Eighth Circuit weighs in on circuit split over proper venue for appeal from denial of motion to compel arbitration in patent case

By John R. Schleppenbach

The Federal Arbitration Act provides that an order denying a motion to compel arbitration is immediately appealable. It does not, however, specify which court or courts possess jurisdiction over such an appeal. In most cases, there is no dispute as to which court is the appropriate court to hear the appeal, as the parties simply turn to the court of appeals for the circuit that includes the district court that denied the motion to compel. In patent cases, however, the Federal Circuit has been given exclusive jurisdiction over some types of appeals, leading to disagreement as to whether it is the appropriate forum for an appeal from the denial of a motion to compel arbitration. The Third Circuit in Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc., determined that the Federal Circuit did not have exclusive jurisdiction over an appeal.

Continued on page 2


By Amy D. Mitchell; J.D. Candidate January 2011; ISBA Student Representative

Title 28 of United States Code §1782 governs judicial assistance U.S. federal courts may provide in foreign discovery. It essentially provides that a district court may order a person residing or found within the district to provide documents or testimony for use in a proceeding in a “foreign or international tribunal.” The district court may issue the order pursuant to a request made by a foreign or international tribunal or any interested person.

With the steady increase in transnational business activity, international arbitration is becoming the method of choice for resolving cross-border disputes. For that reason, the question of whether private international arbitral panels are “foreign or international tribunals” within the scope of §1782 is more significant than ever. The answer to this question could change the nature.
from the denial of a motion to compel arbitration in a patent case because such a decision was not the final decision in the case. The Federal Circuit in Microchip Technologies Inc. v. U.S. Phillips Corp. disagreed, holding that it did have exclusive jurisdiction in such cases because they were "in effect mandatory injunctions." 5 If so, the Federal Circuit would have exclusive jurisdiction over an appeal under 28 U.S.C. §1292(a)(1). 6 If not, the Eighth Circuit would have jurisdiction under 28 U.S.C. §1294(1), which provides for jurisdiction in the "court of appeals for the circuit embracing the district" if no other venue has been statutorily specified. 7 The Eighth Circuit concluded that a motion to compel arbitration does not have "injunctive effect" and that it accordingly retained jurisdiction over the appeal. 8 In doing so, it relied on its earlier decision in Mclaughlin Gormley King Co. v. Terminix Int’l Co., in which it reasoned that the existence of separate appellate jurisdiction statutes covering injunctions and motions to compel arbitration suggested that Congress did not intend for courts to treat the two identically. 9 It also noted that "[t]his outcome makes sense from a practical standpoint" as the court "typically resolve[s] questions of arbitrability by interpreting contract language and provisions of the FAA, not by analyzing the merits of underlying suits, whether they involve patent infringement or not." 10 Accordingly, the court exercised its jurisdiction over the appeal and reversed the district court’s decision, remanding for the entry of an order compelling arbitration. 11

Thus, it can now be said that a majority of the courts that have reached the issue have determined that the Federal Circuit does not have exclusive jurisdiction over appeals from the denial of motions to compel arbitration in patent cases. It remains to be seen if this will change as additional courts address the issue, or if the United States Supreme Court will step in to resolve the circuit split.

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1. John R. Schleppenbach is an associate in the Chicago office of Jenner & Block LLP and a member of its Arbitration: Domestic and International practice group.
4. 367 F.3d 1350, 1354 (Fed. Cir. 2004).
6. 367 F.3d 1350, 1354 (Fed. Cir. 2004).
7. 516, 518 (8th Cir. 2009).
8. ld. at 517-18.
9. ld. at 518.
10. ld.
11. ld. at 519.
12. ld.
13. ld.
14. ld. at 520.
15. ld.
16. 105 F.3d 1192, 1193 (8th Cir. 1997).
17. Industrial Wire, 576 F.3d at 520 n.4.
18. ld. at 521.

Does §1782 allow for discovery in international arbitrations?

Continued from page 1

of international arbitration.

The majority of federal district courts that have considered the issue have found that a foreign or international tribunal can include international arbitral panels. 1 These decisions effectively allow discovery where it is otherwise not available and opens up the U.S. courts to foreign parties who are seeking documents and other evidence for their international arbitral proceedings.

One court resisting that trend is the Northern District of Illinois. In a recent decision in In re Arbitration in London, England between Norfolk Southern Corp. et al. and Ace Bermuda Ltd., the district court held that 28 U.S.C. §1782 does not authorize district court judges to order discovery in private international arbitrations because such arbitrations are not "foreign or international tribunals" within the meaning of the statute. In reaching its decision, the district court reasoned that the statute applies only to state-sponsored arbitral bodies that are subject to judicial reviewability. 12

The movants in that case, Norfolk Southern Corporation, Norfolk Southern Railway, and General Security Insurance Company, (“Norfolk”) petitioned the district court under §1782 for an order requiring Scott Carev, a non-party and former counsel to ACE Bermuda Ltd., to appear for a deposition in Chicago so that his testimony could be used in connection with an ongoing arbitration in London, England between Norfolk and ACE Bermuda Ltd. The London arbitration concerned disputes about insurance cover-
age for over $100 million of losses incurred by Norfolk in relation to a train derailment and subsequent release of chlorine that occurred in Graniteville, South Carolina in 2005. Mr. Carey had represented ACE and several other insurance and reinsurance companies in matters related to the derailment for nearly two years, including defending and settling personal injury and property damage claims. In support of its petition, Norfolk claimed that during his representation, Mr. Carey consulted on several issues currently being disputed by ACE in the London arbitration and for that reason his testimony was not only highly relevant but also extremely important to the arbitration.

Norfolk claimed that 28 U.S.C. §1782 authorized the District Court to order Mr. Carey’s testimony because the London arbitral body was a “tribunal” within the meaning of “foreign or international tribunal” contained in §1782 and as interpreted by recent case law. Specifically, Norfolk asserted that the London arbitral body was a “first instance decision-maker” that issues decisions “both responsive to the complaint and reviewable in court.”

Mr. Carey, opposing the petition, argued that a private arbitration proceeding commenced pursuant to a contract does not constitute “tribunal” within the meaning of the statute and therefore, §1782 does not apply to authorize the District Court to grant Norfolk’s discovery petition. Specifically, Mr. Carey argued that the statute’s legislative history indicates that “only governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state” are considered “foreign or international tribunals” under §1782.

The District Court considered Norfolk’s petition against the backdrop of the recent Supreme Court case interpreting §1782, Intel Corp. v. Advanced Micro Devices. In that case, the Supreme Court was called upon to determine whether the Directorate-General for Competition (“DGC”), a quasi-governmental agency established under the Commission of the European Communities, was a “tribunal” within the scope of the statutory phrase “foreign or international tribunals.” In considering this question, the Supreme Court turned to the legislative history of §1782 and observed that it is a culmination of nearly 150 years of Congressional efforts to provide federal-court assistance in gathering evidence in connection with “any civil action” pending in a “court in a foreign country.” This language replaced the previous legislation that limited federal courts to assisting only where a foreign government was a party or had an interest in the foreign proceedings. In 1943, Congress broadened the statute further by replacing the phrase “civil action” with “judicial proceeding.”

In considering this question, the Supreme Court turned to the legislative history of §1782 and observed that it is a culmination of nearly 150 years of Congressional efforts to provide federal-court assistance in gathering evidence in connection with “any civil action” pending in a “court in a foreign country.” This language replaced the previous legislation that limited federal courts to assisting only where a foreign government was a party or had an interest in the foreign proceedings. In 1943, Congress broadened the statute further by replacing the phrase “civil action” with “judicial proceeding.” Finally, in 1964, Congress completely revised and further broadened the scope of the statute by replacing the phrase “in any judicial proceeding pending in a foreign country” with the phrase “in a proceeding in a foreign or international tribunal,” which reflects the current text of the statute.

After noting Congress’s clear intent to expand the application of §1782 as well as Congress’s actions to progressively broaden its scope over the years, the Supreme Court determined that the statutory phrase “foreign or international tribunals” encompassed “administrative and quasi-judicial proceedings.” Accordingly, it held that the DGC was a “tribunal” within the meaning of §1782 because it acts as a first-instance decision-making body in proceedings “that leads to... a final administrative action... both responsive to a complaint and reviewable in court.”

In applying Intel to the Norfolk’s petition, the District Court pointed out that the Supreme Court did not address whether private arbitral tribunals fall within the scope of §1782 and it did not declare that any foreign body exercising adjudicatory power falls within the purview of the statute. While the District Court acknowledged the Supreme Court’s reference to “arbitral tribunals” in dictum, it interpreted that reference include only state sponsored arbitral bodies and exclude purely private arbitrations.

Accordingly, the District Court flatly rejected the Norfolk’s assertion that it should adopt a broad reading of the term “tribunal” as expressly including “arbitral tribunals” and ultimately determined that neither the legislative history of §1782 nor the Supreme Court’s decision in Intel warranted the type of temporal extension Norfolk requested.

Adopting the reasoning used by the District Court of New Jersey in In re Matter of the Application of Oxus Gold PLC, the Northern District explained that purely private arbitrations established by a private contract are quickly distinguishable from arbitrations conducted by a body operating under gov-
enforcement authority, like the DCG. First, arbitration is utilized generally as an alternative to formal litigation, rather than a precursor, as was the case in Intel, and second, in many situations, the decisions of private arbitral bodies are not reviewable by any court.

In support of these distinctions, the District Court relied heavily on the Intel court’s discussion of the DGC’s role in enforcing European law and its relationship to the Court of First Instance and to the European Court of Justice, which is the court of last resort on European Union matters particularly insightful. It explained that the DCG is responsible for investigating alleged violations of European Union Competition laws, and that it conducts its investigations pursuant to a complaint or sua sponte and considers information provided in the complaint or solicited from the party named in the complaint. Any decision the DGC reaches; to dismiss or pursue the complaint, or to recommend the imposition of penalties, liability, or sanctions, is reviewable by the Court of First Instance and the European Court of Justice. The Intel court found that the ultimately reviewability the DCG’s decisions was of particular importance to its determination that the DCG fell within the scope of §1782.

Finally, the District Court explained that private contracts in which the parties agree to arbitrate their disputes, commonly include provisions waiving judicial review of the decisions reached by arbitrator. The contract at issue, pursuant to which Norfolk sought the order requiring Mr. Carey to sit for a deposition, contains such a provision. It expressly states, “the decision of the “Board” is final and binding on the parties, and that such decision shall be a complete defense to any attempt of appeal of litigation of such decision...” While the contract does allow for decisions reached by fraud or coercion, the District Court concluded that these very narrow circumstances do not allow for judicial review of the merits of the dispute.

It is clear from the District Court’s holding that it viewed the Intel decision as a mere clarification, not an extension or re-definition of the statutory language. In footnote four of the opinion, the District Court points out that the Supreme Court failed to mention the Second or Fifth Circuit authority expressly holding that §1782 does not apply to private arbitrations. Further, the District Court stated that it was not unreasonable to suppose that had the Intel court intended for its holding to extend §1782 to private arbitrations, it would have at least made some mention of those cases.

The issue of whether 28 U.S.C. §1782 authorizes discovery in private foreign arbitrations is far from settled. Given the inconsistencies in the various District Courts’ rulings, it is likely that forum shopping is already occurring, both in drafting arbitration clauses and in determining where to file §1782 discovery requests as well as in determining whether to arbitrate under a state-sponsored or a private tribunals. An appeal from this decision is pending before the U.S. Court of Appeals for the 7th Circuit. As the first Circuit to rule on §1782 since the Supreme Court’s decision in Intel, the Seventh Circuit’s decision will be paramount in molding the landscape of international arbitration.

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2. 28 U.S.C. § 1782(a); Emphasis added.
5. See movants’ motion, 2009 WL 2236855 (N.D.Ill.).
7. Id at 247. Explaining that since 1885, federal courts have been authorized to provide this type of assistance.
8. Id at 248.
9. Id.
10. In re Arbitration between Norfolk Southern Corp, supra at 885.
11. In re Arbitration between Norfolk Southern Corp, supra at 885. Accord, Republic of Kazakhstan, supra at 882 (noting that references in the US Code to arbitral tribunals' almost uniformly concern an adjunct of a foreign government or international agency).
12. This was the approach taken in In re Babcock, supra at 240.
13. In re Arbitration between Norfolk Southern Corp, supra at 886 quoting Intel, supra at 254-55.
14. Id at 885
15. In re Arbitration between Norfolk Southern Corp, supra at 886. The District Court noted that the Second and Fifth Circuits have reached the same conclusion. See National Broadcasting Co. v. Bear Stearns & Co., 163 F.3d 184, 189 (2d Cir. 1999) and Republic of Kazakhstan v. Biedermann International, 168 F.3d 880 (5th Cir. 1999) following National Broadcasting and observing, “[t]here is no contemporaneous evidence that Congress contemplated extending §1782 to the then-novel arena of international commercial arbitration.” Id. at 881-82.)
Dissolution of mandatory credit card arbitration clauses signals need for arbitration reform

By Sidra Hamidi, North Central College

One of the primary uses of arbitration is seen in the settlement of consumer credit card disputes. However, mandatory arbitration clauses in credit card agreements have continually sparked the ire of both consumers and advocates of consumer rights. Oftentimes, consumers are unaware that credit card agreements waive their right to litigate through the court system. These arbitration clauses in credit card agreements have been seen as an attempt by creditors to thwart legal rights in order to enhance profit-driven ventures. Still others have seen arbitration to be a cost-effective and time efficient method for both credit card companies and consumers. The recent move away from credit card arbitration is dramatically affecting the relationship between creditors and consumers. Credit card companies have decided to drop the controversial arbitration clauses in order to restore their credibility and trust in the eyes of American consumers. In August 2009, Bank of America decided to drop the mandatory arbitration clauses from its agreements and other companies followed suit. With J.P. Morgan Chase removing the clause in November and Capital One removing it in mid-December 2009, it is clear that credit card companies are no longer going to force arbitration for all disputes and will give consumers the choice to pursue litigation through the court system. This move was principally facilitated by the filing of a class action lawsuit on the part of a Philadelphia-based law firm, Berger & Montague. As a result of the lawsuit, major credit card companies have been forced to relinquish their enforcement of mandatory arbitration. The lawsuit initially forced Chase to cease sending disputes to arbitration in July and was the catalyst for the reversal of the policy enforced by creditors.

While this change has officially taken effect in recent months, the move away from arbitration was in the works since 2006. The primary parties involved in the shift include the Minneapolis-based arbitration firm, National Arbitration Forum (NAF), and Axiant LLC, a consumer debt collector. Axiant LLC represented the debt collecting arm of the bigger private-equity firm, Accretive LLC. In 2006, Axiant LLC set out to establish a stake in the NAF. The NAF was the country’s largest consumer-debt-arbitration body and was also on its way to becoming the leading arbitration organization by moving beyond credit card arbitration disputes to larger disputes that could be resolved through arbitration means rather than through the court system. However, in July 2009, the Minnesota attorney general’s office alleged that the NAF was unlawfully active in both ends of the credit card dispute resolution process; namely, arbitration and debt collection. Axiant’s financial involvement in the NAF was alleged to be an instance of misleading and false advertising by the Minnesota attorney general. Additionally, Axiant was created in association with Mann Bracken, a debt-collecting company which actively represented credit card companies in credit card disputes. In essence, the NAF, a leading consumer arbitration firm, was indirectly financially involved with Mann Bracken, a credit card company advocate.

Not only did this undermine the mandatory credit card arbitration provision, it removed the credibility of arbitration as a legitimate way to resolve legal disputes between consumers and companies. The NAF’s role as an impartial arbitration entity which defended the rights and interests of consumers was obfuscated by its involvement with debt collectors and collaboration with credit card company advocates. While the NAF reinforced its role as a disinterested party in credit card disputes, it is clear that their financial involvement with other companies has adversely affected alternative dispute resolution and arbitration. The Minnesota-based charge successfully resulted in the cessation of the NAF’s involvement in credit card disputes. Subsequently, the American Arbitration Association (AAA) also stopped hearing credit card arbitration cases which has almost entirely ended arbitration of credit card consumer disputes.

In many ways, these developments represent an effective means of reining in abusive and misleading practices by creditors who impose mandatory binding arbitration clauses to establish the upper hand in legal disputes. However, this shift could also have a deleterious effect on consumers. Arbitrations are relatively inexpensive when compared to the standard litigation procedure. Consumer disputes could cause credit card companies to pay more in the litigation and debt collecting process which could ultimately affect consumers who are entering into crediting agreements with companies such as Bank of America, J.P. Morgan Chase, and Capital One. While mandatory arbitration likely goes beyond the bounds of constitutional legality, arbitration should not be completely discounted as a legitimate recourse for credit card disputes. Arbitration provides a cost-effective alternative to settling disputes between consumers and creditors. Arbitration procedures avoid the many procedural elements of trial courts; elements which are costly, time-consuming, and often hindered by rules and procedures. However, in order to limit abuse and corporate control, there is an express need for arbitration reform that makes arbitration advantageous for all parties involved in the dispute, for both consumers and corporations. The end of credit card arbitration is indicative of the changes that are much-needed in the current arbitration process. What made mandatory arbitration schemes so controversial was the way in which the process was slated to support the interests of the credit card companies instead of the consumer. Unfair practices, such as company choice of their own arbitrators and the removal of the right to appeal a decision, made arbitration widely unpopular. However, any reform measures should uphold the importance of arbitration as a viable alternative to litigation, rather than framing arbitration as a means to windle consumers.

One of the most primary changes that are necessary to salvage the reputation of arbitration is to limit the scope for which arbitration may be used. Arbitration should not be forced in any circumstances and should be outlawed from being used in cases such as employment discrimination suits or in any other statutes that are meant to protect civil rights between contracting parties. The decision to enter into arbitration should not be coerced as a part of a pre-existing contract between parties who have unequal bargaining power. Instead, it should be the result of
a mediation process between contracting parties once the dispute arises. Pre-dispute binding clauses only serve to divert from the true intention of arbitration; to cut litigation costs and resolve minor disputes in an efficient manner. Additionally, any organizations charged with conducting arbitration proceedings between commercial entities and consumers should practice complete transparency and be prohibited from entering into financial arrangements with debt collecting entities or other groups associated with creditors.

Commercial arbitration is regulated by the Federal Arbitration Act (FAA) which was passed in 1925. This act gives authority to the binding mandatory arbitration clauses in credit card and other commercial agreements. Clearly, commercial transactions between corporations and consumers have experienced great changes since 1925. The expansion of the credit card industry is one such change that requires an update of the original FAA in order to reflect the changing juridical and commercial environment. Reform is very much necessary in the current economic environment as a means to restore the credibility of arbitration in certain circumstances. Reform measures should focus on greater involvement by both parties throughout the arbitration proceedings in order to reinforce non-biased decisions. Instead of disbanning domestic arbitration proceedings, lawmakers should focus on defining the bounds of arbitration and enforce measures that keep all sides accountable.

Sources:

Case briefs
By Nicholas Pavlopoulos, North Central College

10th Circuit Court of Appeals Rules that Appealing a Ruling Against a Request for Relief is Precluded if the Request Fails to Specifically Request Relief Offered by the FAA

Conrad v. Phone Directories Co., Inc., No. 07-6276 (United States Court of Appeals for the Tenth Circuit, November 10, 2009)

Phone Directories Co. (PDC) was sued in federal court by a former employee, Sean Conrad, for violation of an employment contract, in response to which PDC filed a motion for Conrad's claims to be dismissed as a result of an arbitration clause that was contained within a subsequently agreed upon employment agreement. When the court denied PDC's motion, PDC appealed to the Tenth Circuit Court of Appeals. The Court dismissed the case, remanding it to the district court, due to a lack of appellate jurisdiction under the FAA. The Court held that since PDC did not request relief in the form of the case being referred to arbitration but had instead requested dismissal of the case under the Federal Rules of Civil Procedure, PDC's motion for relief was not under the FAA. The Court ruled that interlocutory appeals are only permitted under the appellate jurisdiction provision of the FAA when it is clear that the defendant only seeks the relief offered by the FAA or in motions that are brought specifically pursuant to the FAA.

Supreme Court of Appeals of West Virginia Rules Unilateral Withdrawal from Binding Arbitration Precludes the Party's Claims from being Pursued in further Arbitration or Civil Action

Crihfield v. Brown, No. 34593 (Supreme Court of Appeals of West Virginia, November 2, 2009)

After Steven Brown and Charles Crihfield entered a stock purchase agreement containing an arbitration clause, Crihfield was sued by Brown in state court for breach of the agreement. The court granted Crihfield's motion to dismiss the case and compel arbitration. However, Brown unilaterally withdrew from arbitration prior to the final arbitration hearing, choosing instead to appeal the dismissal of his claim. Crihfield moved for summary judgment, but was denied. Crihfield then appealed to the Supreme Court of Appeals of West Virginia, which reversed, reasoning that Brown could have appealed the court's dismissal of his claim prior to the beginning of arbitration or could have postponed the final arbitration hearing rather than unilaterally withdrawing from arbitration. The Court held that unilateral withdrawal from irrevocable arbitration by one of the parties involved in the arbitration precludes the claims raised by the party from being pursued further in later arbitration or civil action, since the claims are abandoned as a result of the party's action.

Court of Appeals of Maryland Rules a Trial Court's Denial of a Motion to Compel Arbitration Cannot be Appealed when the Lower Court Expressly Refuses to Certify the Ruling as Final

Addison v. Lochearn Nursing Home, LLC, No. 134 (Court of Appeals of Maryland, November 10, 2009)

Upon becoming a resident of the nursing facility owned by FutureCare-Lochearn, Inc., Beulah Addison entered a contract with FutureCare which contained an arbitration clause. When Addison was sued in state court by FutureCare for breach of contract, Addison counterclaimed, stating FutureCare had caused her inability to pay. FutureCare responded by moving to compel arbitration of this counterclaim. However, the court denied the motion, expressly declining to certify its order as final. FutureCare appealed this order, and the appellate court certified the lower court's order as final prior to reversing the lower court's order. This ruling was then appealed by Addison to the Court of Appeals of Maryland, which reversed the appellate court's ruling, holding that it was incorrect for the lower court's order to be certified as final when the court itself expressly denied certifying it as such.
Appeals Court of Massachusetts Rules Judicial Review of an Arbitration Award must be done in the Original Venue where Civil Action was Filed

Cybulski v. Vaiani, No. 08-P-1030 (Appeals Court of Massachusetts, Middlesex, October 13, 2009)

Joseph Cybulski sued Andrea Vaiani in state court after they had been involved in a car accident, for which Vaiani did not dispute fault, but denied causation of the injuries Cybulski claimed to have sustained. The parties entered into an arbitration agreement during litigation with the intention of fully settling all claims. When the arbitrator made an award in favor of Vaiani, Vaiani moved to confirm the award whereas Cybulski filed an opposition motion against the award in one state court and a motion to vacate the award in another state court. The judge from the initial litigation ruled in favor of Vaiani. Cybulski then appealed to the Appeals Court of Massachusetts, Middlesex, which affirmed, holding that parties who begin a civil action and then suspend the action, agreeing to arbitrate, must seek confirmation of vacation of the arbitration award in the county where the action was originally filed rather than where arbitration had occurred.

Despite Claim that she did not Voluntarily Sign the Mediated Settlement Agreement, Court of Appeals of Texas Affirms a Mother’s Loss of Parental Rights

In Re. C.H., Jr., No. 05-09-00386-CV (Court of Appeals of Texas, Fifth District, October 13, 2009)

A binding mediation settlement agreement was signed between the Texas Department of Family and Protective Services and M.C. after the Department had filed a petition to terminate M.C.’s parental rights. The settlement proposed placing M.C.’s son, C.H. Jr., in one of a number of homes and providing M.C. with visitation rights. However, if none of the homes were approved by the Department, the agreement provided that M.C.’s parental rights would be terminated. When the Department did not approve of any proposed homes and M.C.’s parental rights were terminated after a hearing, M.C. attempted to have the settlement reversed, claiming that she had been denied effective counsel, due process, and did not voluntarily sign the agreement. The court denied the motion and its ruling was affirmed by the Court of Appeals of Texas, Dallas, which held that M.C. was not denied due process, since her testimony and evidence had been considered at the hearing. The Court also determined that M.C. failed to effectively argue the presumption of effective counsel since she had testified at the hearing to having read, understood, discussed with her attorney and voluntarily signed the agreement.

California Court of Appeals Upholds that Proof of a Valid Arbitration Agreement between Two Parties must be Provided before a Court can Confirm an Arbitration Award

Toal v. Tardif, No. 06CC02050 (California Court of Appeals, Fourth Appellate District, Division Three, October 30, 2009)

After Adam and Joy Toal had purchased a house from Valere and Helen Tardif, the Toals sued the Tardifs for both breach of contract and misrepresentation, after which the parties’ attorneys signed an agreement for the dispute to be submitted to arbitration. The arbitrator awarded the Toals, and the Toals moved to confirm the award. The Tardifs, however, claimed that the arbitration agreement was signed by their attorney without their consent, and they therefore moved for a new trial. The court confirmed the arbitrator’s award and denied Tardif’s motion. As a result, Tardif appealed to the California Court of Appeals, Fourth District, which reversed the ruling, holding that before a court can confirm an arbitration award, it must find there to have been a valid arbitration agreement. Since a client’s substantial rights cannot be waived by an attorney without consent, the Court determined that a copy of the arbitration agreement signed by the attorneys did not meet the burden of showing a valid agreement.

A New Claim for Defects Discovered after Arbitration is not Precluded by Res Judicata

Storey Construction, Inc. v. Hanks, No. 35459-2008 (Supreme Court of Idaho, September 30, 2009)

Lily Reeves is the trustee of Sun Valley Trust, of which Tom Hanks and Rita Wilson are beneficiaries. The trustee entered into a contract with Storey Construction for the building of a house. The contract contained an arbitration clause, and Storey requested arbitration of a dispute which arose in 2002, to which the trustee made a counterclaim, alleging defective construction and thus breach of contract. Storey was awarded $1,218,820 by the arbitrator. In 2005-2006, further defects in construction were discovered, in response to which the trustee and beneficiaries moved to arbitrate the issue. However, Storey filed a motion both to confirm the prior award and to stay the recent arbitration due to res judicata, both of which the court granted. The trustee and beneficiaries appealed to the Supreme Court of Idaho, which reversed, reasoning that since the trustee and beneficiaries had not known of the recently discovered defects during the first arbitration process, they did not need to address them in that arbitration, and thus the trustee and beneficiary may arbitrate over the newly discovered defects.

Supreme Court of Nebraska Rules Agent’s Lack of Actual or Apparent Authority makes Signing of an Optional Arbitration Contract Invalid

Koricic v. Beverly Enterprises-Nebraska, Inc., No. S-08-1167 (Supreme Court of Nebraska, October 16, 2009)

When Manda Baker, a Croatian immigrant with limited knowledge of English, was admitted to Beverly Hallmark Nursing Home, her son, Frank Koricic, aided her by signing documents for her. He signed the admission papers and an optional arbitration agreement. Koricic was not given a power of attorney by Baker, and Baker was not incompetent. After Baker had died, Koricic sued Beverly Hallmark for injuries that Baker had sustained prior to death. In response, Beverly Hallmark moved to compel arbitration, which was granted by the court. Koricic then appealed to the Supreme Court of Nebraska, which reversed the lower court’s decision, citing agency principles that Koricic was limited to only being able to sign the required admission papers. Since the arbitration agreement was optional, Koricic had no authority to sign it for Baker. Additionally, the Court reasoned that Koricic also lacked apparent authority, since Baker did not represent to Beverly Hallmark that Koricic had authority to sign the optional arbitration agreement and also since she had never ratified the agreement.
Supreme Court of Connecticut
Rules Courts will not Review
Arbitration Awards for Errors of Law
or Fact when the Scope of
Submission to the Arbitrator is
Unrestricted

Comprehensive Orthopaedics and
Musculoskeletal Care, LLC v. Axtmayer, No.
SC 18304 (Supreme Court of Connecticut,
October 20, 2009)

Alfredo Axtmayer and Comprehensive
Orthopaedics and Musculoskeletal Care, his
former employer, submitted a dispute to arbi-
tration which had resulted from supposed
violations of the restrictive covenant in Axt-
mayer’s contract. The arbitrator awarded
Comprehensive liquidated damages but no
attorney’s fees. Due to the lack of attorney’s
fees in the award, Comprehensive moved to
have the award vacated in trial court. Axt-
mayer moved to confirm the award. When
the trial court confirmed, Comprehensive
appealed to the Supreme Court of Connecti-
cut, which affirmed the lower court’s ruling.
Comprehensive argued that the scope of the
arbitrator’s authority was exceeded by the
arbiter not awarding attorney’s fees, but
the Court held that courts will not review
an arbitration award for errors of law or fact
when the scope of submission to an arbiter
is unrestricted.

Washington Supreme Court Rules
an Arbitration Award should only
be Overturned as a Violation of
Public Policy when the Policy
Violated is Well Defined, Explicit,
and Dominant

Kitsap County Deputy Sheriff’s Guild v.
Kitsap County, No. 80720-5 (Supreme
Court of Washington, October 29, 2009)

When Brian LaFrance, a deputy in Kitsap
County and member of the Kitsap County
Deputy Sheriff’s Guild, was fired by the Coun-
ty, the Guild requested arbitration based
upon the collective bargaining agreement it
had with the County. Conditional reinstatement
of LaFrance was awarded by the arbiter.
LaFrance sued the County, claiming
it had breached the arbitration agreement,
and the County moved for summary judg-
ment on this claim and also petitioned for a
writ of certiorari for review and vacating of
the arbitration award. The Court granted the
County’s motion for summary judgment, but
denied the writ of certiorari, which the coun-
ty appealed. The appellate court reversed the
lower court’s denial of the writ of certiorari,
but also overturned the arbitration award as
a public policy violation. The Guild then ap-
ppealed to the Washington Supreme Court,
which reversed the ruling, holding that the
award could not be overturned since it did
not violate a well defined, explicit, and domi-
nant public policy.

Happenings

By Kate Oscarson, North Central College

Settlement Agreements Offered
Through E-mail Become
Enforceable Contracts

In Dyer v. Bilaal, the District of Columbia
Court of Appeals ruled that settlements
reached through e-mail are now enforce-
able contracts. This decision was propelled
by a settlement reached in a case the day
prior to the trial via e-mailing between the
attorneys. Willie King sued Dennis Dyer in
the Washington D.C. court claiming Dyer was
involved in a mortgage foreclosure rescue
scam. King’s attorney had received a settle-
ment offer in an e-mail from Dyer’s attorney
and accepted the offer. The Court decided
that since the terms of the offer in the e-mail
were unambiguous, there were no objec-
tions in court, and King had accepted the
e-mailed terms, the e-mailed settlement would
be enforced.

North Carolina Proposes Ethic Rule
Change for Mediators

Currently, mediators are required by Rule
8.3 in North Carolina to report unethical be-
havior of a lawyer to the State Bar. However,
this conflicts with the mediators’ code of con-
duct which states that a mediator is required
to maintain confidentiality of any informa-
tion divulged during the mediation pro-
cess. The North Carolina Dispute Resolution
Committee supports this change due to the
emphasis it puts on the importance of con-
fidentiality. Those opposed worry unethical
behavior will continue without punishment
and lead to unfair mediation. The State Bar
Council hopes to enact this amendment in
January after reviewing the response of the
public to the next State Bar Journal.

Sixth National ECR Conference to be
held May 25-27, 2010 in Tucson

The U.S. Institute for Environmental Con-
flict Resolution will hold a conference in Tuc-
son, Arizona this upcoming May. There will
be training events, workshops, and meet-
ings about environmental conflict resolu-
tion, specifically focusing on new tools and
technology used in ECR. One of the overall
focuses of the conference will be increased
communication between government represen-
tatives, environmental advocates, profes-
sionals in conflict resolution, and many
other groups.

Patents Ombudsman Pilot Program

US Patent and Trademark Office (PTO) is
creating a new program that will allow pat-
et applicants and lawyers a way to request
information about their delayed patents. Af-
ter submitting a request online, an ombuds-
man will follow up with a phone call to clarify
the issues. With this new program, the PTO is
hoping all application-specific problems will
be addressed within ten business days.

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Philip Aka profile

By Laurel White, North Central College

When Philip Aka joined the Illinois State Bar Association’s Alternative Dispute Resolution committee two years ago, he didn’t fit the profile of a “typical” ADR committee member. Aka, a five-year member of the ISBA, identifies himself primarily as an academic and, as such, brings a different perspective to a committee comprised (for the most part) of ADR practitioners.

“I am one of a few [academics] on the committee,” he says. “I learn a lot from the practitioners. I have profound respect for them.”

Aka is currently a tenured professor of political science at Chicago State University and an adjunct professor of law at the Indiana University School of Law at Indianapolis where he teaches international law, international human rights law, and international criminal law. His respective degrees were garnered from Howard University in political science (a PhD), Temple University (a JD), and the Indiana University School of Law at Indianapolis (an LLM).

Aka’s respect for ADR has grown throughout his tenure on its ISBA committee. “I have a lot of passion for ADR,” he says, “because I believe its practices can help dilute some of the excesses of our adversarial system.” Similarly, Aka believes that ADR can play an important role in improving justice administration and citizens’ access to the judicial system.

“What we do in the committee is very important,” he says. “There is a tendency for lawyers, especially in the States, to focus on [law's] adversarial aspect, rather than the notion that we can sometimes supplement the adversarial with ADR.”

Utilizing ADR as a supplement to the “adversarial” aspects of law will have a positive effect of both the expediency and economy of cases, he believes.

The concept of a win-win dispute resolution system, as is sometimes represented by ADR, is not a foreign one to Aka. Born in Nigeria, Aka has cultivated an academic interest in comparing the practices of ADR to those of traditional, cultural systems, some of which he has identified in his home country. Aka presented “Law and Custom in Nigeria: Lessons for ADR” at the September meeting of the ISBA’s ADR committee.

Aka identified Nigeria’s customary law (law derived from cultural systems prior to British colonization) as quite similar to ADR. He explains that, in both systems, “you don’t have a zero-sum situation in which somebody wins completely and the other party loses to the same extent.”

“There can be a middle ground where both actually win and have been given insight into how they disagree,” he says.

Aka, like so many others engaged with ADR (whether on a practical or academic level), has high hopes for the future of the practice in Illinois. He hopes, most primarily, that individuals will come to realize not only the potential of ADR, but its ability to serve not as an alternative to traditional arbitration, but as a supplement, a compliment.

“ADR is not a completely separate system, [the two systems] could complement,” he says.

In the coming year Aka looks forward to continued service on the ISBA’s ADR committee. He will continue both his scholarship and advocacy of ADR as a member of its growing number of state-wide proponents.
### Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

#### February

**Friday, 2/26/10** – Chicago, ISBA Regional Office—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co-sponsored by the ISBA Federal Civil Practice Section. 9-5.

**Friday, 2/26/10** – Webcast—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co-sponsored by the ISBA Federal Civil Practice Section. 9-5.

**Friday, 2/26/10** – Bloomington, Holiday Inn & Suites—Second Amendment and Department of Corrections’ Issues for Criminal Practitioners. Presented by the ISBA Criminal Justice Section. Cap 70. 9-3:45.

**March**

**Tuesday, 3/2/10** – Chicago, ISBA Regional Office—Partnership Law Update- 2010. Presented by the ISBA Corporation, Securities and Business Law Section. 11:45-2.


**Thursday, 3/4/10** – Chicago, ISBA Regional Office—Family Law Skills—Practice Makes Perfect. Presented by the ISBA Family Law Section. 8:30-5.


**Friday, 3/5/10** – Chicago, ISBA Regional Office—Administrative Adjudication in the City of Chicago and other Municipalities. Presented by the ISBA Administrative Law Section; co-sponsored by the ISBA General Practice Section, Small Firm & Solo Section Council. 8:30-5:15.

**Thursday, 3/11/10** – Webcast—Bankruptcy: Tips from the Bench. Presented by the ISBA Commercial Banking and Bankruptcy Section. 12-1.


**Friday, 3/19/10** – Chicago, ISBA Regional Office—Preparing for Trial and Preparing for Appeal. Presented by the ISBA Bench and Bar Section. 8:30 – 6:30.

**Friday, 3/19/10** – Chicago, ISBA Regional Office—Preparing for Appeal. Presented by the ISBA Bench and Bar Section. 1:00-5:30.

**Friday, 3/26/10** – Chicago, ISBA Regional Office—Divorce, Deportation and Disciplinary Complaints: Avoiding Immigration Pitfalls in Family Law. Presented by the ISBA International and Immigration Law Section; Co-sponsored by ISBA Family Law and the ISBA Human Rights Section. 9-1.


**April**


**Thursday, 4/8/10** – Chicago, ISBA Regional Office—Resolving Financial Issues in Family Law Cases. Presented by the ISBA Family Law Section. 8:30-4:30.

**Friday, 4/9/10** – Chicago, ISBA Regional Office—Civil Practice Update- 2010. Presented by the ISBA Civil Practice Section. 9-4.

**Monday - Friday, 4/12/10 - 4/16/10** – Chicago, ISBA Regional Office—40 hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. 8:30-5:45 each day.

**Friday, 4/16/10** – Chicago, ISBA Regional Office—Legal Trends for Non-Techies: Topics, Trends, and Tips to Help Your Practice. Presented by the ISBA Committee on Legal Technology; co-sponsored by the ISBA Elder Law Section Council. 1-4:30 p.m.


**Tuesday, 4/20/10** – Bloomington, Double Tree Hotel—Intellectual Property Counsel from Start-up to IPO. Presented by the ISBA Intellectual Property Section. 8:30-3:30. Cap 80.

**Wednesday, 4/21/10** – Bloomington, Double Tree Hotel—Construction Law—What’s New in 2010? Presented by the ISBA Special Committee on Construction. 9-4. Cap 80.

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