NEWSLETTER

ARBITRATION

INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION

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FROM THE CO-CHAIRS

Looking forward to Buenos Aires

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We hope that many of you reading this newsletter will be attending the International Bar Association (IBA) Annual Conference in Buenos Aires and that we will see you there. Your committee has a number of very interesting sessions planned. The moderators have gathered many eminent speakers together who will share with us their experience and wisdom. You can see full details on page 8 of this newsletter.

In addition to the formal sessions, your committee will have its dinner on the Wednesday evening at the Tattersall. This site, located in one of the most beautiful parts of Buenos Aires (adjacent to the Palermo horse track and in front of the polo grounds), will be a marvellous setting to meet up with friends and colleagues and enjoy a sumptuous meal. Prior to dinner, a one hour drinks reception will be held on the terrace of the same venue.

As we did previously in Singapore and Chicago, in Buenos Aires we will take the opportunity to speak to students at the University of Buenos Aires about arbitration. More and more students are learning the theory of arbitration and are interested to hear what it is like in practice. The Arbitration Committee also supports a scholarship that pays for a young lawyer to attend the conference who could not otherwise afford to do so.

Continued overleaf

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14 *ALS & Assoc., Inc. v AGM Marine Constructors, Inc.*, No. 06-10088-EFH, 2008 U.S. Dist. LEXIS 42642, at * 14 (D. Mass. 2 June 2008).

15 *Prime Therapeutics LLC v Omnicare, Inc.*, No. 08-375 (RHK/JSM), 2008 U.S. Dist. LEXIS 41306 (D. Minn. 31 May 2008); see also *Horton Homes, Inc. v Shaner*, No. 1061659, 2008 Ala LEXIS 120 (Ala. 20 June 2008) (finding that the *Hall Street* court 'rejected the availability of manifest disregard of the law as a basis for vacating an award in proceedings subject to the FAA').

16 *Robert Lewis Rosen Associates Ltd v Webb*, No 07 Civ. 11403 (RJH), 2008 U.S. Dist. LEXIS 51446 (S.D.N.Y. 7 July 2008).

17 *Fitzgerald v H&R Block Financial Advisors, Inc.*, No. 08-10784, 2008 U.S. Dist. LEXIS (S.D. Mich. 11 June 2008) ('[i]n addition to these statutory grounds, a court may vacate an award if the arbitrators have "manifestly disregarded the law"'); *Jimmy John's Franchise, LLC v Kelsey*, No. 08-2040, 2008 U.S. Dist. LEXIS 29535 (C.D. Ill. 10 April 2008) (after reciting FAA §10 standards, stating '[c]ourts will also set aside awards that are "in manifest disregard of the law."').

18 *Rogers v KBR Technical Servs. Inc.*, No. 08-20036, 2008 U.S. App. LEXIS 12320, at * 5-6 (5th Cir. 9 June 2008) ('there is no need in the instant case to determine whether those non-statutory grounds for *vacatur* of an arbitration award remain good law after Mattel').

19 *Comedy Club, Inc. v Improv. West Assocs.*, No. 05-55739, 2008 U.S. App. LEXIS 1258 (9th Cir. 17 April 2007).

20 *Halliburton Energy Servs. Inc. v NL Industries*, No. H-05-4160, 2008 U.S. Dist. LEXIS 26299 (S.D. Tex. 31 March 2008).

21 *Chase Bank USA, N.A. v Hale*, No. 601044/07, 19 Misc. 3d 975 (Sup. Ct. N.Y. 31 March 2008).

22 *Eastern Seaboard Concrete Construction Co., Inc. v Gray Construction Inc.*, No. 08-37-P-S, 2008 U.S. Dist. LEXIS 33256 (D. Maine 18 April 2008).

23 See *Amicizia Societa Navegazione*, 274 F.2d at 808.

24 See, eg, *Collins v D.R. Horton, Inc.*, 505 F.3d 874 (9th Cir. 2007) ('we may not reverse an arbitration award even in the face of an erroneous interpretation of the law. Rather, to demonstrate manifest disregard, the moving party must show that the arbitrator understood and correctly stated the law, but proceeded to disregard the same.').

Judge Alex meets the Supreme Court: *Preston v Ferrer*

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When you think of daytime television, you may think of tacky soap operas, bad talk shows, and TV judges. One thing you certainly would not normally associate with daytime TV is the United States Supreme Court. On 14 January 2008, however, these two dissociative worlds of daytime TV and the US Supreme Court collided when 'Judge Alex' (Alex Ferrer) from the Fox Television daytime court TV programme found himself a party to a case in the US Supreme Court. The dispute involved the arbitration clause of a 'personal management' contract between Judge Alex and Arnold Preston, a California attorney, who had worked for Ferrer in securing his television programme. The substance of the case may not have been overly riveting for the typical Judge Alex viewer; however, to those of us involved with arbitration proceedings in the United States, this case was the definition of 'Must See TV'.

The contract at issue involved a clause that required arbitration of 'any dispute...relating to the [contract's] terms...or the breach, validity, or legality thereof...in accordance with [American Arbitration Association] rules'.[1] Preston invoked this provision to gain fees he claimed were due to him from Alex Ferrer. Ferrer countered by petitioning the California Labor Commissioner for determination, stating that the contract was invalid and unenforceable because Preston had acted as a talent agent without the required licence and that this was in violation of the Talent Agencies Act ('TAA').

The issue before the Supreme Court was not who was right, but rather, who gets to decide who was right, a private arbitrator or the state labor commissioner. Two laws stood in opposition to one another on this matter, and each party was arguing that one of the laws was controlling on this issue. On the one hand, Preston argued that the Federal Arbitration Act ('FAA') was controlling and required that when the parties have agreed to arbitrate, they must do so in lieu of going to court. On the other hand, Ferrer contended that the TAA, which assigns all disputes to the state labor commissioner, was the appropriate law for resolving this dispute.

Ultimately, the question at hand was whether 'the FAA overrides, not only state statutes that refer certain state-law controversies to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency'.[2] This was because the TAA as structured, appeared to create a loophole for arbitration clauses in contracts, even after arbitration was mutually agreed to by both parties and supported by the FAA.

The court, recognising this discrepancy, held that 'when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA'.[3] The court noted that it had ruled consistently that the FAA was 'a national policy favoring arbitration'. When parties contract to settle disputes through arbitration it 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements'.[4]

The decision by the Supreme Court showcases how favourably courts look upon private dispute resolution when it is previously agreed upon by both parties to a contract. The FAA supersedes state law and does not permit legislative attempts to undercut its authority regardless of whether the state law calls for judicial or administrative alternatives to arbitration. So, while one might never think to put daytime TV judges in the same sentence as the US Supreme Court, for at least one day, the two related, yet distant, worlds came together and supplied us with precedent to add clarity to the uncertain environment of contractual arbitration clauses.