

REPORT ON U.S. ADR DEVELOPMENTS (2011-2012)  
for the NAFTA, Art. 2022 Advisory Committee on  
Private Commercial Dispute Resolution\*

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I. Significant Judicial Developments

A. USSC

B. Federal Courts

C. State Courts

1. Massachusetts

2. California

3. Texas

D. Trends (Judicial)

II. Legislative Development

A. Federal – US Congress – Passed

1. Patent reform Act of 2011

2. Dodd-Frank Act

B. Federal – US Congress – Pending

1. Arbitration Fairness Act of 2011

2. Fair Arbitration Act of 2011

C. State Legislation

1. Various States

2. State Mediation Update

## ADR Developments (2011-2012)

- a. California
  - b. Maryland
  - c. Georgia
  - d. Florida
- D. Trends (Legislative)

### III. ADR Institutional Developments

- A. JAMS
- B. American Arbitration Association (AAA)
- C. Financial Industry Regulatory Authority (FINRA) Dispute Resolution Forum
- D. National Arbitration Forum (NAF)
- E. CPR Institute

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## ADR Developments (2011-2012)

### I. Significant Judicial Developments

#### A. U.S. Supreme Court

1. ***AT&T Mobility LLC v. Concepcion***, 563 U.S. \_\_\_, 131 S.Ct. 1740 (2011), reported on at last meeting but updated here,, holds that state law requiring the availability of class wide arbitration is inconsistent with the FAA. A state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitrations is inconsistent with, and therefore preempted by the FAA, irrespective of whether class arbitration is desirable for unrelated reasons.
  - a. In addition, FAA preempted the Discover Bank rule (which had previously held that class action waivers in consumer arbitration agreements were unconscionable) and that class-action waivers in consumer arbitration agreements are enforceable.
  - b. This decision is important because: 1) it effectively struck down the *Discovery Bank* rule; 2) critics argued that this decision demonstrated the Court’s pro-business, anti-consumer attitude towards arbitration; 3) the decision did not settle whether the class-action arbitration waiver is still valid when the plaintiffs could show “large arbitration costs”; 4) absent some legislative changes to the FAA’s breadth of preemption, *Concepcion* may substantially curtail class actions in contractual disputes.
2. ***CompuCredit Corp v. Greenwood***, 565 U.S. \_\_\_, 132 S.Ct. 665 (2012) reversed the Ninth Circuit’s ruling that agreements to arbitrate claims arising from the Credit Repair Organizations Act are unenforceable.
  - a. This is important because the *CompuCredit* Decision is part of a line of cases involving the enforceability of pre-dispute arbitration clauses that have come after the Supreme Court’s seminal decision in *AT&T Mobility LLC v. Concepcion*.
  - b. <http://www.klgates.com/arbitration-world-06-20-2012/#a3>
3. ***Morrison v. National Australia Bank Ltd. (2010)***, \_\_ U.S. \_\_\_, 130 S.Ct. 2869 (2010) ruled firmly against foreign-cubed securities class action lawsuits, thus named because, from the point of view of the United States, they are foreign in two respects: they are between non-US plaintiffs and non-US defendants and relate to the quality of stock market information given by a company listed outside of the US. “Foreign-cubed” actions refers to actions where (1) foreign

## ADR Developments (2011-2012)

plaintiffs sue (2) a foreign issuer in an American court for violations of American securities laws based on securities transactions in (3) foreign countries.

This case is important for foreign practitioners because unless Congress expresses a contrary intent, US laws apply only within the territorial jurisdiction of the US. Following *Morrison*, several lower courts have applied the Supreme Court's bright-line test to other federal laws, including RICO, the Torture Act, and the Lanham Act.

4. ***KPMG LLP v. Cocchi***, 565 U.S. \_\_\_, 132 S. Ct. 23 (2011), held that a court may not issue a blanket refusal to compel arbitration under the Federal Arbitration Act merely on the grounds that some of the claims could be resolved by the court without arbitration. FAA's policy in favor of arbitral dispute resolution, which requires courts to enforce the bargain of the parties to arbitrate, and cannot possibly require the disregard of state law permitting arbitration by or against nonparties to the written arbitration agreement. In addition, courts must examine a complaint with care to assess whether any individual claims must be arbitrated, and the failure to do so is subject to immediate review.
  - a. The decision is based largely on *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, which held "when a complaint contains both arbitrable and nonarbitrable claims, the FAA requires courts to "compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.
  - b. See also: <http://www.karlbayer.com/blog/kpmg-llp-v-cocchi-u-s-supreme-court-holds-that-a-court-may-not-deny-arbitration-when-some-of-the-claims-are-nonarbitrable/>
  - c. <http://www.leagle.com/xmlResult.aspx?page=2&xmlDoc=In%20FLCO%2020120502170.xml&docbase=CSLWAR3-2007-CURR&SizeDisp=7>
  - d. This case is important for all practitioners because it has to do with the Supreme Court's pro-arbitration attitude after its *Concepcion* decision, despite some state court's "creative" maneuver to avoid FAA's mandate.

## ADR Developments (2011-2012)

### B. Federal Courts

1. **Quindao Free Trade Z Genius In'l Trading v. P&S Intl.** (D. Or., Sept. 16, 2009, 08-1292-HU) 2009 WL 2997184 held that a foreign arbitral award cannot be enforced in the US unless it is obtained in accordance with due process.
  - a. This decision is important because it provides authority that failure to provide at least a translated summary of foreign arbitration proceedings served on defendant in the US may, in certain instances, be successfully invoked as a due process defense against the enforcement of a foreign arbitration award.
  
2. **Bank of America v. UMB Financial Servs.**, 618 F.3d 906 (8th Cir. 2010) held that Bank of America could not be compelled to arbitrate its dispute because BOA is not a FINRA member and a party cannot be forced to arbitrate an agreement which it did not originally agree to arbitrate. If a signatory party to a contract with an arbitration clause desires to compel a non-signatory party to arbitrate its claims pursuant to another contract rather than pursue them in litigation, then signatory party should utilize the incorporation by reference method. This contract method promotes fairness and advances the fundamental goal of arbitration: efficiency.

This decision is important for foreign practitioners because it also has to do with foreign signatory party who is a member of New York Stock Exchange. FINRA member ship is mandatory for NYSE member organizations.
  
3. **Argentine Republic v. Nat'l Grid PLC**, (D.C. Cir. 2011) 637 F.3d 365, 367 cert. denied, held that United Kingdom company did not forfeit timeliness defense in proceeding on Argentina's motion to vacate foreign arbitral award which found Argentina liable to company in amount of \$53 million as a result of emergency measures which Argentina implemented in response to financial crisis, although company did not raise defense via motion to dismiss, where company expressly preserved defense in joint stipulation filed three days after deadline for service of notice of motion to vacate, and then raised timeliness defense in company's first responsive pleading. [9 U.S.C.A. §§ 10, 12](#); [Fed.Rules Civ.Proc.Rule 12\(h\)\(1\)](#), [28 U.S.C.A.](#)

## ADR Developments (2011-2012)

- a. This decision is important for the foreign practitioners because it has to do with the “New York Convention” (United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards) which governs the recognition and enforcement of most foreign arbitral awards and is implemented in US law through Chapter Two of the Federal Arbitration Act (FAA).
- b. The Inter-American Convention on International Commercial Arbitration, known as the “Panama Convention,” governs the recognition and enforcement of awards among member States of the Organization of American States who are party and is implemented in US law through chapter 3 of the FAA.
- c. State law governs the recognition and enforcement of foreign court judgments.

4. **Republic of Argentina v. BG Group PLC**, 665 F. 3d 1363 (D.C. Cir. 2012). The U.S. Court of Appeals for the District of Columbia has vacated an arbitral award against Argentina on the basis that the investor commenced an international arbitration against Argentina without first filing a claim in the Argentine domestic courts, as required by Article 8(2) of the U.K.-Argentina Bilateral Investment Treaty (“BIT”). The Court concluded that “the arbitral panel rendered a decision wholly based on outside legal sources and without regards to the contracting parties’ agreement establishing a precondition to arbitration.”

The court of appeals reason that the intent of the contracting parties (Argentina and the UK) was determinative in deciding that the investor should have exhausted domestic remedies prior to commencing the international arbitration, in accordance to the bilateral treaty.

5. **Int’l Trading & Indus. Inv. Co. v. DynCorp Aero. Tech.** No. 09-791 (D.D.C. Jan. 21, 2011) Found that consent has no binding effect in light of its own independent duty to determine whether the Qatari courts are competent authorizes within the meaning of Article V(1)(e).

- a. Arbitrator’s “manifest disregard of the law could not serve as independent and additional ground for denying confirmation.
- b. This case is important because the seat of the arbitration was Paris, France, procedure was governed by the ICC Rules, and Qatari law governed matter of substance.

## ADR Developments (2011-2012)

6. **Smallwood v. Allied Van Lines, Inc.** 660 F.3d 1115 (9th Cir. 2011) held that under the plain meaning of the Carmack Amendment a shipper cannot be forced to arbitrate his claims and may choose to sue in one of Carmack's enumerated venues, the Court finds that the common carrier's arbitration clause was not enforceable against the shipper (unless the shipper agrees otherwise).

This decision is important for the foreign (international commerce) practitioner because it has to do with foreign arbitration clause and the Carmack Amendment. Carmack amendment is an amendment to the Interstate Commerce Act that provides that a common carrier that receives property for transport to a point in another state or territory, the District of Columbia, or an adjacent foreign country, shall be liable for any loss, damage, or injury it causes to its cargo; it makes the carrier liable, without proof of negligence, for all damage to the goods.

7. **Republic of Iran v. Cubic Def. Sys. Inc.** 665 F.3d 1090 (9th Cir. 2011) held that Ministry is entitled to confirmation of its arbitration award. Confirmation of the ICC's award was not contrary to the US public policy under Article V(2)(b) of the New York Convention because Cubic had not identified a public policy sufficient to overcome the strong federal policy in favor of recognizing foreign arbitration awards.

This decision is important because it demonstrates the US court's attitude towards enforcing arbitration agreements and abide by the New York Convention and the ICC award, despite numerous governmental economic sanctions against Iran. Parties challenging such arbitration awards must show that the foreign arbitration award is highly contradictory to US public policy.

8. In **ESAB Group, Inc. v. Zurich Insurance** plc, No. 11-1243, 2012 WL 2697020 (4th. Cir 2012), the Fourth Circuit held that the McCarran-Ferguson Act does not allow a South Carolina statute to "reverse preempt" Chapter Two of the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). It thus affirmed the decision of the District Court of South Carolina compelling arbitration in Sweden.

## ADR Developments (2011-2012)

- a. Source:  
<http://www.lexology.com/library/detail.aspx?g=16315f1c-f317-4246-bfce-b5a9ef39ac61>
  - b. McCarran-Ferguson Act of 1945 gives states the authority to regulate the “business of insurance” without interference from federal regulation, unless federal law specifically provides otherwise.
  - c. “The decision is of interest for two reasons. First, it confirms a federal circuit court split on the issue of whether McCarran-Ferguson saves state insurance prohibitions against mandatory arbitration in international insurance contracts. In favoring arbitration, the Fourth Circuit has aligned itself with the Fifth. The Second Circuit reached the opposite conclusion: it has held that the New York Convention and its enabling legislation are “reverse preempted” by McCarran-Ferguson. Second, the decision underscores the necessity for any international insurer seeking to compel arbitration to choose its venue carefully.”
9. In the recent case of *In re Consorcio Ecuatoriano de Telecomunicaciones S.A., v. JAS Forwarding (USA), Inc.*, Case No. 11-12897, 2012 WL 2369166 (11<sup>th</sup> Cir. June 25, 2012), the Eleventh Circuit held that private commercial arbitral tribunals fall within the scope of 28 U.S.C. §1782 and ordered §1782 discovery in relation to a domestic private commercial arbitration in Ecuador.
- a. <http://www.lexology.com/library/detail.aspx?g=b4fd4a87-c9ce-4153-89c1-77c58701b808>
  - b. “The Eleventh Circuit’s decision, held the recognition of foreign private commercial arbitral tribunals as “tribunals” for §1782 discovery.
  - c. “§1782 provides that US district courts may order parties to produce documents or give testimony for use in a “proceeding in a foreign or international tribunal”. §1782 essentially arms parties engaging in foreign or international proceedings with a valuable tactical and evidentiary tool to be used against parties that are themselves or have entities which have a presence in the US.”
  - d. This case is important because it clarified whether §1782 may be used in the context of private commercial arbitration proceedings.
  - e. Previously, there was a split of circuit courts on this point. However, the U.S. Supreme Court in its *Intel* decision (542



## ADR Developments (2011-2012)

U.S. at 255) set forth a broad and functional definition of “tribunal,” and declined to impose “categorical limitation” on the scope of §1782(a). The Court in *Conсорcio* stated that in 1964 Congress replaced “judicial proceeding” with the term “tribunal” precisely to give §1782 a broader reach and extend the authority of District Courts to provide assistance in connection with quasi-judicial proceedings abroad.

10. ***Oracle America Inc. v. Myriad Group, A.G.***, 2012 WL 146364 (N.D.Cal. Jan. 17, 2012) (Pending Decision) (See also comments: <http://arblog.lexmarc.us/2012/01/an-exceptional-and-proper-judicial-anti-arbitration-injunction/> )

This case is important because it will decide whether parties can meet the “clear and unmistakable” test by simply incorporating a set of arbitration rules (in this case, UNCITRAL Arbitration rules) that purport to vest the arbitral tribunal with the power to rule on its own jurisdiction when the arbitration clause at issue carves out certain types of disputes that expressly must be decided in court and not arbitrated.

### C. State Courts

#### 1. Massachusetts

- a. <http://blog.aboutrsi.org/2012/court-opinions/massachusetts-supreme-court-rules-mediation-constitutes-the-practice-of-law-in-limited-circumstances/>
- b. The Massachusetts Supreme Court recently ruled that, while mediation does not generally constitute the practice of law, it can when it is performed by an attorney who has been suspended, disbarred, or has resigned from the practice of law during a disciplinary investigation. Attorneys in such situations are prohibited from doing any legal or paralegal work in the state. The Court identifies various factors to consider when determining whether mediation – or any activity – would qualify as legal work, including “whether the work as performed by the lawyer invokes the lawyer’s professional judgment in applying legal principles to address the individual needs of clients.” According to the ruling, evaluative mediation would qualify under this provision.
- c. This development is significant because conducting mediation could be treated as practicing law.

## ADR Developments (2011-2012)

### 2. California

- a. ***Cassel v. Superior Court of Los Angeles County***, 244 P.3D 1080 (2011) held that communications between a client and his attorneys during mediation are inadmissible in a malpractice claim the client brought against the attorneys.
  - 1) <https://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/545/A-New-Judicial-Exception-to-Mediation-Confidentiality-The-Cassel-Case-in-California-Web.aspx>
  - 2) This development is important because the law is now clear that California's mediation confidentiality statutes are not subject to judicial construction or judicially crafted exceptions. While the court recognized a policy concern about allowing malpractice actions to proceed, it emphasized that weighing that concern against an interest in confidentiality is exclusively the Legislature's domain. This could be beneficial for defendant's attorneys.
  
- b. ***Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.***, 198 Cal.App.4th 1366 (2011) held that a business suing larger competitors for anticompetitive or unfair trade practices does not need to prove the defendant's unfair practices harm consumers by making products or services immediately less available or more expensive. Rather it is sufficient to show that such practices "tend to create monopoly" by eliminating competitors in the same "relevant market."

This development is important for foreign practitioners because California courts interpret the definition, and protection, of "competition" differently than courts in certain other jurisdictions. In other jurisdictions, harm to competition means consumers must have already suffered actual, measurable, harm before a right to sue exists. Hence, businesses who believe they have been harmed by unfair or anti-competitive practices should consult counsel to determine whether they have a right to sue under California law.

### 3. Texas

- a. In October, 2011, the U.S. Supreme Court denied cert to [\*Nafta Traders, Inc. v. Quinn\*](#), 339 S.W.3d 84 (Tex. 2011). In

## ADR Developments (2011-2012)

*Nafta Traders*, the Texas Supreme Court had held that the Federal Arbitration Act (“FAA”) did not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the Texas Arbitration Act (“TAA”). Such enforcement was consistent with the FAA’s purpose of ensuring that private arbitration agreements were enforced according to their terms. See *Texas Supreme Court Declines to Follow Hall Street in Arbitration Case: Nafta Traders, Inc. v. Quinn*, May 13, 2011.

- 1) The Supreme Court of Texas has held that the *Texas General Arbitration Act* (TAA) allows judicial review of arbitral awards by agreement beyond what the Federal Arbitration Act (FAA) allows.
- 2) This development is significant because this decision “aligning the [Texas] state with others such as California, New Jersey, and Alabama to allow easier and expanded judicial review of arbitration awards in conjunction with state statutes.”
- 3) <http://www.lawfirmnewswire.com/2011/07/austin-business-attorney-gregory-d-jordan-comments-on-new-texas-supreme-court-ruling-on-arbitration/>

### D. Trends (judicial)

#### 1. Judicial Anti-Class Arbitration

- a. “Class arbitrations have undoubtedly hit their high-water mark. Indeed, it now appears that the Stolt-Nielsen and Concepcion decisions are part of a broader retrenchment by the Supreme Court on class action procedures.”
- b. <http://www.globalarbitrationreview.com/reviews/39/sections/137/chapters/1420/us-developments-class-arbitration-what-comes-next/>

#### 2. International Arbitration in the US not affected

- a. International consumer arbitration in the US not likely affected by the recent Stolt-Nielsen, Concepcion, and Dukes decisions, and Arbitration Fairness Act. “The recent developments involve the specific context of consumer arbitration that implicate unique considerations and are limited to the domestic sphere. Outside of this narrow context,

## ADR Developments (2011-2012)

arbitration - and particularly international arbitration - continues to thrive in the United States.”

- b. <http://www.globalarbitrationreview.com/reviews/39/sections/137/chapters/1422/current-challenges-consumer-arbitration-united-states-ado-nothing-international-arbitration/>
- c. “The current debate in the United States over consumer arbitration, including the propriety of class arbitration in consumer disputes, is fuelled by concerns over unequal bargaining power that are absent in the complex disputes arbitrated by today's sophisticated international corporations.”

### 3. Pro-International Arbitration & US Discovery Rule

- a. In re Consorcio Ecuatoriano de Telecomunicaciones S.A., v. JAS Forwarding (USA), Inc., Case No. 11-12897, 2012 WL 2369166 (11th Cir. June 25, 2012) [see *supra*].  
The 11th Circuit held that a foreign arbitration panel is a “tribunal” within the meaning of 28 U.S.C. §1782, thereby authorizing parties to such arbitrations to seek discovery from a United States district court pursuant to that statute.  
<http://www.mayerbrown.com/US-Court-of-Appeals-for-the-Eleventh-Circuit-Holds-that-Parties-in-Foreign-Commercial-Arbitrations-May-Seek-Discovery-in-the-United-States-06-28-2012/>
- b. “This ruling is likely to be controversial, because it may enable parties to circumvent the limited document disclosures that typically are available in international arbitration by seeking broad discovery from a US affiliate of the opposing arbitral party.”  
“The Eleventh Circuit’s decision is only binding on the federal courts sitting in the states comprising the Eleventh Circuit – Florida, Georgia and Alabama – and is at most persuasive to other circuits.”
- c. This development is important because “in adopting a more internationally-minded approach, US federal courts expose US companies to the risk of having to engage in broad traditional US judicial discovery instead of the limited disclosure which has come to be accepted in international arbitration, even though the seat of the arbitration is outside the US.”
- d. <http://herbertsmitharbitrationnews.com/2012/07/11/broad-us-discovery-ordered-in-support-of-a-foreign-seated-arbitration-eleventh-circuit-holds-that-a-private-commercial-arbitral->

## ADR Developments (2011-2012)

[tribunal-is-a-foreign-tribunal-for-the-purposes-of-%C2%A71782-disco/](#)

### II. Legislative Developments

#### A. Federal – US Congress Passed.

##### 1. U.S. Congress - **Passed**. (Source:

<http://www.karlbayer.com/blog/u-s-arbitration-and-mediation-update-feb-2012/> )

##### a. **Patent Reform Act of 2011**, H.R. 1249, 112th Cong. (2011-2012) (enacted) (AKA America Invents Act).

- 1) On September 16, 2011, President Obama signed into law the Leahy-Smith America Invents Act. The Act provides four major alternatives to litigation. 1) Supplemental Examination, 2) Post-Grant Review, 3) Inter Partes Review, 4) Derivation Proceedings
- 2) Parties to a derivative action may resolve the dispute via arbitration.
- 3) This development is important because the primary purpose of the act is to harmonize U.S. patent law with that of other countries, most notably Europe and Japan. <http://businessonmain.msn.com/browseresources/articles/intellectualproperty.aspx?cp-documentid=30691996#fbid=Txk6looPkN6>

##### b. **Dodd-Frank Wall Street Reform and Consumer Protection Act**, H.R. 4173, 111st Cong. (2011)

- 1) “Under current law and regulations, investors with securities-related disputes are required to go through arbitration with financial firms, which are administered by the Financial Industry Regulatory Authority (FINRA).”
- 2) “The language in the Dodd-Frank Act directing the SEC to look into mandatory predispute arbitration came from the Obama Administration and passed through both chambers of Congress unaltered.”
- 3) <http://www.jamsadr.com/files/Uploads/Documents/DR A/DRA-2011-01.pdf#InDepth>
- 4) This development is significant because the Dodd-Frank Act will have a major and lasting impact on the financial condition and operations of US banks,

## ADR Developments (2011-2012)

nonbank financial institutions, and non-US banking organizations and other financial services organizations. For instance, JPMorgan Chase CEO Jamie Dimon testified that “If JPMorgan overseas operates under different rules than our foreign competitors, we can no longer provide the best products and services to our US clients or our foreign clients.”

1) <http://www.cfr.org/united-states/dodd-frank-act/p28735#p7>

5) Dodd-Frank Act has international trade implications. “Section 1502 of the Dodd-Frank Act applies to SEC reporting companies for which ‘conflict minerals’ are ‘necessary to the functionality or production of their products.’ The goods in question are defined as (a) gold, wolframite, cassiterite, columbite-tantalite (coltan) or their derivatives; or (b) ‘any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the DRC [Democratic Republic of Congo] or an adjoining country.’”

1) <http://tradecompliance.ghy.com/tag/dodd-frank/>

### B. US Federal US Congress – **Pending**

#### 1. **Arbitration Fairness Act of 2011**, H.R. 1873, 112th Cong.

- a. Declares that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, or civil rights dispute.
- b. Last year, the ABA sent a letter to the sponsors of the legislation expressing concerns regarding certain specific language in the bill that could inadvertently void existing international commercial arbitration agreements and potentially discourage international commercial parties from engaging in commerce with U.S. parties.
- c. This development is important because the new Arbitration Fairness Act demonstrate post-*Concepcion* attempts by the congress to pass a law that would reverse the *Concepcion* decision, syncing US arbitration practice with international arbitration practice of “competence competence.”

## ADR Developments (2011-2012)

### 2. **Fair Arbitration Act of 2011**, S.1186, 112th Cong. (2011-2012)

Amends the Federal Arbitration Act to establish certain procedures for arbitration clauses in contracts: the arbitration clause should have a printed heading in bold, capital letters entitled `arbitration clause`, which heading shall be printed in letters not smaller than 1/2 inch in height; explicitly state whether participation within the arbitration program is mandatory or optional; and identify a source that a consumer or employee can contact for additional information regarding costs and procedures. <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01186:@@D&summ2=m&>

### C. States Legislation [Source: Benjamin Angulo et. al., State Legislative Update, 2011 J. Disp. Resol. 387].

#### 1. Various states – Anti-Foreign Law/Arbitration bills

- a. Proposes to prohibit the use of foreign law in their respective state courts if such use would violate the constitutional rights of the citizens of their states. However, key differences among the bills include: 1) whether the bills apply to business that are parties to business-to-business international commercial contracts, and 2) whether the bill's definition of foreign law includes institutional organizations and tribunals such as the International Chamber of Commerce (ICC).
  - 1) During 2011, state legislators proposed bills prohibiting the application of foreign law to arbitration, mediation, and litigation in twenty two states (*see* tables of the sampled bills for summary and status).
  - 2) This development is significant because it is “possibly detrimental to the practice of international business in their respective states.” Benjamin Angulo et. al., State Legislative Update (2011) 2011 J. Disp. Resol. 387, 395

#### 2. State Mediation Update

##### a. California

- 1) After *Cassel v. Superior Court of Los Angeles County* that barred mediation communications from being disclosed in an attorney malpractice lawsuit, the state

## ADR Developments (2011-2012)

legislature is currently considering a bill to have a state agency investigate the relationship between mediation confidentiality and attorney malpractice and misconduct.

2) Source:

[http://www.aboutrsi.org/pfimages/Connection\\_June12.pdf](http://www.aboutrsi.org/pfimages/Connection_June12.pdf)

3) If the bill is passed, the California Law Revision Commission would consider the impact of the state's mediation confidentiality and malpractice laws on "public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation and the effectiveness of mediation." The Commission will be tasked with making recommendations to revise state law "to balance the competing public interests between confidentiality and accountability." This bill is a step back from the original proposal, which would have amended the mediation confidentiality law to include an exception for client-attorney communications made during mediation.

### b. Maryland

1) [http://www.aboutrsi.org/pfimages/Connection\\_June12.pdf](http://www.aboutrsi.org/pfimages/Connection_June12.pdf)

2) MD passed a bill into law in May 2012 that protects communications made in mediation. The Mediation Confidentiality Act will go into effect in 10/2012.

3) The act says that, with some exceptions, mediators, mediation parties and other mediation participants may not disclose and may not be required to disclose mediation communications in judicial, administrative or other proceedings.

### c. Georgia

1) [http://www.aboutrsi.org/pfimages/Connection\\_September2011.pdf](http://www.aboutrsi.org/pfimages/Connection_September2011.pdf)

2) <http://www.digitalsmarttools.com/eGODR/August-2011.htm>



## ADR Developments (2011-2012)

- 3) The GA Supreme Court revised the state's rule on providing interpreter services for people with limited English proficiency. The rule now requires courts to provide access to interpreters for all court managed functions, including court alternative dispute resolution programs, at no charge. The change brings the state into compliance with US department of Justice (DOJ) guidelines, which are based on the Civil Rights Act of 1964. The DOJ has recently increased its efforts to bring states into compliance with its guidelines.
  - 4) This development is important because it could benefit foreign businesses operating in the U.S.
- d. Florida [Source: Adr Brief, 30 Alternatives to High Cost Litig. 115].

### Florida Court Rule 1.720 (effective 1/1/2012)

- 1) A rule that requires parties to show up with real authority to settle their case at the ADR table – with real implication for their lawyers and their insurance carriers.
- 2) The new rule provides a reasonable objective approach by setting out a legal standard on who can sign the mediation agreement, on final decision makers, and on the insurance carriers' limits – the policy limits or the demand, whatever is less.

## D. Trends (Legislative)

### 1. *Anti-Sharia/ International Law not likely to be wide-spread*

- a. Dead in many states: see list of Sample state legislatures and status (excel document)
- b. (see also: <http://gaveltogavel.us/site/2012/05/29/bans-on-court-use-of-shariainternational-law-signed-into-law-in-kansas-sent-to-study-committee-in-new-hampshire-still-technically-alive-in-mi-nc-pa-sc/>)

### 2. Legislative's Anti-Mandatory-Arbitration movement may invalidate *Concepcion*

- a. Although the Supreme Court's ruling in *Concepcion* may point to a pro-arbitration / pro-business trend, recent

## ADR Developments (2011-2012)

legislative attempts such as the ABA's lobbying efforts, Arbitration Fairness Act of 2011 and Dodd-Frank Act demonstrate a push against mandatory arbitration. (Congressional Arbitration Reform Returns-but It's Not Moving Soon (2011) 29 Alternatives to High Cost Litig. 139)

b. But See:

<http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202561826154&slreturn=20120630050457>

1) California Senate Bill 491, which outlaws contracts that bar the class pursuit of claims, failed at the first committee hearing.

c. In addition, Supreme Court's ruling in *Concepcion* has reinvigorated the Arbitration Fairness Act of 2011. Led by Senators Al Franken (D-Minn.) and Richard Blumenthal (D-Conn.), and Rep. Hank Johnson (D-Ga.), so far, 17 other senators have cosponsored the legislation.

1) <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.00987>:

### III. ADR Institutional Developments

#### A. [JAMS \(Judicial Arbitration and Mediation Service\)](#)

1. (May 2012) JAMS, the largest provider of mediation and arbitration services worldwide, announced it has expanded its ADR services and opened a Resolution Center in Miami. The move expands JAMS presence in the Southeast and signifies its commitment to Florida, which is also a gateway to delivering ADR services in Latin and South Americas.

a. <http://www.jamsadr.com/jams-launches-miami-resolution-center-with-impressive-panel-05-01-2012/>

#### B. [American Arbitration Association \(AAA\)](#)

1. Joia Johnson, Chairperson of the Board of the American Arbitration Association (AAA) announced that India Johnson, Senior Vice President and Chief Strategy Officer at AAA has been promoted to the position of Acting Executive Vice President in anticipation of advancing to the position of President and CEO on January 1, 2013. She will be the first woman to head AAA.

a. [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_019606](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_019606)

2. AAA developed a new mobile app designed to streamline access to vital information about arbitration and mediation.

a. [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_018607](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_018607)

## ADR Developments (2011-2012)

- b. This development is significant because AAA is working to make the ADR process more efficient by decreasing as many time-and-cost components as it can by providing mobile APP users easy reference to AAA rules, Codes and Protocols, and AAA contact information.

### C. [Financial Industry Regulatory Authority \(FINRA\) Dispute Resolution Forum](#)

1. The Financial Industry Regulatory Authority (FINRA) has filed a proposed rule change that would provide the Mediation Director with the discretion to approve a mediator selected by the parties who is not currently a member of the mediation roster maintained by the authority.
  - a. <http://www.jamsadr.com/files/uploads/Documents/ADR-Updates/JAMS-ADR-News-and-Case-Updates.pdf>
  - b. This development is significant because “FINRA believes that giving the Mediation Director discretion to determine whether parties may select a mediator who is not on FINRA’s mediator roster would protect the quality and integrity of the process for users of FINRA’s mediation program.”
2. (July 2012) The Financial Industry Regulatory Authority (FINRA) announced the launch of a pilot program specifically designed for large arbitration cases involving claims of \$10 million or more.
  - a. <http://www.finra.org/Newsroom/NewsReleases/2012/P127254>
  - b. This development is significant because FINRA is the largest independent regulator for all securities firms doing business in the United States. This program enables parties to customize the administrative process to better suit special needs of a larger case and allows them to bypass certain FINRA arbitration rules.
3. (February 2011) The Securities and Exchange Commission (SEC) approved its proposed rule change to provide customers in all FINRA arbitrations the option of having an all public panel.
  - a. <http://www.finra.org/Newsroom/NewsReleases/2011/P122877>
  - b. This development is significant because this change will give investors an additional choice in selecting their arbitrators when they file claims which will increase public confidence in the fairness of FINRA’s dispute resolution process.

### D. [National Arbitration Forum \(NAF\)](#)

## ADR Developments (2011-2012)

1. (December 2011) The National Arbitration Forum, an international provider of dispute resolution services launched the Rapid Evaluation Service on behalf of ICM registry, operator of the New .xxx sponsored top level domain. The Rapid Evaluation Service is designed to protect trademarks from online infringement. The Rapid Evaluation Service provided by the FORUM allows performers and entertainers an avenue of relief when real or stage names are misappropriated.
  - a. <http://www.adrforum.com/newsroom.aspx?&itemID=1703&news=3>
  - b. The National Arbitration Forum (NAF), founded in 1986, provides arbitration and mediation services to businesses, based at its Minneapolis, Minnesota headquarters and offices in New Jersey. The company is one of the United States' largest and most controversial dispute resolution companies. The company has attracted widespread controversy because businesses frequently force consumers and employees to pursue their disputes through NAF by means of mandatory binding arbitration clauses in adhesion contracts. The company maintains a panel of over 1,600 arbitrators and mediators who are attorneys and former judges located across the United States and in 35 countries around the world. Panelists arbitrate and mediate the disputes.
  - c. This development because the FORUM consistently develops technological enhancements that make online filing more efficient, including secure portals for panelists and evaluators to access cases and for parties to access case documents, upload documents, and pay fees. The FORUM's paperless case management system permits complainants and respondents to file submissions, upload evidence, request stays, withdrawals, and extensions, and receive decisions in real time. The RES allows respondents who may have missed its quick deadlines to file a late response, even if the final determination has been made.
    - 1) <http://www.prnewswire.com/news-releases/national-arbitration-forum-launches-dispute-program-for-xxx-domain-names-135017913.html>

### E. CPR Institute

#### 1. Source:

<http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/739/CPR-Institutes-New-Patent-Mediation-Task-Force-To-Deliver->

## ADR Developments (2011-2012)

[An-Effective-Practices-Protocol-For-Mediation-Of-Patent-Disputes-Press.aspx](#)

2. The International Institute for Conflict Prevention & Resolution (CPR Institute) formed a Patent Mediation Task Force in December 2011 to investigate ways to improve the use of ADR for patent disputes. The committee, made up of in-house and external counsel, mediators, judges and representatives from ADR organizations, is tasked with developing an “effective practices protocol” for promoting the mediation of patent disputes.