service's duties as set forth in title 4, subtitle 1 of the article included the mediation of labor disputes, and upon agreement of the parties, establishing arbitration boards to arbitrate such disputes. *Id.* at 891.

12. *Id.* at 892.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

employees' rights to self-organize were being violated by the City's bad faith.[17] The Commissioner of the Division of Labor and Industry responded that: (1) the Mediation and Conciliation Service had been abolished on July 1, 1991; (2) that the Division would not assert jurisdiction over the claim because they did not have the resources; and (3) the ordinance did not compel the Division to mediate.[18]

The Union responded by filing a complaint for injunctive relief claiming that their collective bargaining rights were being violated, that grave harm was being caused to the Union, that the due process rights of the Union members were being violated, and that it was without remedy to enforce Union members' rights.[19] The City moved to dismiss because: (1) the creation of new remedies for violations of the collective bargaining ordinance was for the City Council, not the courts; (2) Maryland's Anti-Injunction Act prevents courts from granting injunctive relief in this sort of labor dispute; (3) sovereign immunity barred the Union's claim; (4) the lieutenants and captains lacked a "due process" right to be represented by a Union; (5) the Union did not allege an immediate irreparable injury that could not be adequately compensated with money; and (6) the complaint failed to state a claim upon which relief could be granted.[20] The court denied the request for a preliminary injunction and dismissed the complaint.[21] In doing so, the court stated that there was no legal authority for the court to issue the injunction, the Union could seek relief from the Annapolis City Council, and that the Union did not establish that they would suffer immediate, irreparable injury which could not be compensated with money.[22]

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17. *Id.* Of the 80 members of the unit, 22 were captains or lieutenants, including the president and secretary (both lieutenants) of the Union who composed two-thirds of the Union's negotiating committee. *Id.*

18. *Id.* According to the 1992 Evaluation Report prepared by the State Department of Fiscal Services pursuant to the Program Evaluation Act:

> The Mediation and Conciliation Program was another casualty of Maryland's recent fiscal crisis. The program was eliminated in the Governor's budget for fiscal year 1992. Prior to that time, program staff mediated and arbitrated public sector labor disputes and supervised elections. The program also maintained a list of all the collective bargaining agreements in effect throughout the state. Currently, the division has suspended all activities in these areas, though the authorizing laws remain on the books.

Id.

19. *Id.* The complaint for injunctive relief stated that the union was "without an adequate administrative remedy or remedy at law to enforce their rights," that the unilateral removal of fire lieutenants and captains from the bargaining unit "void[ed] their opportunity to participate through collective bargaining in the setting of their terms and conditions of employment," "cause[d] grave harm to the organization and structure of the [Union]," and "violate[d] each and every plaintiff's rights to due process." *Id.*

20. *Annapolis*, 642 A.2d at 893.

21. *Id.*

22. *Id.* The order denying the request for preliminary injunctive relief and dismissing the complaint specified in relevant part:

> 1. There is no legal authority known to the Court which would support the issuance of an injunction against Defendant under the circumstances alleged in the Complaint;
> 2. As a result of the abolition of the State Mediation and Conciliation Service named in the City of Annapolis' collective bargaining ordinance, § 3.32.070 of the Annapolis City

The Union appealed the decision to the Court of Special Appeals of Maryland.[23]

The Court of Special Appeals affirmed the lower court's decision and held that the Union could ask the lower court to designate a substitute mediator or neutral factfinder in light of the parties' agreement to mediate their dispute and that such request is consistent with a general policy to avoid injunctions in labor disputes.[24]

III. LEGAL BACKGROUND

A. History of Enforcement of ADR Provisions

Throughout the early history of the United States there was much hostility expressed by the courts at the idea of enforcing an agreement to alleviate future disputes through any alternative dispute resolution process.[25] Over the last seventy years, however, courts have laid a foundation providing for the modern view that various types of alternative dispute resolution methods are valid and enforceable.[26]

Throughout the 1900's, United States courts expressed the view that an agreement to arbitrate an existing or future dispute was unenforceable unless allowed by a specific statute.[27] In 1920, New York enacted the first statute

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Code, Plaintiffs may seek relief from alleged unfair labor practices on the part of Defendant, including the issue of the exclusion of fire captains and fire lieutenants from the Annapolis Professional Firefighters' bargaining unit, by addressing their claims to the Annapolis City Council; . . . [and]

4. Injunctive relief is inappropriate because Plaintiffs have failed to establish that they will suffer immediate, irreparable injury which cannot be readily, adequately and completely compensated with money.

Id.

23. *Id.* In this appeal, the Union raises the single question, "Did the Court below err in failing to grant injunctive relief prohibiting the City of Annapolis from unilaterally excluding Fire Lieutenants and Fire Captains from the collective bargaining unit represented by [the Union]?" *Id.*

24. *Id.* at 895-96. The Court of Special Appeals held:

It is clear that, had such a remedy been requested by the union, the court could have designated a substitute mediator/neutral fact-finder in light of the parties' inability or unwillingness to agree themselves upon a substitute for the nonfunctional State Mediation and Conciliation Service. Unfortunately, except to the extent included within the union's general prayer for relief, that request was not made." "The union, and upon its request, the court, had a viable, less intrusive, and more appropriate alternative to the injunctive relief sought in this case. It is for these reasons that we shall affirm the judgment below, without prejudice to either party seeking further relief in the circuit court consistent with this Opinion.

Id.

25. Alison Brooke Overby, Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1139 (1986).

26. *Id.*

27. *Id.* "Courts historically were hostile to arbitration as an alternative means of dispute resolution, viewing arbitration as an unacceptable form of ousting the court from its jurisdiction." *Id.*

which enforced agreements to arbitrate future disputes.[28] In 1925, the first Uniform Arbitration Act was adopted.[29] It provided only for the irrevocability of agreements to arbitrate existing disputes.[30] In 1925, Congress moved to change the common law by enacting the Federal Arbitration Act which stated that written agreements to arbitrate existing or future disputes were valid, irrevocable and enforceable.[31] In 1955, the second Uniform Arbitration Act was adopted, making agreements to arbitrate future disputes irrevocable.[32] As of May of 1986, forty-five states had enacted statutes similar to the second Uniform Arbitration Act, enforcing agreements to arbitrate future disputes.[33] Presently, in most state and federal courts, agreements to arbitrate future disputes are valid, irrevocable, and enforceable.[34]

Maryland has adopted the Maryland Uniform Arbitration Act, which states that a written agreement to submit existing or future disputes to arbitration is irrevocable, valid, and enforceable, except for an agreement between employers and employees.[35] Agreements between employers and employees to arbitrate are not valid unless the agreement specifically references the Act and states that it applies.[36] The Act further states, that if the agreement to arbitrate future disputes provides a method of appointing a arbitrator, the court is to enforce this method, and if the agreed method fails, then it is the court's responsibility to appoint an arbitrator.[37] The Act demonstrates the continued hostility in Maryland to collective bargaining agreements which provide that arbitration is the preferred method of resolving future disputes.[38]

Courts in Maryland debated, for many years, the exception contained in the Maryland Uniform Arbitration Act providing that collective bargaining agreements to arbitrate future disputes were unenforceable. In 1988, in the case of *Anne Arundel County v. Fraternal Order*,[39] the highest court in Maryland finally

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28. Act of Apr. 20, 1920 ch. 275 N.Y. Laws 803 (current version at N.Y. Civ. Prac. Law §§ 7501-7514 (McKinney 1980)).

29. *See* Overby, *supra* note 25.

30. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597 (1928).

31. The Act's purpose was to erase the effects of years of judicial hostility toward arbitration. "In the wake of the Act, the historical judicial hostility to arbitration has disappeared in the federal courts and arbitration is now considered by the judiciary to be an acceptable and encouraged form of dispute resolution." Overby, *supra* note 25, at 1141.

32. The second Uniform Act is similar to the Federal Arbitration Act. Written agreements to arbitrate future disputes are irrevocable and enforceable. Courts have power to compel arbitration or stay proceedings pending arbitration of an arbitrable issue. *See* Overby, *supra* note 25, at 1141.

33. Overby, *supra* note 25, at 1139.

34. *Id.*

35. Maryland Uniform Arbitration Act, Md. Code, Cts. & Jud. Proc. § 3-206 (1957).

36. *Id.*

37. Md. Code Ann., Cts. & Jud. Proc. § 3-211, (1957).

38. Anne Arundel County, Maryland v. Fraternal Order of Anne Arundel Detention Officers & Personnel, 543 A.2d 841, 845-46 (Md. 1988).

39. *Id.* at 846.

decided, as a matter of public policy, that agreements to arbitrate future disputes should be enforceable even in the absence of a specific supporting statute.[40]

B. Enforcement of Non-Arbitral Dispute Resolution Agreements: Mediation & Neutral Fact-Finding

As more and more agreements to arbitrate future disputes are enforced, other nonarbitral forms of alternative dispute resolution such as mediation and neutral fact-finding have been incorporated into contracts.[41]

Agreements to mediate future disputes simply express the parties' desire to present their side to the mediator, a neutral third-party, whose sole purpose is to facilitate negotiation and settlement of the dispute.[42] A mediator does not have the authority to impose a settlement on the parties.[43] The mediator simply works with the parties to help them come up with a mutually satisfying agreement.[44]

Neutral fact-finding is a process more closely resembling arbitration than mediation.[45] There are two types of neutral fact-finding: binding and advisory.[46] In both types, the parties present their case to the neutral third party who decides the facts of the case and renders a decision based on those facts.[47] In binding neutral fact-finding, the decision is final and binds the parties.[48] In advisory neutral fact-finding, the decision represents only the neutral fact-finder's opinion, is not binding and can not be enforced.[49] If the agreement to submit future disputes to neutral fact-finding stipulates that a arbitrator will make a final decision in the case, the arbitrator is bound by the facts found by the neutral fact-

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40. *Id.* The *Anne Arundel* court held:

> We agree with the Union that the earlier refusal of courts to enforce agreements to arbitrate future disputes is no longer a sensible approach." "There is no sound public policy for distinguishing between the enforceability of some agreements to arbitrate disputes that might arise in the future and the enforceability of all other arbitration agreements. We believe that agreements to arbitrate future disputes generally should be enforceable even in the absence of a specific statutory provision.

Id.

41. Lucy V. Katz, *Special Issue on Alternative Dispute Resolution, Enforcing an ADR Clause - Are Good Intentions All You Have?*, 26 AM. BUS. L.J. 575 (1988).

42. *Id.* at 578. "In mediation a third party facilitates negotiation and settlement by suggesting options and clarifying areas of agreement and disagreement." *Id.* "Mediation contracts are essentially agreements to negotiate with the assistance of a third party." *Id.*

43. *Id.* "The mediator has no authority to impose a settlement; rather, a skilled mediator helps the parties fashion their own settlement." *Id.*

44. *Id.* at 579.

45. *Id.*

46. *Id.*

47. *Id.* The fact-finding "is usually limited to clearly delineated factual issues and does not necessarily resolve the whole dispute, although resolution of those issues may often result in a negotiated settlement." *Id.*

48. *Id.*

49. *Id.*

finder but has the responsibility of making the final decision in the case based on those facts.[50]

C. Neutral Fact-Finding Case Law

In *Blair v. Lovett*,[51] the Colorado Supreme Court provides a detailed analysis of the duties of an advisory neutral fact-finder and the effects of their decisions.[52] In that case, a teacher was dismissed despite the fact that the school board received the advisory opinion of the neutral fact-finding committee that the teacher should not be dismissed.[53] The teacher appealed and the Colorado Supreme Court held that the findings made by the neutral fact-finder were binding on the school board.[54] Therefore, the school board could only dismiss the teacher if the findings of fact made by the neutral fact-finding committee were sufficient to justify dismissal.[55] The court ruled that the neutral fact-finding committee had not provided the board with the facts necessary to make a decision, and that the neutral fact-finding committee would have to reconvene in order to provide the board with sufficient facts to make their final decision.[56] The court specifically held that the board could not make any findings of fact on their own and was bound by the committee's findings of fact.[57] On remand, the school board could only decide against the advisory committee's opinion if the facts found by the fact-finding committee supported their decision.[58]

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50. *Id.*

51. 196 Colo. 118, 582 P.2d 668 (1978).

52. *Id.*

53. *Id.* at 670. "On review, the board determined that the panel's findings were too sketchy and conclusory in nature to enable the board to decide whether to dismiss or retain Mrs. Lovett." *Id.* "The board then examined the transcript of the panel's proceedings, issued its own findings in substitution for those issued by the panel, and voted unanimously to dismiss Mrs. Lovett." *Id.*

54. *Id.* at 671. The court stated further that:

> [H]aving actually heard the testimony, the panel is in a better position than the board to evaluate the weight credibility of witnesses and other evidence. To permit the board to overrule the panel's fact findings on the basis of the "cold" hearing transcript would thus defeat one purpose of having an impartial hearing panel, and place decisions based on the evaluation of evidence in the hands of a body which has not actually seen and heard the witnesses. Such a holding would not comport with the legislative intent underlying this statutory scheme.

Id.

55. *Id.*

56. *Id.* at 673.

57. *Id.*

58. *Id.* "*Basic evidentiary* facts found by the panel are binding on the board if supported by competent evidence in the record. However, any *ultimate* findings of fact are not binding on the board because it, not the panel, has the power to determine what facts constitute the statutory grounds for dismissal." *Id.* (emphasis in original).

The case of *Olson v. Lovett*,[59] addressed the effect of a nonbinding fact-finding proceeding on a court who later hears the case.[60] In that case, the parties met with an advisory neutral fact-finder pursuant to a statute requiring that disputes initiate with this procedure.[61] The neutral fact-finder advised against the claimant who later took the matter to court.[62] The district court relied on the neutral fact-finder's advisory opinion and denied the claimant's motion.[63] The Minnesota Court of Appeals reversed the decision holding that the trial court could not base its decision on the findings of the advisory neutral fact-finder.[64]

D. The Enforceability of Agreements to Submit Future Disputes to Non-Arbitral Forms of ADR

Much debate has taken place regarding the enforceability of agreements to submit future disputes to nonarbitral forms of alternative dispute resolution including mediation and neutral fact-finding.[65] Courts have been reluctant to enforce these agreements because they: (1) usually lack statutory backing; (2) take away some of the courts power; (3) can be remedied by damages; and (4) do not ensure settlement of the case.[66]

As early as 1904, the Maryland legislature recognized that mediation and other forms of alternative dispute resolution were beneficial to parties involved in labor disputes.[67] Maryland's State Mediation and Conciliation Service of the Division of Labor and Industry ("Service") had existed since 1904.[68] The 1904 legislation authorized the Service to seek mediation between an employer and employees and allowed the Service to form an arbitration board if the parties so stipulated.[69]

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59. 457 N.W.2d 224 (Minn. Ct. App. 1990).

60. *Id.*

61. *Id.* at 225. The court referenced the statute by saying:

> In litigation involving an amount in excess of $50,000 in controversy, the presiding judge may, by order, direct the parties to enter nonbinding alternative dispute resolution. Alternatives may include private trials, neutral expert fact-finding, mediation, mini-trials, and other forms of alternative dispute resolution. The guidelines for the various alternatives must be established by the presiding judge and must emphasize early and inexpensive exchange of information and case evaluation in order to facilitate settlement.

Id.

62. *Id.* at 224.

63. *Id.* at 225. "The trial court stated: 'The Findings, Conclusion and Memorandum [of the neutral] are adopted as the Findings, Conclusion and Memorandum of this Court.'" *Id.*

64. *Id.* at 226. In making its' decision, the court relied on the fact that under the Minnesota statute court instructed ADR was to be nonbinding. *Id.*

65. *See* Katz, *supra* note 41, at 575.

66. *See* Katz, *supra* note 41.

67. *Annapolis*, 642 A.2d at 894.

68. *Id.* at 891.

69. *Id.*

In a 1985 case, the United States District Court for the Eastern District of New York enforced an agreement stipulating that future disputes regarding false advertising claims would be submitted to the National Advertising Division of the Council of Better Business Bureaus for an advisory determination of whether there was support for the claim.[70] Although the court recognized that the non-binding agreement did not involve a traditional form of arbitration, the court held that the contemplated dispute resolution process was a form of arbitration and, therefore, enforceable.[71] The court reasoned that this form of arbitration, although non-binding, would likely settle the dispute and, therefore, was enforceable as a temporary alternative to litigation even though it would not guarantee a settlement prior to litigation.[72] The court made it clear that the agreement between the parties to submit future disputes to a non-binding form of alternative dispute resolution was an agreement which could not be remedied at law because a breach of this agreement would bring substantial irrecoverable injury to the parties.[73] Therefore, the court used it's equitable power to grant specific performance of the contract.[74] The court stressed that the non-binding agreement was designed precisely to keep future disputes out of court and that monetary damages due to a breach of the contract would be impossible to determine since the value of skilled, speedy and inexpensive efforts available by specific performance would be too difficult to estimate.[75] Finally, the court stated that when alternatives to litigation are in the best interest of the parties and judicial administration, general public policy favored implementation of the alternative dispute methods.[76]

Courts have previously addressed the issue of using their equitable power to select a neutral fact-finder to make a non-binding advisory opinion in order to enforce a statute requiring that neutral fact-finding in future disputes take place.[77] In *Association of Classroom Teachers v. Independent School District #89*,[78] a teachers' collective bargaining agent requested that the court issue a writ of mandamus requiring the school board to select a neutral fact-finder from a list provided by the American Association of Arbitrators as specified in the governing statute.[79] The Supreme Court of Oklahoma issued the writ of mandamus to

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70. AMF, Inc. v. Brunswick Corp., 621 F. Supp. 456 (E.D.N.Y. 1985).

71. *Id.* at 460.

72. *Id.* at 461. The court reasoned that the non-binding ADR would either solve the dispute, or settle that there is actually a valid issue in dispute to be settled in a court of law. *Id.*

73. *Id.* at 462. "The agreement itself recognized that the legal process would not adequately address the parties' needs. Through their contract the parties have identified an injury sufficient to require the dispute resolution mechanism they thought most appropriate." *Id.*

74. *Id.* at 462-63.

75. *Id.* The court noted that lawsuits adversely affect parties' reputations, and that this was one of the reasons that the parties had agreed to settle disputes through ADR resolution. *Id.*

76. *Id.*

77. *See* Association of Classroom Teachers of Oklahoma City, Inc. v. Independent Sch. Dist. #89 of Oklahoma County, 540 P.2d 1171 (Okla. 1975).

78. *Id.*

79. *Id.*

select a neutral fact-finder from the list of arbitrators, binding the parties to an initial attempt at neutral fact-finding.[80]

One theory which justifies the enforcement of agreements to settle future disputes through nonarbitral alternative dispute resolution processes is presented by Professor Katz in the *American Business Law Journal*.[81] Professor Katz theorizes that alternative dispute resolution does not require the parties to be eager to settle their dispute.[82] The parties' agreement to submit to an alternative dispute resolution process assumes that the parties will be in heated dispute and that the non-litigation process will facilitate the resolution of the dispute faster, more efficiently, less costly, and in a less alienating way than traditional litigation.[83] Therefore, the argument that enforcement of the alternative dispute resolution method would be futile is without weight because more often then not the alternative method will result in a better overall solution then the litigation method. Measuring damages due to breach of the alternative method is, therefore, impossible to accomplish.[84]

IV. INSTANT DECISION

The *Annapolis* court began its analysis by referencing § 3.32.070 of the City ordinance, and Article 28 of the contract involved in this dispute, to point out that there was both a legislative direction and a voluntary written agreement to submit this very type of dispute initially to mediation, and later to neutral fact-finding.[85] The court noted that in a similar type of dispute in *Anne Arundel County* that agreements to arbitrate future disputes were enforceable notwithstanding the absence of governing statutes.[86] The court further noted that in *Anne Arundel*

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80. *Id.* at 1178. The court concluded that forcing the parties to go directly to litigation would not suffice as an adequate legal remedy. *Id.*

81. Katz, *supra* note 41, at 575.

82. *Id.*

83. *Id.* at 584. Professor Katz specifically states:

> A major flaw in the futility argument is its assumption that because one party does not want to settle through ADR, settlement will occur. This argument has virtually no logical or empirical support. In fact, it is difficult to imagine any experienced litigator or trial judge taking it seriously. Every dispute reaches a point at which one or both parties declare that settlement is impossible and that their demands and interests are so far apart that any discussion is a waste of time. Yet dozens of such cases settle every day in any busy trial court or law office. Resort to ADR presumes that settlement has not been achieved because there is a genuine and difficult dispute, probably accompanied by strong feelings and apparently irreconcilable differences. To agree to an ADR clause is to agree to participate in dispute resolution when the relationship is at its worst.

Id.

84. *Id.* The party trying to enforce the ADR agreement considers the use of ADR instead of litigation to be valuable, and thus, would be irreparably damaged by breach of the agreement. *Id.*

85. *Annapolis*, 642 A.2d at 892-93.

86. *Id.* at 894. "We believe that agreements to arbitrate future disputes generally should be enforceable even in the absence of a specific statutory provision." *Id.*

County, arbitration was held to be a favored method of dispute resolution especially for this type of situation.[87]

The court stated that in *AMF, Inc. v. Brunswick Corp.*,[88] an agreement to seek an advisory determination upon future dispute, was enforced as an arbitration agreement, although it was not arbitration in the traditional sense.[89] The court noted that the *Brunswick* court had stretched to find that the agreement called for arbitration rather than some other form of alternate dispute resolution because the *Brunswick* court felt that the validity of the agreement depended on the applicability of the Federal Arbitration Act.[90] The instant court stated that the *Brunswick* court's holding that the agreement was one to arbitrate was not a necessary stretch.[91]

For the first time in Maryland, the *Annapolis* court asserted that Maryland common law and the expanding liberal approach taken to modern day alternative dispute resolution agreements, demands that "a written agreement to submit either an existing or a future dispute to a form of alternative dispute resolution that is not otherwise against public policy will be enforced at least to the same extent that it would be enforced if the chosen method were arbitration."[92]

In doing so, the *Annapolis* court noted that various methods of alternative dispute resolution, such as mediation and neutral fact-finding, have been long recognized as equally beneficial methods to resolve disputes.[93] The court recognized that the Legislature had provided for a Mediation and Conciliation Service authorized to seek mediation between opposing parties in labor disputes as early as 1904.[94] The court expounded that there was no longer any rational

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87. *Id.*

88. 621 F. Supp. 456 (E.D.N.Y. 1985).

89. *Annapolis*, 642 A.2d at 894. The *Brunswick* court said:

> Viewed in the light of reasonable commercial expectations the dispute will be settled by this arbitration. That this might not end all controversy between the parties for all times is no reason not to enforce the agreement. The mechanism agreed to by the parties does provide an effective alternative to litigation, even if it would not employ an adversary process.

Brunswick, 621 F. Supp. at 461.

90. *Annapolis*, 642 A.2d at 895 n.6.

91. *Id.* Specifically, the *Annapolis* court stated:

> We recognize that alternative dispute resolution is an evolving concept and that new mechanism, often borrowing on more traditional methods, are being created. Although we would not likely be inclined to enforce an agreement to resolve a dispute through trial by combat or ordeal, we do not wish to put a straight jacket on the creative development of new forms of alternative dispute resolution that individual parties, or industries, find useful and preferable to litigation.

Id.

92. *Id.*

93. *Id.* at 894. "For disputes that are susceptible to it, mediation and neutral evaluation have become, throughout this State, equally 'favored method[s] of dispute resolution,' and we can see no rational basis for not enforcing agreements to utilize such methods in much the same manner as agreements to arbitrate are enforced." *Id.*

94. *Id.*

basis to differentiate, for purposes of enforceability, between an agreement to arbitrate and a agreement to utilize some other form of alternative dispute resolution.[95] The court reasoned that there was no basis for limiting dispute resolution methods that were preferable to litigation to the parties involved.[96]

The court, having held the agreement to mediate and submit to neutral fact-finding enforceable, next addressed the issue of whether it would be authorized to select a mediator to enforce the agreement since the agency selected to mediate had dissolved.[97] The court reasoned that since the Uniform Arbitration Act requires that a court shall appoint an arbitrator if the agreed method for selecting an arbitrator breaks down, a court should also have the power to select a mediator when the agreed upon method of selecting a mediator also breaks down.[98] The court noted that although the act governing arbitration was statutory, equity courts long had the power to specifically enforce agreements.[99]

Finally, the court stated that it was unfortunate that the Union had not requested the court to designate a substitute mediator/neutral fact-finder and instead had requested an injunction to retain captains and lieutenants within the bargaining unit.[100] The court stated that the standard of review to evaluate the lower court's denial of the injunction was abuse of discretion.[101] The court referenced the Maryland anti-injunction provision of the state labor statute which stated it's general preference for courts to avoid granting injunctive relief in a labor dispute until the plaintiff had made every reasonable effort to settle the dispute with the help of available dispute resolution mechanisms.[102]

The court held that based on the anti-injunction intent of the legislature and the fact that in this case the plaintiff had not requested the court to select a mediator to enforce the mediation/neutral fact-finding agreement, that there existed a more appropriate method to resolve the dispute without the use of an injunction. Therefore, the court also held that the judgment below had to be affirmed without prejudice to either party seeking relief in the circuit court based on this opinion.[103]

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95. *Id.* at 894-95.

96. *Id.*

97. *Id.* at 895.

98. *Id.*

99. *Id.* The court stated:

> Courts of equity are not, in the dispensation of justice, subject to those strict technical rules, which in other Courts are sometimes found in the way, and so difficult to surmount .... If such a decree can be put upon the record as will meet the substantial justice of the case, it will be done.

Id.

100. *Id.* at 895-96. "Unfortunately, except to the extent included within the union's general prayer for relief, that request was not made." *Id.*

101. *Id.* at 896.

102. *Id.*

103. *Id.*

V. COMMENT

The court's decision in the instant case is of considerable importance due to the immense effects it will have on future decisions. Prior to this case and after years of debate, Maryland Courts had come to the conclusion that a agreement to arbitrate a future dispute was enforceable even in the absence of a specific supporting statute. However, no court in Maryland had held that an agreement to use a non-arbitral dispute resolution process in the event of a future dispute was enforceable.[104] Therefore, the *Annapolis* court's decision to expand the arbitration precedent to encompass forms of non-arbitral dispute resolution, such as mediation and neutral fact-finding, was a tremendous step. After this case, any agreement to submit future disputes to any type of alternative dispute resolution process will be enforceable even in the absence of a specific supporting statute, as long as it does not conflict with public policy.[105]

There are many competing policies which must be carefully analyzed before a decision of this magnitude can be reached. First of all, it must be recognized that for decades, non-arbitral forms of dispute resolution have been beneficial to parties seeking resolutions of their disputes.[106] For this reason, more and more parties are agreeing to go through a non-arbitral type of dispute resolution process in the event of a future dispute. The reason that these types of alternative dispute resolution processes, such as mediation and neutral fact-finding, are so popular is because litigation is frequently looked upon as being more costly, aggravating, stressful, time-consuming, in-efficient, and alienating than some forms of alternative dispute resolution.[107] Often, parties who agree to use an alternate dispute resolution process do so because they feel that they will have more control over the outcome of the dispute and will reach a more mutually satisfying agreement then they would through litigation.[108]

There are many potential problems when agreements to go through some type of non-arbitral dispute resolution process are enforced. Foremost, mediation and advisory neutral fact-finding are non-binding forms of resolution.[109] Therefore, there is no guarantee that parties who go through these types of resolution processes will reach any conclusion to their dispute, and in the process it is quite possible that a tremendous amount of time and money will be spent in trying to reach a satisfactory resolution. Another problem that can arise in these types of processes is that one party may go through the alternate dispute resolution process in order to stall for time, without any serious intention of reaching a mutually satisfying resolution. When this happens, the other party can be left without a

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104. *Id.*
105. *Id.*
106. *Id.* at 893-94. The Maryland Legislature has recognized forms of ADR beneficial since 1904. *Id.*
107. *See* Katz, *supra* note 41.
108. *Id.*
109. *Id.*

solution to their problem, or in a worse position than when they started out. Litigation may be very frustrating, time-consuming, inefficient, and costly, but at least it guarantees an ultimate resolution of the dispute. Finally, many courts have worried that alternative dispute resolution processes are robbing them of their power and jurisdiction to deal with cases that they would normally have a right to govern.[110]

The *Annapolis* court in this case made the right decision but failed to analyze the competing policies that are presented by these issues. The court stated that an agreement to enter into a non-arbitral dispute resolution process should be enforced to the same extent as would an agreement to arbitrate.[111] As such, the court did not provide any reasons explaining their position.

There are two major problems that the *Annapolis* court should have addressed before making this decision. First, the court should have addressed the potential problems due to the non-binding nature of non-arbitral dispute resolution processes. The critics of non-arbitral dispute resolution methods argue that the non-binding nature of the methods make the methods less efficient and more costly than traditional litigation because the parties are not guaranteed a resolution of the dispute.[112] The response to this argument that the *Annapolis* court should have made is that although non-arbitral means of dispute resolution are non-binding, these methods of dispute resolution will reach a conclusion most of the time and the conclusion will most often be reached faster, more-efficiently, less costly, and less stressful than traditional litigation. Therefore, the benefits of enforcing non-arbitration agreements outweigh the costs of not enforcing them and is, therefore, a better overall solution to disputes.

The court also could have compensated for the fact that non-arbitral dispute resolution methods are indeed non-binding and provided a disclaimer that although agreements to go through a non-arbitral dispute resolution process are enforceable, that after a certain period of time without reaching a satisfactory conclusion, the dispute will proceed to litigation. Therefore, a party will not be left without a resolution to his problem if the alternate dispute resolution process fails.

Finally, the court could have stated that enforcing these types of non-arbitral dispute resolution methods is not taking away any of the court's power but rather making the court system more efficient. As long as the policy is to give the parties a certain amount of time to resolve their dispute through the non-arbitral method chosen, before allowing the parties to go through litigation, the courts will be retaining their jurisdiction and power. In addition, the courts' efficiency will increase because many cases will be resolved through alternative means.

110. *Id.*
111. *Annapolis*, 642 A.2d at 894.
112. *See* Katz, *supra* note 41.

VI. CONCLUSION

The holding in *Annapolis* that written agreements to submit to alternative forms of dispute resolution processes are fully enforceable as long as they do not violate public policy is a decision that will allow quicker and more efficient resolution of cases that are resolved both out of court through alternative resolution methods and cases that are resolved in court through the traditional litigation process. In making this decision, the court has made a significant improvement in the resolution of disputes both in and out of court.

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