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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 inaugural issue of the Yearbook on Arbitration and Mediation's bi-annual Newsletter. The purpose behind our newsletter is simple: to provide the legal community with a brief, easy to read update on the latest legal happenings within the realm of ADR. YAM additionally publishes one volume annually on the most current developments in ADR. To learn more about either publication, please visit us at http://law.psu.edu/academics/journals/yearbook_on_arbitration_and_mediation.

Our Board of Executive Editors hopes you find this Newsletter useful and informative!

- Zachary Grey
Editor-in-Chief, 3L

Federal District Court Adopts Two-Tiered Approach When Considering Vacating an Arbitration Award

Wachovia Sec., LLC v. Brand, No. 4:08-CV-02349-TLW, 2010 WL 3420214 (D.S.C. Aug. 26, 2010).

In *Wachovia Securities v. Brand*, the South Carolina District Court employed a unique, two-tiered approach when considering a Motion to Vacate an Arbitration Award. The dispute stemmed from a Financial Industry Regulatory Authority mandated arbitration where Wachovia sought vacatur of a $1,111,554 award rendered against it. The District Court reviewed Wachovia's claims under the FAA Sections 10(a)(3)-(4). Further, as a result of Wachovia's prodding, the District Court considered vacatur pursuant to the common law standard of "manifest disregard of the law." After reviewing the record, the District Court determined that vacatur was not supported under the FAA or manifest disregard. The District Court acknowledged the ongoing non-statutory 'manifest disregard' debate, but refused to employ the theory. While the Fourth Circuit has permitted vacatur on similar grounds in the past, this District Court appeared to merely humor the possibility. South Carolina courts are likely to continue to engage in similar posturing until the Fourth Circuit adopts the view of the Supreme Court in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), which proscribes manifest disregard claims.

- Nicholas Fox, 2L

Transnational Ponzi Schemes: The Importance of Due Diligence

Alasdair Ross Anderson v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3. "Award." April 29, 2010 (Dr. Sandra Rico, Jeswald W. Salacuse, Raul E. Vinuesa).

From 1996-2002, brothers Luis Enrique Villalobos Camacho and Osvaldo Villalobos perpetrated an international Ponzi scheme from an office in Costa Rica's San Pedro Mall. Eventually, over 6,200 people, many of whom were foreign nationals, deposited approximately $405 million into the fraudulent operation. Costa Rican authorities did not catch wind of the brothers' criminal activity until 2002, when an investigation was finally conducted. In *Alasdair Ross Anderson v. Republic of Costa Rica*, 137 Canadian nationals, all victims of the Ponzi scheme, commenced an action before ICSID against the Costa Rican government,

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alleging that Costa Rica had failed to maintain appropriate supervision over its national financial system and had violated regulatory protection provisions contained in the bilateral investment treaty between Canada and Costa Rica. The Tribunal, in determining its jurisdictional authority, ruled the Canadians could not properly be categorized as "investors" under the bilateral investment treaty because they did not own their assets in accordance with the laws of Costa Rica. As such, the Canadians' contributions to the scheme did not constitute "investments" under the treaty. In so holding, the Tribunal concluded that it lacked jurisdiction to entertain the Canadians' Request for Arbitration. This case demonstrates an important tenet of smart investment practice: never underestimate the importance of due diligence or legality.

- Melody Mahla, 2L

Developments in State Legislation

Arizona House Bill Seeks to Modernize Arbitration Law Effective January 1, 2011, Arizona's ADR practitioners are now subject to a new statutory regime, one the state hopes will be an improvement over the previous system. Arizona House Bill 2430, or the Revised Uniform Arbitration Act, seeks to codify state case law and fill in gaps and ambiguities in the Uniform Arbitration Act. The Bill adds a new chapter to Title 12, establishes new default arbitration procedures, allows arbitrators and courts to provide interim remedies, and creates a *de jure* presumption of notice if "reasonably necessary" steps were taken to inform the other party of the arbitration. The Bill provides five exemptions, including disputes arising out of employment and insurance law.

• Arizona State Legislature, HB 2430, Status Overview, *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2430o.asp

• Audio recording: Hearing on House Bill 2430, held by the House Judiciary Committee (February 18, 2010), *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=6802

- Nathan Volpi, 2L

New York Requires Binding Arbitration for the Settlement of Contract Termination Disputes New York State Assembly Bill 488 amends Section 55-c of New York's McKinney's Alcohol Beverage Control Laws whereby microbreweries producing below 300,000 barrels of beer annually are permitted to terminate their distribution agreements with beer wholesalers without a showing of good cause, but must pay the wholesaler fair market value for the loss of distribution rights. If the parties cannot agree on "the fair market value of the distribution rights," then the brewery shall pay what it deems, in good faith, to be the fair market value. If the wholesaler believes the payment is below fair market value, it may appeal the brewery's estimation to binding arbitration.

• A.B. 488, 2010 Leg., 233rd Sess. (N.Y. 2010), 2009 NY A.B. 488 (NS) (Westlaw).

- Scott C. Denlinger, 2L

Maryland Bill Provides Homeowners with Foreclosure Mediation Option Since July 1, 2010, Maryland homeowners faced with foreclosure have had the opportunity to participate in mediation proceedings prior to losing of their homes. House Bill 472 encourages greater interaction between lenders and homeowners in an effort to find alternatives to foreclosure. Maryland's Office of Administrative Hearings will handle all mediation requests filed by homeowners. While mediation does not guarantee that the pending foreclosure will stop, it does guarantee that those who are eligible for alternative solutions have the op-

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portunity to seek them.
• H.B. 472, 2010 Leg., 427th Sess. (Md. 2010).
• Maryland Office of Administrative Hearings, Foreclosure Mediation, *available at* http://www.oah.state.md.us/foreclosuremediation.asp
• Arnold S. Platou, New Law Offers Mediation in Md. Foreclosure Cases, The Herald-Mail (August 7, 2010), *available at* http://www.herald-mail.com/?cmd=displaystory&format=html&story_id=250535&autoreload=true

- Jennifer Adams, 2L

Washington Provides Symphony Musicians Access To Arbitration Title 49 of the Revised Code of Washington Annotated recognizes symphony musicians as public employees entitled to collective bargaining benefits under the Public Employment Relations Commission. Section 49.94.100(2) provides symphony musicians with the right to submit labor disputes to arbitration, extending public sector recourse to private employees.
• S.B. 5046, 61st Leg., Reg. Sess. (Wash. 2010), *available at* http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5046
• Commerce & labor comm'n Analysis of SSB. 5046 (Wash. 2010), *available at* http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/House/5046-S%20HBA%20CL%2010.pdf

- Julia Rabich, 2L

Florida to Reflect UNCITRAL Model Law Florida's International Arbitration Act was substantially altered to reflect the UNCITRAL Model Law. The newly enacted legislation resolves many of the issues with the state's prior authority on international arbitration, primarily related to statutory scope, arbitrator appointment and removal, and finality of arbitral awards. Florida joins just six other U.S. states in the adoption of the UNCITRAL Model Law – a benchmark in the field of international arbitration.
• 2010 Fla. Laws ch. 60 (2010), *available at* http://laws.flrules.org/files/Ch_2010-060.pdf

- Ryan J. Maerz, 2L

Watch the live web cast of our inaugural symposium, "Arbitrator as Judge… and Judge of Jurisdiction" on Weds., Feb. 16 at 12:00 PM Eastern. The event will focus on two recent cases: Rent-a-Center v. Jackson, 130 S.Ct. 2772 (2010) and Stolt-Nielsen v. Animalfeeds, 130 S.Ct. 1758 (2010).

Visit http://law.psu.edu/events/arbitrator_symposium for information on the event and access to the live webcast.

Institutional Developments

Greater Transparency on the Horizon for UNCITRAL Rules With the increase of investor-State arbitrations, issues are being raised about the availability of case information, access to investor-State dispute settlement awards, and public access to hearings, causing many to question the traditional confidentiality attached to investor-State arbitration. UNCITRAL recognized that both "transparency and confidentiality can be considered as legitimate interests of investor-State treaty-based arbitrations." At its forty-third session, the Commission formulated a questionnaire and entrusted the Working Group with the task of preparing a legal standard for transparency in investor-State arbitration. It appears that all member States would approve of the drafting certain transparency provisions. At its fifty-third session, the Working Group is expected to commence preparation of a uniform law on transparency in treaty-based investor-State arbitration on the basis of the notes and recommendations of the Secretariat.
• UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Preparation of Rules of Uniform Law on Transparency in Treaty-Based Investor-State Dispute Settlement.*
• U.N. Doc. A/CN.9/WG.II/WP.160 (August 5, 2010), *available at* http://daccess-ods.un.org/TMP/2029940.93298912.html
• U.N. Doc. A/CN.9/WG.II/WP.160/Add.1 (August 5, 2010), *available at* http://daccess-ods.un.org/TMP/5147374.86839294.html

- Kristin A. Miller, 3L

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Can(not) a State Law Override a Federal Treaty Obligation?

Safety Nat'l. Casualty Co. v. Certain Underwriters at Lloyd's London, 587 F.3d 714 (5th Cir. 2009).

In *Safety National Casualty Company v. Certain Underwriters at Lloyd's London*, the Fifth Circuit, en banc, dealt with the arduous task of sorting through the McCarran-Ferguson Act, a Louisiana law prohibiting the arbitration of insurance disputes, the FAA, and the New York Convention, to determine the validity of a series of arbitration agreements in the reinsurance policy between a United States party and a London based reinsurer. Citing the U.S. Constitution's Supremacy Clause, the Fifth Circuit determined that treaties are superior to federal legislation; therefore, the McCarran-Ferguson Act cannot supersede a federal treaty and trigger the scheme of reverse preemption. The Second Circuit came to the opposite conclusion in *Stephens v. American International Insurance Company.*, 66 F.3d 41 (2d. Cir. 1995) (emphasizing the New York Convention is a non-self-executing treaty that deserves the same treatment as any other federal legislation under the Supremacy Clause). The Supreme Court denied certiorari to resolve the circuit split. Until the Supreme Court speaks on this issue, Fifth Circuit practitioners must be aware that international agreements to arbitrate insurance disputes will be upheld despite any contrary state insurance law that would normally preempt federal law. On the other hand, in the Second Circuit, an otherwise valid international agreement to arbitrate an insurance dispute will be found unenforceable if state insurance laws proscribe such agreements.

- Evangelo M. Theodosopoulos, 3L

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