

World Arbitration & Mediation Report



Vol. 14, No. 10

Covering Dispute Resolution in the United States and Around the World

October 2003

HIGHLIGHTS

In a remarkable ruling, the **U.S. Court of Appeals for the Ninth Circuit** has reconsidered its 1997 holding in *Kyocera v. LaPine Technologies*, and concluded that the FAA does not allow the parties to an arbitration agreement to dictate the standard of review for arbitral awards. The federal circuit courts are unevenly split on the question of whether parties can enter into so-called **opt-in provisions for the judicial supervision of awards**. Such

provisions can obligate the court of enforcement to review the award or designated parts of it on the merits. FAA Section Ten thereby becomes a “default” basis for the court scrutiny of arbitral awards. The Ninth Circuit initially upheld opt-in clauses. It was joined by the Fifth Circuit and later the Third Circuit. The Sixth, Seventh, Eighth, and Tenth Circuits, however, ruled that these agreements exceeded the parties’ contract authority and were unenforceable. Emphasizing that the rule of contract law in arbitration ends with the rendering of the award, the court stated that the FAA—the enacted law—governed matters of enforcement. (Story at 271.)

The **Florida Bar’s** Commission on **Multijurisdictional Practice** has voted unanimously to **exempt arbitration** from its proposed rules. The Commission’s rules would have banned unlicensed foreign attorneys from representing clients in international arbitral proceedings that took place in Florida. The rules also would have imposed stringent requirements on U.S. lawyers who were not licensed in Florida and who were involved with international arbitrations held in Florida. Miami is second only to New York City as a venue for international arbitrations. (Story at 272.)

CONTENTS

Around The States	271
Around The World	274
Judicial Decisions	276
State Judicial Decisions	279
Perspectives	283
Bibliographic Resources	296

The IBA’s **Seventh Annual International Arbitration Day** will be held in Sao Paulo, Brazil on February 12, 2004. (Story at 274.)

The **U.S. Supreme Court** has reversed an Alabama state Supreme Court decision by holding that a debt-restructuring agreement was “a contract evidencing a transaction involving commerce” within the meaning of the FAA. The arbitration agreement in the contract was, therefore,

enforceable. *Citizens Bank v. Alafabco, Inc.* (Case summary at 276.)

In yet another decision on arbitration, the **U.S. Court of Appeals for the Ninth Circuit** has held an **employment arbitration agreement** unconscionable. The court criticized the agreement’s provisions regarding the statute of limitations, class action litigation, cost-splitting, and the employer’s unilateral right to modify or terminate the agreement. *Circuit City Stores, Inc. v. Mantor*. (Case summary at 277.)

The **California state Supreme Court** has held that a provision in an employment arbitration agreement that allowed either party to “appeal” awards of \$50,000 or more to a second arbitrator unduly favored the interests of the employer and, as a consequence, was unconscionable. *Little v. Auto Stiegler*. (Case summary at 279.)

In the *Perspectives* section, **Dr. Vernon Nase** of the T.C. Beirne School of Law at the University of Queensland, Australia provides an excellent account of “ADR and International Aviation Disputes Between States.” He concludes that, “Despite the lethargy of states, the need to modernize the system remains.” (The article begins on page 283.)

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

IN THIS ISSUE

NEWS AT HOME

- Ninth Circuit Holds That Private Parties may not Expand
the Scope of Judicial Review Through Contract271
- The Florida Bar's Multijurisdictional Practice
Commission Reverses its Proposed Rules Governing
International Arbitration272
- The University of Missouri-Columbia School of Law's
LL.M. in Dispute Resolution273

NEWS ABROAD

- The Seventh Annual IBA International Arbitration Day274
- NAFTA Tribunal Defines its Jurisdiction274
- ICSID Tribunal Finds a Violation of the BIT in *TecMed*275
- Recent Activities of the Australian Centre for International
Commercial Arbitration275

JUDICIAL DECISIONS

- Arbitration Provision Enforceable Where Debt-Restructuring
Agreements Were Contracts Evidencing Transactions
Involving Commerce276
- Ninth Circuit Rules That Employment Arbitration
Agreement is Unenforceable277
- Second Circuit Allows a Motion for Costs and
Attorney's Fees278
- Sarbanes-Oxley Does not Preempt the Arbitration of
Whistleblower Claims279

STATE JUDICIAL DECISIONS

- California Supreme Court Rules That Provision for
Appeal of Award is Unconscionable279
- Colorado Supreme Court Holds That Provisions
of ColoradoHealth Care Availability Act are not the
Preempted by FAA280
- Idaho Supreme Court Upholds Arbitrability of Claims
and the Cost-Splitting Arbitration Clause281
- Texas State Court Affirms Judicial Discretion in
Implementing Arbitration282

PERSPECTIVES

- ADR and International Aviation Disputes Between States
by Dr. Vernon Nase283

BIBLIOGRAPHIC RESOURCES296

EDITORIAL STAFF

Editor-in-Chief:

Thomas E. Carbonneau
Penn State 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,
Dispute Resolution Institute,
Hamline University School of Law

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

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

Jeanette A. Jaeggi, Domestic Arbitration,
Penn State Dickinson School of Law

Deborah Massucci, Securities Arbitration,
Director, JAMS
Adjunct Professor, Brooklyn Law School

Production Manager:

Michael Murphy
Juris Publishing, Inc.

Editors-At-Large:

William W. Park
Boston University School of Law

Jan Paulsson
Freshfields (Paris)

Editorial Assistants:

Margaret Driscoll Erin Chafin
Ariel Caris Keri Schantz

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 the United States: \$650.00 yearly; International: \$710.00 yearly. Prices include shipping & handling and complete online access to the full archive of *all* WAMR issues. 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 Dickinson School of Law, 150 South College Street, Carlisle, PA 17013-2899. You may call him at (717) 240-5153; email: tec10@psu.edu.