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WINTER 2012

THE YEARBOOK ON ARBITRATION AND MEDIATION

An Innovative Update to Developments in Alternative Dispute Resolution

Editor-in-Chief's Welcome

Welcome to the Winter 2011 issue of *The Yearbook on Arbitration and Mediation*'s newsletter. 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 publication and events.

Volume 3 of *The Yearbook on Arbitration and Mediation* was published over the summer and is now available via major book retailers. Our student editors and professional authors are currently working to assemble Volume 4, which will be available in the summer of 2012. In the meantime, I invite to you peruse our newsletter, and I do hope you will consider joining us, either in person or online, for our 2012 Symposium. The Symposium will take place on February 22, 2012 and is themed "U.S. Arbitration Law in the Wake of AT&T Mobility v. Concepcion." We have assembled an extraordinary panel of leading scholars and practitioners to contribute to this exciting event.

To learn more about *The Yearbook on Arbitration and Mediation*'s publications and events, please visit us at: http://law.psu.edu/academics/journals/yearbook_on_arbitration_and_mediation.

Respectfully,

Nick Fox
Editor-in-Chief
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FOREIGN DEVELOPMENTS

THE FÉDÉRATION INTERNATIONALE DE BASKETBALL SCORES A SLAM DUNK FOR ARBITRATION LAW WITH THE CREATION OF THE FIBA ARBITRAL TRIBUNAL

The Fédération Internationale de Basketball ("FIBA"), headquartered in Geneva, Switzerland, is the non-profit international governing body for basketball. FIBA is responsible for establishing the official rules that are applied in all international and olympic basketball competitions. To better resolve disputes amongst players, teams and other agents involved in international basketball, FIBA established, effective May 1, 2010, the FIBA Arbitral Tribunal ("FAT"). The new arbitral procedures established by FAT appear to simplify and systemize arbitration in international basketball, while providing for the resolution of disputes in a speedy manner. By systematizing and legitimizing the procedures, participants involved in a dispute engage in a structured process. The detailed rules seemingly enable all persons involved in the dispute to be aware of the procedures and the expectations accompanying the procedures. In dealing with international players, international teams, and international agents, FAT strives to successfully resolve potentially complex international disputes in a relatively quick and easy manner with the implementation of its arbitral rules.

- Julia Rabich, 3L

SWISS COURT RULES ON FATE OF SOCCER PLAYER

On April 13, 2010, the Swiss Federal Supreme Court issued its decision in Club Atlético de Madrid SAD v. Sport Lisboa E Benfica – Futebol SAD & FIFA, putting an end to long and complicated string of proceedings involving the purchase and transfer of an international soccer player. In a landmark decision, the Court overturned and annulled an international arbitration award on grounds of procedural public policy, placing the emphasis of its decision on res judicata and the egra omnes effect, marking the first time that such a decision has been made since the Swiss Private International Law (PILA) took effect in 1989.

- Linnea Ignatius, 3L

Public Service, Coalbeds, Consumer Protection

Developments in State Legislation

New Jersey Proposes New Procedures for Public Service Arbitration

Concerned with the state's ability to balance its budget, politicians in New Jersey are debating the future of labor arbitration for firefighters and police officers. Republican governor, Chris Christie, stands on one side of the dispute; his goal is to make the arbitration process more favorable to towns and to balance arbitral awards with taxes. On the other side of the issue, Democrats have proposed an overhaul of the system that is designed to address funding concerns while maintaining flexibility in the arbitral decision-making process and arbitral awards. Meanwhile, those public servants most directly affected – firefighters and police officers – question why the system needs to be changed at all.

- Jennifer Adams, 3L

Virginia Requires Arbitration for Disputes Over Coalbed Methane Gas

Virginia House Bill 1344, codified in Virginia Code Annotated Sections 45.1-361.22 and 45.1-361.22:1, became effective on July 1, 2010. The Bill amends section 45.1-361.22 to require that the Virginia Gas and Oil Board order payment to claimants of the principal and interest derived from an escrow account following a determination by an arbitrator. Section 45.1-361.22:1 addresses the requirement that the Board must order arbitration to "settle conflicting claims of ownership over coalbed methane gas." The section details the procedures for initiating arbitration, selecting an arbitrator, and issuing a determination, and also elaborates on judicial review and an arbitrator's scope of authority. Because courts are authorized to review arbitral determinations and parties are free to avoid arbitration at the onset by providing a clause in their contract against arbitration as a condition precedent to the judicial system, the impact of judicial participation on arbitral proceedings is unclear. Notwithstanding the uncertainty as to the statute's effect on the relationship between the judicial system and arbitration, the statute aims to promote fairness by specifying measures for arbitrating a dispute in an efficient and expert manner.

- Julia Rabich, 3L

Maine Amends Law Relating to Consumer Arbiration Agreements

Maine House Bill 875 ("H.B. 875") repeals section 1392 ("section 1392") of Title 10 of the Maine Revised Statutes Annotated ("Statutes") and substitutes it with section 1393 ("section 1393") and section 1394 ("section 1394"). Replacing section 1392 with sections 1393 and 1394 provides consumers with protection and enables them to spend their money more confidently. Maine House Bill 875 requires arbitration service providers to be transparent in relation to their billing fees and possible conflicts of interest. Consumer protection is paramount and is one of the Supreme Court's main concerns when dealing with the Federal Arbitration Act. Representative Flaherty recognized that mandatory arbitration agreements are increasingly becoming part of everyday contracts for consumer goods and services. He sponsored a Bill that allows consumers, who often do not understand the arbitral process, the opportunity to better understand their rights and protections.

- Scott Denlinger, 3L

Attorney Sanctions, Transport, Credit Transactions

Recent Cases

Fifth Circuit Rules on the Imposition of Sanctions For Attorney Conduct During Arbitration Proceedings

In Positive Software Solutions, Inc. v. New Century Mortgage Corp., 619 F.3d 458 (5th Cir. 2010), the United States Court of Appeals for the Fifth Circuit held that a district court has no inherent authority to impose sanctions on attorneys for their conduct during arbitration proceedings. The court determined that arbitration is not an annex to the litigation process, but a collateral proceeding which is an alternative method for dispute resolution. Accordingly, district courts have no inherent authority to sanction conduct from an arbitration proceeding either when the parties have chosen to enter into arbitration from the beginning and both complied with the arbitration agreement, or when one party was compelled to arbitrate. Additionally, the court reasoned that under the Federal Arbitration Act, district courts only have the authority to perform narrowly defined procedural tasks, such as compelling arbitration and vacating, modifying, or confirming arbitration awards.

- Jamie Augustinsky, 3L

Illinois Appellate Court Overturns Arbitral Decision to Reinstate Transportation Employee As Against Public Policy Favoring Safe Transportation

Maurice Gibson worked as a bus driver for the Chicago Transit Authority ("CTA") until he was fired after his employer found out he had previously been convicted of aggravated criminal sexual abuse of a family member and had failed to register as a sex offender as a condition of his probation. Gibson's union filed a grievance and the arbitrator reinstated Gibson. After CTA filed a petition to vacate the award and the union cross-moved for affirmation of the arbitral award, the trial court sided with the union. In Illinois, vacating an arbitral award is a two-step process. First, the court must identify whether there is a well-defined and dominant public policy; and second, whether the arbitral award violated that public policy. The Court found that there is a public policy in favor of protecting the public, and especially children, from sex offenders. In fact, many statutes in Illinois restrict the movements of registered sex offenders. For example, they cannot be within 500 feet of a school, and cannot be at a school in which persons under the age of eighteen are present. The court next considered whether the arbitrator's decision violated that public policy, and determined that it did. In fact, the court found that the CTA could be sued for negligent hiring if they were forced to reinstate Gibson.

According to Illinois case law, negligent hiring arises when prior conduct of an employee puts an employer on notice of his unfitness that gives rise to harm of a third party. Since the CTA was now on notice that Gibson had been convicted of a sex crime and was supposed to register as a sex offender, it had notice of a prior incident where he sexually abused a child. Therefore, the court reversed the arbitrator's decision reinstating Gibson to his job as a public bus driver.

Chicago Transit Auth. v. Amalgamated Transit Union, 926 N.E.2d 919 (Ill. App. 2010), appeal denied, 237 Ill. 2d 553, ---N.E.2d ---- (2010).

- Michael Barbarula, 3L

Federal Court Rules on The Arbitration of Consumer Credit Transactions

In Holmes v. Mann Bracken, L.L.C., Chase Bank hired Mann Bracken, L.L.C. ("Mann Bracken"), a debt collection firm, to initiate arbitration proceedings against Delores

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Our second annual symposium, "U.S. Arbitration Law in the Wake of AT&T Mobility v. Concepcion" will take place on Weds., Feb. 22 at 8:45 am EST.

The symposium will be webcast live at http://law.psu.edu/arbitration_law_symposium

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Holmes ("Holmes), when she defaulted on her Visa credit card debt. Mann Bracken filed a claim against Holmes in the National Arbitration Forum ("NAF"), and forwarded Holmes an arbitration demand letter, stipulating that if Holmes did not pay her debt or answer the notice, "an award may be entered against [her]." Although the parties specifically agreed that the Federal Arbitration Act ("FAA") would govern the proceedings, the Pennsylvania Supreme Court had amended the Pennsylvania Rules of Civil Procedure to preclude a corporate entity from attempting to confirm default arbitration awards against consumers who do not participate in the arbitration, and that these "Amended Rules" should apply.

The District Court for the Eastern District of Pennsylvania agreed with Holmes's contention that the Amended Rules did not interfere with the parties' agreement to arbitrate, because they were "'consistent with, not repugnant to, the FAA.'" The Amended Rules simply require a creditor to first file an action in court to compel arbitration or enforce an arbitral award against a debtor; this cannot reasonably be construed as an "obstacle" to the objective of Congress in enacting the FAA. The Pennsylvania Amended Rules of Civil Procedure, although slightly different than the FAA in terms of their arbitral provisions, seek to ensure that arbitral agreements are "'valid, irrevocable, and enforceable.'" The FAA, therefore, has preemptive authority only to the extent that state arbitral provisions violate the Congressional policy in favor of enforcing arbitration agreements and awards.

- Emma Kline, 3L

In the Upcoming Yearbook:

Trendsetters: Asia-Pacific Jurisdictions Lead The Way In Dispute Resolution

This Article discusses the impressive steps that the Asia-Pacific nations have taken in their efforts to be recognized as active participants in the international dispute resolution field. It reviews improvements that members of the region have made to the rules and policies that apply to their arbitrations and mediations; it analyzes the time and cost saving innovations that have been introduced to facilitate early identification and resolution of disputes; and it discusses a variety of techniques that have improved the efficiency of the proceedings themselves—all this with a view toward providing the "swift, inexpensive and effective" dispute resolutions that are the goal of any meaningful alternative to conventional litigation.

- Donald P. Arnavas & Dr. Robert Gaitskell, Q.C.

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Newsletter

The *Yearbook on Arbitration and Mediation* is a peer-reviewed annual publication with a law review format, produced and edited by Penn State University's Dickinson School of Law, under the supervision of Professor Thomas E. Carbonneau. The *Yearbook on Arbitration and Mediation* aims to become one of the nation's most influential, respected, and widely read alternative dispute resolution scholarly journals by publishing timely articles on the most pressing and controversial topics dealing specifically with arbitration and mediation. The *Yearbook on Arbitration and Mediation* strives to provide inquisitive legal minds with practical, relevant and immediate information.