

WORLD ARBITRATION & MEDIATION REPORT

Vol. 14, No. 4

Covering Dispute Resolution in the United States and Around the World

April 2003

HIGHLIGHTS

James Coben, Director of Hamline's active and highly regarded Dispute Resolution Institute and a **WAMR** Editor for Domestic Mediation, has contributed a number of case summaries for this issue of **WAMR**. The topics range from the enforcement of mediation as a pre-condition to arbitration, to sanctions for the repeated failure to participate in mediation, and end with a court ruling on the judicial use of confidential arbitration information. (The *News At Home* section contains most of these contributions.)

Nadja Alexander's book, entitled *Global Trends in Mediation*, is poised to appear in print. Professor Alexander, **WAMR's** Editor for International Mediation, is one of the first scholars on mediation to undertake the study of the field from a comparative and international perspective. (The book announcement appears in the *News Abroad* section on page 98.)

A **California** court of appeal has held that a unilaterally imposed contractual term that bars **class action arbitration** is **unconscionable**. The language that prohibits class action arbitration needed to be severed from the agreement. (The case summary appears in the *State Judicial Decisions* section on page 103.)

Another California court of appeal has held that a **binding arbitration clause** in a **retainer agreement** was **void** under the California Mandatory Fee Arbitration statutes. These statutes were intended to remedy the disparity of bargaining power between lawyers and clients by giving clients a right to a trial of the matter after advisory arbitral proceedings. (The case summary appears in the *State Judicial Decisions* section on page 104.)

WAMR is pleased and privileged to publish a **commentary on mediation** by a well-known and distinguished Australia-

lian barrister. **Ian Hanger, QC**, provides an invigorating analysis of the benefits of mediation. Mr. Hanger also is one of Australia's leading mediators. (The *Commentary* section begins on page 106.)

Lisa Brenner's article on the *Costs and Value of Arbitration* provides a timely, insightful, and comprehensive perspective on a topic of fundamental importance to the continuing development of arbitration law. To the Editor's knowledge, this represents the first attempt to assess systematically this vital arbitration topic. "Th[e] article addresses the nature and scope of arbitration costs, as well as whether and under what circumstances the value of arbitration outweighs the fact that, in many cases, the overall expense to a party may be more than in traditional litigation. The impact of arbitration costs cannot be evaluated in a vacuum; the substantial benefits of arbitration, as opposed to traditional litigation, cannot be overlooked." (The *Perspectives* section begins on page 111.) Part II of Ms. Brenner's article will appear in next month's issue.

CONTENTS

AROUND THE STATES	95
AROUND THE WORLD.	98
JUDICIAL DECISIONS.	98
STATE JUDICIAL DECISIONS.	103
COMMENTARY.	106
BOOK REVIEW.	109
PERSPECTIVES.	111
BIBLIOGRAPHY.	120
CALENDAR.	122

PENNSTATE



The Dickinson
School of Law

Juris Publishing, Inc., Huntington, NY, USA.

Published in conjunction with Penn State University's
Dickinson School of Law, Carlisle, PA, USA

EDITORIAL STAFF

Editor-in-Chief:

Thomas E. Carbonneau
Penn State University's
Dickinson School of Law

Senior Editor:

Kimberly A. Koko, Research
Tulane University School of Law

Editors:

Nadja Alexander, International Mediation
T.C. Beirne School of Law, University of
Queensland (Australia)

James Coben, Domestic Mediation
Arbitration Dispute Resolution Institute,
Hamline University School of Law

Robert Ackerman and Nancy Welsh,
Domestic Mediation,
Penn State University's
Dickinson School of Law

Paul Friedland, International Arbitration
White & Case LLP (New York)

Production Manager:

Michael Murphy
Juris Publishing, Inc.

Editors-At-Large:

William W. Park
Boston University School of Law

Jan Paulsson
Freshfields (Paris)

Editorial Assistants:

Kathleen Caggiano Janice Sayas
Gregg Hilzer Paul Toner
Pamela Kyatt
Gene Molino

Publication and Subscription Information

The WORLD ARBITRATION AND MEDIATION REPORT is published monthly by Juris Publishing, Inc., 71 New Street, Huntington, New York 11743; telephone: (631) 673-3330; fax: (631) 673-9117; (800) 887-4064; e-mail: subscriptions@jurispub.com. Visit our website at <http://www.jurispub.com>. The Report is distributed worldwide by Juris Publishing, Inc. Subscription price: In North America: \$535.00 yearly; outside North America: \$595.00 yearly. Prices include shipping and handling. ISSN # 0960-0949.

Submission Information

Editorial correspondence should be directed to Professor Thomas Carbonneau, Editor, *World Arbitration and Mediation Report*, 71 New Street, Huntington, New York 11743 (USA) or Penn State's Dickinson School of Law, 150 South College Street, Carlisle, PA 17013-2899. You may call him at (717) 240-5153; email: tec10@psu.edu.

IN THIS ISSUE

NEWS AT HOME

SEC Approves Amendments to its Rules on Simplified Arbitration.....	95
The NYSE Moves to End its Pilot Mandatory Mediation and Administrative Conference Program.....	95
First Circuit Refuses to Compel Arbitration Without Satisfaction of the Contractually-Required Request for Mediation.....	96
South Carolina Appeals Court Affirms Dismissal of Case With Prejudice for Plaintiff's Repeated Failure to Participate in Mediation.....	96
Hawai'i Supreme Court Encourages Judicial Use of Confidential Arbitration Information.....	97

NEWS ABROAD

Book Announcement.....	98
------------------------	----

JUDICIAL DECISIONS

Second Circuit Affirms District Court Ruling Dismissing Action to Confirm a Foreign Arbitral Award in the United States Under the Doctrine of Forum Non Conveniens.....	98
Eleventh Circuit Rules That Anticipatory Breach of Contract is Within Scope of Arbitration Agreement.....	99
More on <i>Martens</i> : District Court Reaffirms the Second Circuit Rule That Arbitration Clauses in Title VII Disputes are Enforceable.....	100
The Court's Equitable Jurisdiction is Limited to Temporary Injunctive Relief Pending Arbitration of the Claim.....	101

STATE JUDICIAL DECISIONS

The Unilateral Barring of Class Arbitration is Held Unconscionable.....	103
Arbitration Provision in Retainer Agreement Void Under Mandatory Fee Arbitration Statutes.....	104
Contractor Preserves Right to Compel Arbitration by Immediately Filing a Motion to Stay a Lien Action.....	105
Rhode Island Supreme Court Affirms Lower Court Ruling That Vacated an Award for Punitive Damages and Remanded the Award to the Arbitrator for Clarification.....	105

COMMENTARY

Has Mediation Made the Courts Irrelevant? An Australian Perspective by Ian Hanger, QC.....	106
--	-----

BOOK REVIEW

Goh Bee Chen, <i>LAW WITHOUT LAWYERS, JUSTICE WITHOUT COURTS: ON TRADITIONAL CHINESE MEDIATION</i> (Ashgate Publishing, Ltd. 2002) (149 pages) Reviewed by Nadja Alexander.....	109
--	-----

PERSPECTIVES

Costs and Value of Arbitration, Part One by Lisa Brener.....	111
---	-----

BIBLIOGRAPHY

Recent Publications on Arbitration and ADR by Kimberly A. Koko.....	120
--	-----

CALENDAR	122
-----------------------	-----