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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 Winter 2013 issue of the *Yearbook on Arbitration and Mediation*'s newsletter. Our board of Executive Editors produces this newsletter bi-annually to provide a brief update on the latest happenings in the Alternative Dispute Resolution field. Also, the newsletter offers a preview of our upcoming publication and events.

Volume 4 of The Yearbook on Arbitration and Mediation will be available for purchase shortly. Currently, our student editors and professional authors are working on their articles for volume 5.

The Yearbook's 2013 Symposium is planned for Friday, February 22, 2013 and is titled "The Role of the Courts: Judicial Review of Arbitral Awards and Mediated Settlement Agreements." We are fortunate to offer an outstanding panel of scholars for this event. The Symposium will be held at both our University Park and Carlisle campuses. All are invited to attend and we will be offering CLE credits.

Lastly, please visit our new website to learn more about The Yearbook on Arbitration and Mediation and our 2013 Symposium at: www.pennstateyam.com.

Sincerely,
Zach Morahan
Editor-in-Chief
zdm108@dsl.psu.edu

The *Yearbook on Arbitration and Mediation* is available for purchase at: www.Amazon.com

To join our newsletter listserv, please send an e-mail to: DSL-YAM-Newsletter-subscribe-request@lists.psu.edu

### DID LANCE ARMSTRONG STAND A CHANCE FIGHTING THE USADA?

On July 12, 2012, the United States Anti-Doping Agency ("USADA") initiated an investigation against seven-time Tour de France champion, Lance Armstrong, regarding possible anti-doping rules violations. The USADA's protocol delineates a sports disciplinary process for an athlete, coach, or other sports individual notified of an anti-doping rules violation. The first step involves an investigation completed by an independent Anti-Doping Review Board. In this case, the Review Board inspected evidence submitted by the USADA and Armstrong, and provided the USADA with a written recommendation stating sufficient evidence of doping existed for the USADA to proceed with adjudication. After receiving notification of the Review Board's recommendation, Armstrong had the option of either accepting the proposed sanctions or challenging the sanctions before an arbitral panel. Rather than present his case before an arbitral panel within the Court of Arbitration for Sport ("CAS"), Armstrong filed suit against the USADA in the United District Court, W.D. Texas, Austin Division. The federal judge dismissed Armstrong's claim in favor of arbitration, ultimately causing Armstrong to drop his claim and accept the USADA's sanctions. Armstrong's aversion to sports arbitration is understandable, as the USADA has experienced nearly exclusive success before the CAS. Based on an analysis of CAS precedent, the USADA has a record of thirty seven and one in arbitral proceedings against athletes for anti-doping rules violations. As Armstrong's argument in his federal court lawsuit implies, either the USADA is a grossly efficient agency, or the arbitral process exhibits a significant imbalance against the athletes' due process rights.

- Kelsey Swaim, 2L

# *Recent Developments in Arbitration Law*

### The Rise of the Asian Tiger: Singapore as the New Hub for Arbitration in Asia

Singapore has gained prominence as a center of arbitration in Southeast Asia by increasing the number of international arbitration cases it hosted by 378% from 2000 to 2010. While Singapore is a small island nation, it handles the second most international arbitration cases in Southeast Asia where it competes with countries that are many times its size. On June 1, 2012, Singapore amended the International Arbitration Act of 2002 by enacting the International Arbitration (Amendment) Act ("The Amendment") to make Singapore a more attractive hub for international arbitration disputes. The legislature enacted The Amendment with two driving purposes: to clarify the arbitration law of Singapore and to draw more international arbitration disputes to Singapore. The Amendment changes four aspects of Singapore arbitration law: it relaxes the requirement that agreements to arbitrate must be in writing, allows the Singapore High Court to review negative jurisdictional rulings, clarifies the power of arbitral tribunals to award either simple or compound interest on awards from when the tribunal rendered the award, and assures that awards issued by emergency arbitrators are enforceable.

- Thomas Panighetti, 2L

### Open for Business: *Delaware Coalition for Open Government v. Strine* and Preserving the Line Between Arbitration and Litigation in Business Disputes

Delaware has long been known as a very hospitable state for corporations, which explains why such a large number of them call the state home. As such, the Delaware legislature looks for ways in which it can best serve the interests of its corporate residents. In 2009, the legislature adopted section 349 of the Delaware Code, which created a new form of arbitration using a sitting judge of the Court of Chancery as arbitrator. This was meant to create an efficient and cost friendly way for businesses to utilize the Delaware courts to solve their disputes. However, in its recent decision in *Delaware Coalition for Open Government v. Strine*, the United States District Court of Delaware ruled that conducting arbitration using a sitting Chancery Court judge as an arbitrator is unconstitutional. In doing so, the District Court directly struck down portions of section 349 of the Delaware Code, as well as portions of Chancery Court Rules 96, 97, and 98. The court reasoned that section 349, which gave the Chancery Court the power to conduct private and confidential arbitration for business disputes, crossed the line between arbitration and litigation and was in fact a civil proceeding. By making this process private, the law violates the First Amendment right to public access to civil and criminal trials and is thus unconstitutional.

- Alex Mise , 2L

# *Articles*

### Protecting the Defenseless Receiver

In response to ongoing proposals to provide student-athletes a stipend for their performance, a new proposal has been made to institute an arbitration process in intercollegiate athletics. Prior to this, student-athletes have not been considered employees of a university. Failure to be classified as "employees" has not allowed student-athletes certain rights, including workers' compensation and the right to collectively bargain. In light of a payment of a stipend, student-athletes could now be considered "employees." Accordingly, they would now be entitled to collectively bargain, and in turn, could bargain for an arbitration system. Labor arbitration can be a mechanism to protect the rights of the student-athletes' newfound employment status.

- Drew Hushka, 2L

### Educational Collective Bargaining: The Effect of Alternative Dispute Resolution Agreements on Public School Teachers' Wages

Thirty-five states have enacted collective bargaining statutes to govern negotiations between teachers and school districts. Twenty-seven states' collective bargaining statutes prohibit teacher strikes and eighteen states impose penalties for teacher strikes. As a result of this type of legislative action, teachers' unions emerged as powerful entities to negotiate collective bargaining agreements on behalf of teachers. As evidenced by the recent Chicago Teachers' Union strike and the controversy surrounding Wisconsin's Act 10 legislation, the debate over teachers' wages is a persistent source of controversy in negotiations between teachers' unions and public school districts. Alternative dispute resolution procedures within collective bargaining agreements have become means for teachers' unions to achieve their goals regarding wages for teachers in the public sector when negotiating with school districts.

- Jessica Nixon, 2L

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

# *Developments in International Arbitration Law*

**Treaty Shopping and Venezuela's Denunciation of the ICSID Convention**

Venezuela's denunciation of the ICSID Convention in January of 2012 is only the third in the institution's history, but is telling of a larger struggle on the part of Latin American countries in the realm of international investment arbitration. Claims stemming from financial crises and nationalization of industries have led to substantial awards against certain Latin American countries, and Venezuela has led the chorus of ICSID respondents claiming bias in the favor of investors. In addition, Venezuela has asserted that investors are participating in "treaty shopping" to gain access to ICSID, contrary to the original purpose of the facility. Countries like The Netherlands have served as conduits for the development of holdings or "shell" corporations which give investors the requisite nationality to gain protection under the nation's numerous bilateral investment treaties, without having to establish minimum contacts with the country in the physical or economic sense. Dutch bilateral investment treaties are also known for their unequivocal consent to ICSID jurisdiction, as well as "most favoured nation" clauses that have proved useful in ICSID arbitration. Under ICSID rules, as well as an expansive web of bilateral investment treaties, denunciation of the Convention does little to stem the tide of claims against Venezuela. The country still has to address the almost 30 pending ICSID cases against it, and potentially more that have yet to be filed.

- Katie Rimpfel, 2L

Join the Penn State Yearbook on Arbitration and Mediation for our 2013 Symposium:

*The Role of the Courts: Judicial Review of Arbitral Awards and Mediated Settlement*

February 22, 2013 – 9:00 am – 3:00 pm

Registration is now open!

The cost is free to students and faculty, $49 for Dickinson School of Law alumni and $99 for general registration.
Breakfast and lunch is included in this price.

For more information or to register, please visit www.pennstateyam.com

**Defusing Hydroelectric Brinkmanship: The Indus Waters Treaty's Alternate Dispute Resolution Provisions and Their Role in the Tenuous Peace Between India and Pakistan**

Since the 1947 partition, India and Pakistan have sustained a bloody rivalry centered on the disputed Kashmir region. One agreement has withstood the years of strife: the Indus Waters Treaty of 1960 (IWT). Indian and Pakistani leaders drafted the IWT with the help of the World Bank, deftly predicting that water rights would be a contentious issue in the coming years. Crucial to the IWT's efficacy, and therefore to the uneasy peace between India and Pakistan, is Article IX. Article IX memorialized the process for the "settlement of differences and disputes" through negotiation, mediation, and arbitration. Questions about award enforcement, a decided lack of timeliness in arbitral decisions, and repeated or frivolous requests for arbitration, however, threaten to undermine the efficacy of Article IX, the IWT, and a tenuous peace based in part on the ability of both India and Pakistan to utilize the waters of the Indus. The continued relevance of the IWT depends fundamentally on Article IX's effectiveness in resolving the recent spate of disputes involving Indian hydroelectric dam projects.

- Thomas Robins , 2L

# *Domestic Arbitration Cases*

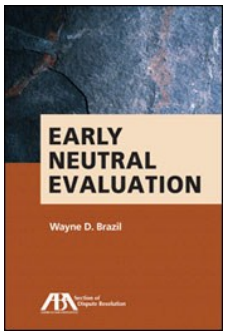
**Broad Powers, Silent Intentions: "Compelling Class Action Arbitration Without Expressed Authorization"**

In the wake of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, many state and federal courts have struggled to identify the depths of an arbitrator's power to compel class arbitration. Recent Supreme Court decisions—such as *AT&T Mobility LLC v. Concepcion*—have contained significant discussions regarding the unfairness and disadvantages of the class arbitration procedure. In light of these discussions, the question of whether an arbitrator can imply party consent to class arbitration has persisted. As evidenced by two recent cases, the Third and Fifth Circuit Courts of Appeal have differed markedly on how they attempt to address this issue. In *Sutter v. Oxford Health Plans LLC*, the Third Circuit held that an arbitrator—who had based his authority on the broad language contained in the agreement—did not exceed his powers by construing the arbitration agreement to authorize class arbitration. Whereas in *Reed v. Florida Metro. Univ., Inc.*, the Fifth Circuit held that an arbitrator exceeded his powers by compelling class arbitration when he failed to show a statutory basis for his decision. Yet, in order to provide arbitrators and businesses with predictability in the arbitration process, consensus must be attained and applied uniformly throughout the lower courts.

- Daivy P. E. Dambreville, 3L

# *BOOKS AND LITERATURE REVIEW*

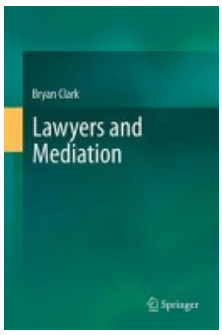
## A Look at Recently Published Books on Alternative Dispute Resolution




### BOOK REVIEW: *EARLY NEUTRAL EVALUATION*

By: Geoffrey Peters, 2L

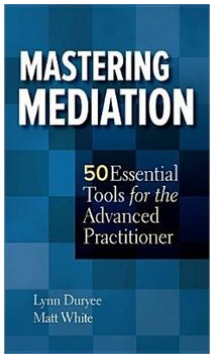
*Early Neutral Evaluation* is a handbook authored by Wayne D. Brazil, a former judge of the Northern District of California and one of the pioneers of Early Neutral Evaluation (ENE). ENE was formed to combat the skyrocketing costs of discovery and to provide parties with focus regarding trial issues. *Early Neutral Evaluation* provides a lucid manual for judges, litigators, and neutral evaluators to counsel clients looking at extremely expensive discovery matters or complicated trial issues. As a fairly new and creative method of dispute resolution, *Early Neutral Evaluation* also provides a compelling case for jurisdictions to adopt ENE into their arsenal of useful tools to decrease litigation and cut costs.




### BOOK REVIEW: *LAWYERS AND MEDIATION*

By: Brian Rans, 2L

*Lawyers and Mediation* discusses how legal professionals have impacted the development of mediation in multiple jurisdictions across the world. Bryan Clark, a mediation scholar at the University of Strathcylde and an Adjunct Professor at John Marshall Law School, provides evidence from multiple academics' empirical research to formulate and critique arguments for lawyer involvement in mediation. Clark does not formulate many arguments for or against lawyer involvement in mediation, but he does frame mediation development as a platform between two competing interests: advocates for judicial efficiency and advocates for disputant control. Thus, *Lawyers and Mediation* serves as a great book for individuals interested in reading balanced and pragmatic research on an evolving ADR mechanism.




### BOOK REVIEW: *MASTERING MEDATION: 50 ESSENTIAL TOOLS FOR THE ADVANCED PRACTITIONER*

By: Kevin Schock, 2L

In Lynn Duryee and Matt White's *Mastering Mediation: 50 Essential Tools for the Advanced Practitioner,* the authors purport to offer their audience a set of tools that will help the experienced facilitator serve as more effective neutral during settlement negotiations. *Mastering Mediation* is an incredibly broad book that provides a few insightful tips for practicing mediators; however, on the whole the book is largely introductory and would probably not further the advanced practitioners understanding of effective mediation practices. While *Mastering Mediation* will probably not be a particularly useful tool for the advanced practitioner, the book may be useful for a law student or a novice practitioner who is seeking a basic introduction to the field of mediation. Duryee and White do a nice job of raising some of the basic issues that arise in mediation, and provide some simple tools that describe the way in which a neutral could effectively address some of the problems that