

World & Arbitration & Mediation Report



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Covering Dispute Resolution in the United States and Around the World

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HIGHLIGHTS

A recent California appellate court ruling on a legal malpractice allegation has implications upon defining the **duty of disclosure** in the ADR context. According to the court, the **lawyer-mediator** assumes a number of professional duties in regard to the mediating parties. Although the circumstances may not have supported the finding of a lawyer-client relationship, the lawyer had a duty nonetheless to disclose information that could implicate impartiality. (Story on page 63.)

The **Alabama state Supreme Court**, one of the most active courts in the country in terms of arbitration, has abandoned its ruling in *Sisters of the Visitation* and conformed its doctrine to the U.S. Supreme Court's ruling in *Citizens Bank v. Alafabco, Inc.* Adopting the wide definition of the concept of **interstate commerce**, the state high court found that "few, if any, economic or commercial transactions ... are beyond the reach of Congress's commerce power." (Story on page 64.)

The **U.S. Ninth Circuit Court of Appeals** has ruled that the FAA does not require a court to **compel arbitration** when the moving party has defaulted on the arbitration. In so doing, the court defined the interplay between FAA §§ 3 and 4. (Case summary at page 67.)

The **U.S. Fifth Circuit Court of Appeals** has ruled that, when a party alleges that no agreement to arbitrate exists, the court—rather than an arbitrator—decides whether the agreement complies with the requirements of state contract law. (Case summary at page 68.)

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Todd Weiler, Professor of Law at the University of Windsor Faculty of Law, provides a rigorous and insightful evaluation of a decision of the Federal Court of Canada in regard to *S.D. Myers, Inc. v. Canada*. The Canadian government had filed a **motion to set aside an award** rendered by a NAFTA tribunal in which the tribunal unanimously found against the Canadian government. According to Profes-

sor **Weiler**, "Canada basically sought a *de facto* appeal of the tribunal's final award." The court rejected Canada's arguments, holding that there was no reason to disturb the ruling of the *Myers* Tribunal. (The *Commentary* begins on page 74.)

Ethan S. Burger and **Dmitri Davydenko** provide an extensive and thorough assessment of *Commercial Mediation in Russia*. The authors' study centers upon provisions in the 2002 *Arbitrazh* Procedure Code allowing commercial disputes to be resolved through mediation. The authors conclude that, although "[m]ediation is still in its infancy in Russia, ... there is an increasing level of interest in mediation by Russian judges, lawyers, businessmen, and legislators" "What remains to be seen is whether the necessity of resolving business disputes will push the Russian legislators and courts to take the required steps to institutionalize mediation." (The *Perspectives* section begins on page 75.)

Finally, **Timothy S. Cole**, Director of the NAF's Internet Dispute Resolution Solutions, provides a summary of and an opinion in a recent **domain name award**. (The *Documentary Resources* section begins on page 82.)

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