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THE YEARBOOK ON ARBITRATION AND MEDIATION

An Innovative Update to Developments in Alternative Dispute Resolution

Editor-in-Chief's Welcome

Welcome to the Spring 2012 newsletter for the *Yearbook on Arbitration and Mediation*. Our Board of Executive Editors produces this newsletter bi-annually with the goal of providing a brief update on the latest happenings in the areas of arbitration and ADR. The newsletter also offers a preview of our upcoming events and publications.

With the annual symposium behind us, our editors are working to finalize our latest publication. Volume 4 of the *Yearbook on Arbitration and Mediation* will be available over the summer and will feature a number of articles contributed by panelists from our recent symposium. If you were unable to join us for our symposium titled, U.S. Arbitration Law in the Wake of *AT&T Mobility v. Concepcion*, I invite you to view the footage at http://law.psu.edu/multimedia.

Other exciting news includes the selection of the *Yearbook*'s 2012 - 2013 Board of Executive Editors. Congratulations to each newly appointed Executive Editor; the *Yearbook* is certain to benefit from the leadership of this talented and highly capable group.

As my tenure as Editor-in-Chief draws to a close, I want to thank both the student editors and the professional authors for their hard work and their commitment to excellence. Additionally, I want to thank those attorneys that have attended our events for their involvement and interest. It has been a privilege, and I look forward to this journal's promising future.

Respectfully,

Nick Fox
Editor-in-Chief
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ANNOUNCEMENTS

2012-2013 EDITORIAL BOARD

The *Yearbook on Arbitration and Mediation* is pleased to announce the incoming members of the 2012-2013 Editorial Board:

Editor-In-Chief
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U.S. Arbitration Law in the Wake of *AT&T Mobility v. Concepcion*

On Wednesday, February 22, 2012, the *Yearbook on Arbitration and Mediation* held its annual symposium. Distinguished law professors and practitioners from throughout the country met to discuss the landmark case and its impact on the future of arbitration. In addition to a number of student and faculty attendees, many practitioners attended the Symposium to earn CLE credits.

The Symposium was divided into four topics of discussion:
- The Impact of *AT&T Mobility* on Federalism Interests
- The Federal Arbitration Act and Class Action Arbitration After *AT&T Mobility*
- Procedural Fairness After *AT&T Mobility*
- The Likely Legacy of *AT&T Mobility*

Thank you to all the speakers, the attendees, and the *Yearbook* staff for making the Symposium a successful event.

Zachary Morahan,
Incoming Editor-in-Chief

Land Disputes, Consumer Protection, Divorce

Developments in State Legislation

Utah Provides Private Landowners with an Alternative to Litigation in Condemnation, Taking, and Eminent Domain Disputes with Local and State Government

In 2011, Utah's Property Rights Ombudsman Act was amended, with several significant changes made to the institution of the Property Rights Ombudsman. The Office of the Property Rights Ombudsman is a unique program that provides an alternative to litigation when a claim arises between a government entity and a private landowner in a condemnation, taking, or eminent domain dispute. The goal of the program is to bring the government entity and the private landowner together in negotiations so as to avoid the courtroom. If necessary, the ombudsman can conduct or arrange for mediation or arbitration, and if a private property owner requests alternative dispute resolution through the ombudsman office, the government entity must participate as if it were court-ordered. The 2011 legislative changes mandate that ombudsmen mediate each dispute on a case-by-case basis instead of conducting dispute resolution with a class or group of private property owners. In addition, the arbitration review process has been altered; the award, and any issue on which the award is based, may now be submitted to the district court for a trial *de novo*, whereas previously the appeals process was conducted as a *de novo* review.

- Jesse Baez, 2L

Maryland Aims to Protect Consumers from Biased Arbitrators

On July 1, 2011, Maryland enacted the Consumer Protection-Transparency in Consumer Arbitration Act aimed at protecting consumers who become parties to binding consumer arbitration, often through adhesion. The Act requires specified arbitration organizations to collect, publish, and make available information relating to binding consumer arbitration. The law was enacted to equip consumers with the tools to determine whether or not the arbitrators hearing their case are neutral, and have not fallen prey to the "repeat player bias." Opponents argue that the new law may jeopardize the efficiency of the arbitration process by inviting courtroom-like proceedings and complicated discovery requests regarding the publication of awards. The Act's proponents, however, are confident that the benefits that consumers will experience in the form of increased transparency, fairness, and accountability in binding consumer arbitration outweigh the potential risks.

- Laura Magnotta, 2L

Comments

The Growing Trend Toward the Arbitration of Marital Disputes

The increase in the use of arbitration agreements in commercial transactions has influenced recent state legislative changes to family law procedures, specifically issues arising out of divorce proceedings. The area of family law and marital disputes was not intended to be within the scope of the Federal Arbitration Act, therefore it is necessary to fashion a set of governing rules that address the specific and unique needs of parties in marriage dissolution suits. These legislative innovations in arbitration law have been spearheaded by states, specifically North Carolina, with seven other states subsequently following suit. North Carolina's Family Law Arbitration Act makes specific allowances for court intervention, written explanation of the arbitral award, and a prohibition on submitting child custody issues to arbitration. By augmenting the Revised Uniform Arbitration Act, states have crafted a piece of legislation that expressly permits arbitration of family law disputes. Carefully structured guidelines for marital dispute resolution offer an affordable and efficient solution to messy family law disputes.

- Teleicia Rose, 2L

AT&T Mobility, Class Action Waivers, Authority

Making the Withdrawal: The Effect *AT&T Mobility* will have on State Laws Similar to California's *Discover Bank* Rule

Before *AT&T Mobility v. Concepcion*, many state and federal courts routinely struck down classwide arbitration waivers in adhesive contracts using unconscionability rules similar to California's *Discover Bank* rule. Although scholars continue to grapple with the breadth of the *Concepcion* holding, federal courts are uniformly lining up behind an interpretation that the FAA will preempt any "state rules mandating the availability of class arbitration based on generalizable characteristics of consumer protection claims" inherent to small-dollar claims. *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212 (11th Cir. 2011) (finding the FAA preempted a Florida unconscionability rule); *see also Litman v. Cellco P'ship, No. 08-4103*, 2011 WL 3689015, at *1 (3d Cir. 2011) (New Jersey); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) (Minnesota); *King v. Advance America, Nos. 07-237, 07-3142*, 2011 WL 3861898, at *6 (E.D. Pa. 2011) (Pennsylvania); *Adams v. AT&T Mobility, LLC, No. C10-763RAJ*, 2011 U.S. Dist. LEXIS 118375, at *28-29 (W.D. Wash. 2011) (Washington). As of December 2011, twelve states still maintained unconscionability rules against classwide arbitration waivers where courts had yet to apply the holding of *Concepcion*. If federal courts in these states continue to follow the examples already set, these remaining state unconscionability rules will fall like dominoes to the broad, preemptive sweep of *Concepcion*.

- Zach Brecheisen, 3L

Recent Cases

The End of Unconscionability: The Eleventh Circuit Applies *AT&T Mobility* and Upholds Adhesive Class Action Waiver

In *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011), the Eleventh Circuit held that the arbitration clause between Cruz and AT&T was not unconscionable or against public policy because it contained a class action waiver. This decision invalidated a Florida law requiring that a class arbitration mechanism be available for suits that could not be brought otherwise because they involved an insubstantial amount of money and also ushered the Eleventh Circuit into the realm of post-*AT&T Mobility LLC v. Concepcion* arbitration jurisprudence. By adopting the Supreme Court's language in *AT&T Mobility*, the Eleventh Circuit fundamentally changed the way that consumer agreements will be enforced within its jurisdiction. Consumers will no longer be able to simply claim that their agreement was adhesive in nature or that it violated some public policy. The *Cruz* decision firmly implants the strong federal policy favoring the recourse to arbitration within the circuit.

- Dustin Morgan, 2L

Pennsylvania Supreme Court Holds That Trial Court Lacked Legal and Equitable Authority to Terminate an Arbitration Proceeding Before the Arbitrator Rendered A Final Award

In *Fastuca v. L.W. Molnar & Associates*, 10 A.3d 1230 (Pa. 2011), the Pennsylvania Supreme Court held that a trial court had no authority in law or equity to enter an order to terminate an ongoing arbitration. The court first determined that the arbitrator's initial findings regarding the partnership dissolution did not constitute an award, because the findings did not resolve all of the outstanding issues. As such, the trial court had no legal authority to interfere with the ongoing arbitration procedure. Further, the court noted that courts have equitable jurisdiction to afford relief when the statutory or legal remedy is not adequate, or if the equitable relief is necessary to prevent irreparable harm. In this case, however, the equitable action was improper as a means of interfering with an ongoing arbitration procedure. Once the arbitration process has begun, the procedures upon which the parties agreed will control.

- Skipper Dean, 2L

International

An Argentinian Tango: The Jurisdiction and Admissibility of Mass Bondholder Claims Against Argentina in Investment Arbitration

No International Centre for Settlement of Investment Disputes (ICSID) arbitral tribunal has considered nor allowed a large group of individual claimants, or a "mass claim," to be joined to arbitrate a claim, until now. The majority of the tribunal in *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011 (Pierre Tercier, Albert Jan van den Berg), issued a landmark arbitration decision by allowing 60,000 Italian bondholders to submit an investment arbitration against Argentina to ICSID. The decision was highly anticipated because of its elaboration on the distinction between jurisdiction and admissibility. Although the *Abaclat* tribunal provided a landmark decision regarding mass claim arbitrability in ICSID arbitration, their work is not complete. The tribunal must also analyze all elements of the claims and create new procedural steps to hear the mass claims, which will undoubtedly stir controversy. Nevertheless, the decision on jurisdiction and admissibility of mass claims in investment arbitration decided by the *Abaclat* tribunal is a novel decision that will have a ripple effect throughout arbitration.

- Meeran Ahn, 2L

Unfair Prejudice in the United Kingdom: an Inalienable Right For Shareholders Comes to an End as Courts Resolve Split Between Exeter and Vocam

Litigation involving the trade of a professional soccer player was recently found to be arbitrable, ending a regime of unfettered access to courts for shareholders in the United Kingdom. In *Fulham v. Richards*, [2011] EWCA (Civ) 855, the court found the logic supporting full court access for unfair prejudice, a shareholder remedy for corporate wrongs, to be baseless. While there was not unity among the courts, one prior court had articulated that a shareholder action was necessarily inarbitrable, primarily because the relief available in such an action routinely affects third parties. Today, under *Fulham*, the court determined that the remedies available to shareholders in arbitration are immaterial unless the winding up of the company is almost assured. Hence, the unfair prejudice action is entirely arbitrable, although the logic may apply to shareholder actions generally.

- Paul Jorgensen, 2L

To learn more about the *Yearbook on Arbitration and Mediation*'s publications and events, please visit us at:

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Newsletter

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