

World Arbitration & Mediation Report



Vol. 17, No. 10

Covering Dispute Resolution in the United States and Around the World

October 2006

HIGHLIGHTS

The U.S. Third Circuit has ruled that a court may **adjust the terms of an award** for the **passage of time**. The case involved the **enforcement** of an international arbitral award under the New York Arbitration Convention. Apparently, ten years separated the date of rendition of the award from the date of its enforcement. The court adjusted the terms of the award to account for the lapse of time, emphasizing that such emendations should track the content of the original award as clearly as possible. (Story on page 319.)

The U.S. Tenth Circuit has determined that **appraisals** do not constitute arbitrations; therefore, the FAA does not apply to disputes that emerge regarding an appeal. In the court's view, an arbitral award disposes of an entire litigation, is final and binding, and cannot be reviewed for mistakes of law. An appraisal has none of those features. (Story on page 319.)

The **National Arbitration Forum (NAF)** provides a number of *Case Summaries* for this issue of **WAMR**. The cases address a wide range of cutting-edge issues in U.S. arbitration law: *functus officio*, merits review of awards, arbitrability, class action waivers, the requirement of mutuality, and available remedies. In particular, on matters of arbitrability, the courts have held that arbitration agreements are valid in wrongful death actions and in regard to issues

CONTENTS

News At Home.....	319
NAF Case Summaries.....	321
Documentary Resources.....	326
Commentary.....	329
Perspectives.....	331
Calendar.....	345

arising from marital dissolution. (The *NAF Case Summaries* begin on page 321).

In the *Commentary* section, **Mitchell Zimmerman**, a partner at **Fenwick & West, LLP** in San Francisco, writes about the risk of too much **flexibility** in alternative dispute resolution, in particular, the

shifting of the neutral's role from arbitrator to mediator and *vice versa*. He writes about a recent case, *Morgan Phillips, Inc. v. JAMS/Endispute, LLC*, 140 Cal. App. 4th 795 (2006), that involved issues of **arbitral immunity** and breach of contract. There, the court ruled that "arbitral immunity" should not act as a shield to the "unprincipled abandonment of the arbitration." It concluded that the failure "to make a timely decision" amounted to the arbitrator's "breaching a contractual duty to both parties." Mr. Zimmerman draws a number of conclusions from the court's reasoning and ruling. (The *Commentary* begins on page 329.)

Finally, in the *Perspectives* section, **Albena P. Petrova** provides a thorough comparative assessment of the case law regarding the **ICSID Annulment grounds**. She concludes that in terms of the annulment mechanism: "It is critical to maintain finality, efficiency, uniformity, and consistency, and to balance finality with accuracy, as the Washington Convention faces a growing number of pending annulment cases." (The *Perspectives* section begins on page 331.)

PENNSTATE



The Dickinson
School of Law

JurisNet LLC, Huntington, NY, USA

Published in conjunction with Penn State University's
Institute of Arbitration Law and Practice, Carlisle, PA, USA

IN THIS ISSUE

NEWS AT HOME

Third Circuit sets new Precedent for Modifying International Arbitration Awards.....	319
Tenth Circuit Distinguishes Appraisals From Arbitral Awards.....	319
Predatory Lenders Win? New Jersey High Court Rules on Class Action Agreements.....	320

NAF CASE SUMMARIES

Provision for Alternative Rules Saves Arbitration Agreement.....	321
In California, Parties can Contract for Judicial Review of Arbitrator's Misapplication of Law by Using "Magic Words".....	321
Arbitrators Cannot Render Supplementary Awards.....	321
Arbitration Clause Enforced Against Decedent.....	321
Martial Dissolution Issues are Arbitrable.....	322
Waiver of Class-Action Proceedings Upheld.....	323
Lack of Mutuality Renders Arbitration Agreement Unenforceable.....	323
Employers Need not Demonstrate Bilateral Effect of Mutual Arbitration Agreements.....	323
Rule 55 Default Judgment Proceedings Unsuitable to Confirm or Vacate Arbitration Award.....	324
Arbitration Provides Consumers a Full Range of Legal Remedies.....	325
Parties' Submissions Expand Arbitrator's Authority.....	325
Courts Have Authority to Order Arbitration Outside Their Districts.....	325

DOCUMENTARY RESOURCES

Domain Name Decision (<i>Anheuser-Busch, Inc. v. Ryan Forrester</i>) Provided by Kristine Dorrain	326
---	-----

COMMENT

Beware the Dangers of Arbitrations Morphing Into Mediators by Mitchell Zimmerman.....	329
---	-----

PERSPECTIVES

A Comparative Analysis of the ICSID Annulment Grounds by Albena Petrova.....	331
--	-----

CALENDAR.....	345
---------------	-----

EDITORIAL STAFF

Editor-in-Chief:

Thomas E. Carbonneau
Penn State Dickinson School of Law

Executive Editor:

Crystal L. Stryker, Esq.
Penn State Dickinson School of Law

Editors:

Frédéric Bachand, Investment Arbitration,
McGill Law Faculty (Montréal)
Welber Barral, Latin American Arbitration,
Universidade Federal de Santa Catarina (Brazil)
Richard Chernick, Editor for Arbitration Law &
Practice, JAMS (Los Angeles)

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

Robert Davidson, Editor for Arbitration Law
& Practice, JAMS (New York)

Christopher Drahozal, U.S. Arbitration Law,
University of Kansas School of Law

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

Barry Garfinkel, International Arbitration,
Skadden Arps Slate Meagher & Flom
(New York City)

Grant Hanessian, International Arbitration,
Baker & McKenzie (New York City)

Gail Partin, Research Editor,
Penn State Dickinson School of Law

David Zaslow, International Arbitration,
Baker & McKenzie (New York City)

Production Manager:

Wendy M. Ser

Editors-At-Large:

William W. Park
Boston University School of Law
Jan Paulsson
Freshfields (Paris)

Editorial Assistants:

Andrea Alabi
Shailey Gupta-Brietzke
Tricia Goldburn
Michelle Wirth

Publication and Subscription Information

The WORLD ARBITRATION AND MEDIATION REPORT is published monthly by JurisNet LLC, 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 JurisNet LLC. 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.