# Significant U.S. ADR & Litigation Developments for 2012-2013

Submitted to NAFTA Advisory Committee
on Private Commercial Dispute Resolution (NAFTA, Art. 2022)

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## I. Significant Judicial Developments in ADR

### A) USSC

1. ***Marmet Health Care Center, Inc. v. Brown***, 132 S.Ct. 1201 (2012).
    a. **Background:** Three negligence suits were brought against nursing homes in West Virginia. Family members of patients requiring extensive nursing care had signed an agreement which included a clause requiring to arbitrate all disputes. West Virginia Supreme Court held that in cases of negligence that results in personal injury or wrongful death, pre-dispute arbitration clauses in nursing home agreements need not be enforced and that the FAA does not pre-empt state public policy.
    b. **Holding:** West Virginia's prohibition against pre-dispute agreements to arbitrate personal-injury or wrongful death claims against nursing homes is pre-empted by the Federal Arbitration Act (FAA). The case is remanded to consider whether the arbitration clauses are unenforceable under state common law principles of unconscionability.
    c. **Significance:** Controlling federal law, in this case the FAA, will be enforced.
        i. The FAA reflects federal policy in favor of arbitral dispute resolution. 9 U.S.C.A. § 1 et seq.
        ii. The "bargain of the parties" to arbitrate will be put into effect.

2. ***Kiobel v. Royal Dutch Petroleum Co.***, 133 S.Ct. 1659(2012).
    a. **Background**: Nigerian nationals residing in United States sued Dutch, British, and Nigerian corporations pursuant to Alien Tort Statute (ATS), alleging that corporations aided and abetted (provided food, transportation, and compensation) Nigerian government in committing violations of the law of nations (attacking villages, beating, raping, killing residents) in Nigeria.
    b. **Holding**: Affirmed the Second Circuit's dismissal of the suit and held that the presumption against the extraterritorial application of U.S. law applies to claims under the Alien Tort Statute

c. **Significance**: "In a ruling that is likely to result in a significant reduction in international human rights litigation in U.S. courts, the Supreme Court has held that claims will generally not be allowed under the Alien Tort Statute (ATS) if they concern conduct occurring in the territory of a foreign sovereign."
    i. In addition, the Court is cautious not to tread in the dangerous frontiers of "unwarranted judicial interference in the conduct of foreign policy," thereby recognizing the separation of powers doctrine within the U.S. government.
    ii. http://www.asil.org/insights130418.cfm

3. ***Nitro-Lift Technologies, LLC v. Howard***, 133 S.Ct. 500 (2012).
    a. **Background**: Employees brought an action against employer seeking declaration that non-competition agreements were null and void, even though the agreement included a clause to arbitrate any dispute. The District Court dismissed the action. The employees appealed. The Supreme Court of Oklahoma reversed; holding that the arbitration provision did not prohibit judicial review of underlying agreements, and those agreements were null and void.
    b. **Holding**: Supreme Court vacated Oklahoma Supreme Court's decision. It held that the validity of the non-competition agreements was for the arbitrator to decide in first instance.
        i. When parties commit to arbitrate contractual disputes, attacks on the validity of the contract are to be resolved by the arbitrator in the first instance and not by a federal or state court.
        ii. On the other hand, attacks on the validity of the arbitration clause itself are to be resolved by the court.
    c. **Significance**: FAA is the supreme law of the land and lower courts must abide by that principle. The Court again stresses on policy in favor of arbitration.

4. ***Oxford Health Plans LLC v. Sutter***, 133 S.Ct. 2064 (2013).
    a. **Background**: Sutter, a pediatrician, provided medical services to Oxford Health Plans under a fee for services contract that required arbitration of contractual disputes. During arbitration, the arbitrator concluded that their contract authorized class arbitration. Oxford filed a motion in federal court to vacate the arbitrator's decisions, claiming he "exceeded [his] powers" under § 10(a)(4) of the FAA.
    b. **Holding**: The arbitrator did not exceed his powers in authorizing class arbitration.
        i. The arbitrator interpreted the contract through textual analysis and found the parties' intent to permit class

arbitration. The sole question on judicial review is whether the arbitrator interpreted the parties' contract, not whether he construed it correctly.

ii. Parties seeking relief under § 10(a)(4) bear a heavy burden and even convincing a court of an arbitrator's grave error is not enough. So long as the arbitrator was "arguably construing" the contract, a court may not vacate his decision. *Id.* at 2070.

iii. *But see* ***Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.***, 559 U.S. 662, 130 S.Ct. 1758 (2010).

c. **Significance**: Having a full appeals process for every arbitration decision would prove futile; by burdening parties with two forums (litigation and arbitration) and consuming the time of the already flooded court system.

5. ***American Exp. Co. v. Italian Colors Restaurant***, 133 S.Ct. 2304 (2013).

a. **Background**: An agreement between American Express and merchants who accept American Express cards, requires all of their disputes to be resolved by arbitration and provided no right to arbitrate on a class action basis. Merchants filed a class action claiming violations of the Sherman Act and Clayton Act. American Express moved to compel individual arbitration, but merchants argued that the cost to prove the antitrust claims would greatly exceed maximum recovery for an individual plaintiff.

b. **Holding**: American Express' arbitration clause is enforceable. The FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

i. Unless FAA's mandate has been overridden by a contrary congressional command-which it has not here.

ii. The Court further explained that the "effective vindication" exception to enforcement of arbitration clauses under the FAA is only concerned with prospective waiver of statutory remedies.

c. **Significance**: The case reaffirms the principle that arbitration is a matter of contract and court must enforce those agreements to their terms.

d. *See* Matthew Harris, *Riding the Waiver: In re American Express Merchants' Litigation and the Future of the Vindication of Statutory Rights*, 54 B.C.L. Rev. (2013), http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/3

6. ***Rep. of Argentina v. BG Group PLC***, 665 F.3d 1363 (D.C. Cir. 2012), *cert. granted*, 81 U.S.L.W. 3070 (U.S. June 10, 2013) (No. 12-138).
    a. Certiorari granted on the question of whether, in disputes involving a multi-staged dispute resolution process, a court, or instead, the arbitrator determines whether a precondition to arbitration has been satisfied.
    b. http://www.lexology.com/library/detail.aspx?g=1c6e48b3-6fd8-457b-99ca-b47906db5ba7

**USSC CASE LAW SYNOPSIS**: Expect state law to be preempted, where federal law applies. USSC stands firm in its support of the FAA federal policy in favor of arbitration(as well as business friendly). Moreover, there is a continuing effort to enforce the express terms of private arbitration agreements, in line with the concept that arbitration is a matter of contract law.

B) **Federal Circuit Courts**

1. ***Southern Communications Services, Inc. v. Thomas,*** --- F.3d --- (11th Cir. 2013), 2013 WL 3481467.
    a. **Background:** Cellular telephone service provider moved to vacate arbitration awards allowing class litigation and certifying a class in underlying arbitration action brought by customers, relating to early termination fees.
    b. **Holding:** The court held that the arbitrator did not "exceed [his] powers" under § 10(a)(4) of the FAA, either in construing the arbitration clause or in certifying a class.
        i. Court cites the test from *Oxford Health Plans, supra.*
        ii. Neither an arbitrator's behavior acting in disregard of the law, nor an arbitrator's incorrect legal conclusion, is a valid ground for vacating or modifying an arbitration award under the FAA.
    c. **Significance:** We are witnessing a recently decided Supreme Court case put to the test by lower courts, as well as a continued deference toward arbitrator decisions.

2. ***Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru,*** 665 F.3d 384 (2d Cir. 2011).
    a. **Background:** Brazilian corporation sued Republic of Peru seeking the enforcement of Peruvian arbitration award of more than $21 million for corporation's engineering studies on Peru's water and sewage systems pursuant to contract.
    b. **Holding:** *Forum non conveniens* bars federal courts from exercising jurisdiction over action. Petition seeking confirmation of an international arbitration award should be dismissed.

i. Even though jurisdiction in the U.S. is established by the Panama Convention, enforceable pursuant to the FAA, court may still reject jurisdiction for reasons of convenience, judicial economy and justice.
ii. After assessing public and private factors, especially Peru's cap statute, the suit favors dismissal.
iii. The court "concluded that a Peruvian statute limiting the amount of money a government agency may pay annually to satisfy a judgment to three percent of its budget was a public interest factor that precluded confirming the award. The dissent…found this position unpersuasive, believing that *forum non conveniens* should not be available to contest an action intended to gain enforcement of an arbitral award against the losing party's assets in the jurisdiction." 106 Am. J. Int'l L. 360 2012.

c. **Significance:** Abiding by the procedural laws of the country where the award is to be executed is more important than the interest of the U.S. favoring enforcement of arbitration agreements in international contracts.
i. The court seems to be playing a back and forth game; it dismisses the suit, but warns that if Peru doesn't consent to the lawsuit and the Peruvian court declines to entertain a suit to enforce the awards, then the U.S. lawsuit may be reinstated.
ii. FNC may increasingly become an easy tool to dismiss enforcement actions.

3. ***Belize Social Development Ltd. v. Government of Belize***, 668 F.3d 724 (D.C. Cir. 2012).
a. **Background:** A London arbitration panel ruled in favor of Belize Company in a commercial dispute with the Government of Belize. Company then sued in U.S. District Court to enforce the arbitration award. Government of Belize asked for temporary stay pending the outcome of a related judicial proceeding in Belize. Company appealed seeking mandamus to overturn the temporary stay. District court granted stay order.
b. **Holding:** District court exceeded its authority by issuing stay order in favor of Belize. Case remanded.
i. "Mandamus is appropriate because the FAA, by codifying the New York Convention, provides a carefully structured scheme for the enforcement of foreign arbitral awards and represents an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of

international commerce." *Mitsubishi Motors Corp.*, 473 U.S. at 631, 105 S.Ct. 3346.

ii. The plain terms of the FAA instruct a district court reviewing a foreign arbitral award to "confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement ... specified in the [New York] Convention." 9 U.S.C. § 207. *Belize* at 733.

4. ***Rota-McLarty v. Santander Consumer USA, Inc.***, 700 F.3d 690 (4th Cir. 2012).
   a. **Background:** Rota-McLarty purchased a used car and Santander (financing company) was assigned the Retail Installment Sale Contract. Rota returned the car without making payments on the loan and filed a putative class action. Santander moved to compel non-class arbitration. District court deemed transaction intrastate and applied the Maryland Uniform Arbitration Act rather than the FAA and concluded that Santander waived its right to enforce arbitration by its delay.
   b. **Holding:** The case is reversed and remanded with directions to refer the claims to arbitration.
      i. Diversity of citizenship between parties is not enough to implicate FAA application, however reliance upon funds from a foreign source is.
      ii. Under FAA, a party may lose its right to compel arbitration if it "is in default in proceeding with such arbitration." 9 U.S.C. § 3. Default and waiver are not identical. In determining default, the court asks whether the opposing party has suffered actual prejudice, factoring the amount of delay and the extend of the moving party's trial activity.
   c. **Significance:** http://www.bressler.com/pub/files/Publications/ABAArticleRPMCRL.pdf

5. ***Hamstein Cumberland Music Group v. Estate of Williams***, No. 05-51666 (5th Cir. 2013).
   a. **Background**: During arbitration proceedings between Hamstein Cumberland Music Group, a company that publishes songwriters and recording artists, and estate of deceased songwriter Jerry Lynn Williams, Williams ignored arbitrator's discovery requests. Hamstein was awarded $1.1 million, including $500,000 in sanctions imposed against Williams. District court reduced the arbitration award and wiped out the sanction award..

b. **Holding**: District court improperly reduced arbitrator's award. Vacated and remanded in order for the arbitrator's award to be confirmed in its entirety.
c. http://www.disputingblog.com/fifth-circuit-considers-arbitrators-authority-to-issue-discovery-related-sanctions/

6. ***In re Thorpe Insulation Co.***, 671 F.3d 1011 (9th Cir. 2012).
   a. **Background**: Breach of settlement agreement, which included an arbitration clause, in complex asbestos litigation between insurance claimant and Thorpe Company, a party to a Chapter 11 proceeding.
   b. **Holding**: The Court affirmed the bankruptcy court's denial of a motion to compel arbitration. It joined other circuits in holding that a bankruptcy court has discretion to refuse enforcement of an arbitration agreement only if arbitration would conflict with the underlying purposes of the Bankruptcy Code
      i. In this case, the alleged breaches were actions taken to exercise rights in bankruptcy and, thus, were "inextricably intertwined" with the bankruptcy.
      ii. In other words, only a bankruptcy court could determine whether they gave rise to a claim for damages.
   c. **Significance**: This case illustrates the application of a carve out to the otherwise liberal federal policy of pro-arbitration.
   d. http://www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2012-04.pdf

**FEDERAL CIRCUIT COURT CASE LAW SYNOPSIS**: The D.C. Circuit has no problem enforcing an international arbitration award, whereas the Second Circuit pulls out *forum non conveniens* from its deck of playing cards to bar enforcement on an international arbitration agreement. In regards to domestic issues, the court demonstrates a continued deference to arbitrator's decision, such as in certifying a class or imposing sanctions, in an effort to reinforce the integrity of the system and confidence of the parties. In an otherwise contrary move to pro-arbitration policy, the Ninth Circuit joins others circuits in granting discretion to a Bankruptcy court to refuse enforcement of an arbitration agreement (if in conflict with the

C) **Federal District Courts**

1. ***Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion***, 10 CIV. 206 AKH, 2013 WL 4517225 (S.D.N.Y. Aug. 27, 2013).
   a. **Background**: A U.S. engineering firm subsidiary, Corporacion Mexicana ("Commisa") entered into two contracts with Pemex (Mexican state oil company) to build and install two oil platforms in the Gulf of Mexico. In 2004, Commisa filed an ICC arbitration against Pemex for breach of contract.. Arbitrators issued an award of four hundred million dollars in

favor of Commisa. Commisa sought confirmation in NY, but proceedings were stayed pending Pemex's appeal to the Second Circuit. Pemex also sued in Mexican courts, and the ICC award was ultimately set aside in Mexico because arbitrators were not competent to hear cases brought against a state instrumentality. In February 2012, the Second Circuit sent the case back to the NY district court to reconsider their award confirmation in light of the Mexican decision.

b. **Holding**: The Court confirmed the ICC award, in spite of the Mexican Court set aside.
   i. Under Article 5 of the Panama Convention (enforced by the FAA) the recognition of an arbitral award may be refused it the award has been nullified by competent authority.
   ii. However, the court also relied upon *TermoRio v. Electranta*, 487 F.3d 928 (D.C.Cir. 2007) in refusing to give comity to the nullification of the ICC award by the Mexican court. *TermioRio* concluded that a district court should hesitate to defer to a nullification judgment that conflicts with notions of fairness and justice.
   iii. The District Court held that setting aside the award violated basic notions of fairness, because the Mexican court applied a law that did not exist at the time the underlying contract was formed, specifically the 2009 Amendment to the Law of Public Works.

c. **Significance**: This is a rare case in which a US court denies comity and exercises its narrow, yet arguably appropriate, authority against a foreign court decision under "notions of justice."

d. http://globalarbitrationreview.com/news/article/31854/pemex-award-upheld-us-despite-set-aside-mexico/

2. ***In re Application of Mesa Power Grp., LLC***, 878 F. Supp. 2d 1296 (S.D. Fla. 2012).
   a. **Background:** In a pending arbitration under NAFTA between Mesa Power and the Government of Canada, Mesa sought judicial assistance in obtaining evidence from a third party for use in a foreign and international proceeding pursuant to 28 U.S.C § 1782. Third party filed a Motion to Quash Subpoena.
   b. **Holding:** The motion to Quash is denied.
      **i.** Mesa's § 1782 to compel production of evidence for use in NAFTA arbitration enforced.
      **ii.** NAFTA qualifies as a "foreign or international tribunal" under section 1782.

c. *See* http://friedfrank.com/siteFiles/Publications/ARB012913cm2.pdf

3. ***Delaware Coal. for Open Gov't v. Strine***, 894 F. Supp. 2d 493 (D. Del. 2012).
   a. **Background**: Pursuant to the Delaware General Assembly legislation, the Court of Chancery may arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under Court rules, to arbitrate a dispute. To qualify for the program both parties must have consented, at least one party had to be a business entity, at least one party formed under laws of DE, and amount in controversy no less than $1 million dollars. 10 Del. C. § 349 (West 2012).
   b. **Holding**: Delaware's Court of Chancery's unique arbitration program held unconstitutional, violates First Amendment's Right of Access to the Courts.
      i. The court found that the proceeding functions as a non-jury civil trial before a Court of Chancery judge.
      ii. Therefore, it must be opened to public access.
   c. *See* Stipanowich, Thomas, In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program (2013). Journal of Business, Entrepreneurship and the Law, Forthcoming; Pepperdine University Legal Studies Research Paper No. 2013/10. Available at SSRN: http://ssrn.com/abstract=2271359.

**FEDERAL DISTRICT COURT CASE LAW SYNOPSIS**: In a unique move by Delaware to implement an arbitration program, the policy in favor of arbitration is obviously trumped by the First Amendment of the U.S. Constitution. Moreover, in a rare case the US District Court for the Southern District of New York confirms an ICC award, despite the awards nullification in a foreign court, illustrating that decisions (in regards to arbitral awards) by foreign court will not automatically be upheld in the US, but rather, at the end of the day fairness and justice will be upheld.

D) **State Courts**
   1. ***GMAC v. Pittella***, 205 N.J. 572 (2011).
      a. **Background:** Pitella entered into a sale contract, which included an arbitration agreement, with Pine Belt to finance the purchase of a car. Pine Belt assigned the contract to GMAC. GMAC repossessed the car for nonpayment and filed suit.
      b. **Holding:** New Jersey Supreme Court held that any order compelling or denying arbitration will be considered final for

the purposes of appeal and that the trial court will retain jurisdiction to address other issues pending the appeal.

i. The court held that *Rule* 2:2–3(a) be further amended to permit appeals as of right from all orders permitting or denying arbitration.

ii. "The Court further noted that the Revised Uniform Arbitration Act of 2000, N.J.S.A. 2A:23B-1 et seq., applied to the contract at issue and the Act's purpose is to promote expeditious arbitration, and expressly provides that a party may appeal when an arbitration is denied or stayed. Thus, the Court concluded that all orders denying or granting arbitration should be treated as final for the purposes of appeal."

iii. http://www.bressler.com/pub/files/Publications/ireg_summer2011%20authcheckdam1.pdf

2. ***Adams v. StaxxRing, Inc.***, 344 S.W.3d 641 (Tex. App. 2011), reh'g overruled (Aug. 11, 2011), review denied (Jan. 6, 2012).
   a. **Background**: Adams was appealing the denial of motion to compel arbitration in favor of Langford and StaxxRing, Inc., a business equally owned by Adams and Langford.
   b. **Holding**: Affirmed the trial court's order and held that Adams waived any right of arbitration because Adams substantially invoked the judicial process to the detriment and prejudice of StaxxRing.
      i. StaxxRing established heavy burden that Adams substantially invoked the judicial process (totality of circumstances).
      ii. Additionally, StaxxRing met burden of showing prejudice in order to establish Adams' waiver or arbitration.
   c. http://www.mediate.com/articles/GoodmanBbl20110725.cfm

3. ***Wolf v. Sprenger %8F Lang, PLLC***, 11-CV-1206, 2013 WL 3466348 (D.C. 2013).
   a. **Background**: Attorneys moved to partially vacate arbitration award of attorney fees allocated to them in age discrimination case while representing television writers over the age of 40, because arbitrator committed misconduct and exceeded his powers within the meaning of section 10(a)(4) of the FAA (by basing award of arbitrator's own notions of ethical propriety rather than the co-counsel agreement.)
   b. **Holding**: The arbitrator did not exceed his authority under co-counsel agreement in awarding attorney fees.

i. The court cites *Sutter*, relying on the principle that the sole question for a court is whether the arbitrator interpreted the parties' contract, not whether he got the meaning right or wrong.
ii. Misconduct under 10(a)(3) involves the exclusion of pertinent and material evidence that deprives a party of fundamental fairness.

c. http://arbitrationnation.com/eleventh-cir-applies-sutter-to-affirm-class-arbitration-ninth-cir-applies-concepcion-to-preempt-montana-law/

**STATE LAW SYNOPSIS**: New Jersey Supreme Court amends New Jersey Rules of Court, Rule 2:2-3(a) to authorize appeals as of right from orders permitting or denying arbitration. The court also amended Rule 2:9-1(a) to provide that a trial court retains jurisdiction to address other issues relating to the case. The D.C. Court of Appeals cite the recently decided Supreme Court case, *Sutter*, in refusing to vacate an arbitration award and consequently, deferring to the policy of deterring to the arbitrator's decision and limiting the scope of instances where that decision may be vacated.

## II. Significant Judicial Developments in Mediation

1. ***In re A.T. Reynolds & Sons, Inc.***, 452 B.R. 374 (S.D.N.Y. 2011).
   a. **Background:** Bankruptcy court judge sanctioned party for failing to participate in good faith in court-ordered mediation.
   b. **Holding:** Reversed. The court held that findings of violations of good faith during mediation must be based on objective criteria.
      **i.** The court held that a party satisfies the good faith requirement based on objective criteria by showing up, producing the required pre-mediation memorandum and sending a party with settlement authority. Refusing to settle is not indicative of bad faith.
      **ii.** Federal district courts in California do not include a requirement that parties participate in good faith, but rather have adopted local court rules, which mandate that parties submit a written mediation statement, are represented by lead counsel and send a person with full settlement authority.
   c. **http://www.lexology.com/library/detail.aspx?g=c6ac59b9-043b-48be-bcc5-5ac07f1bddaa**
   d. **Significance**: Seeking to keep the mediation process confidential and keeping in line with established law that courts may not coerce parties into settlement; "litigant autonomy".

2. ***In re Teligent, Inc.***, 640 F.3d 53 (2d Cir. 2011).

a. **Background:** Mandl's, former CEO of Teligent Company, and Teligent engaged in court ordered mediation after Teligent filed for bankruptcy. They reached agreement requiring Mandl to sue his former attorney for malpractice. Defendant law firm sought motion to lift two protective orders prohibiting disclosures of communications made during a mediation. The motions were denied by the Bankruptcy court, because a compelling need was not shown.
b. **Holding:** Affirmed.
    i. The court articulates a three prong test that party seeking disclosure must meet to obtain mediation material: "(1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality." *Id.* at 58.
    ii. The court relied upon the Uniform Mediation Act, Administrative Dispute Resolution Act of 1996 and 1998.
c. **Significance:** The three prong test sets a high hurdle for parties seeking to obtain mediation material disclosed. The case in general encourages mediation and preserves its most vital characteristic- confidentiality. However, the standard in favor of confidentiality is not bullet-proof and may be overcome by arguments of non-party's. Therefore, lawyers must assess the risk.
d. http://www.maglaw.com/publications/articles/00320/_res/id=Attachments/index=0/Mediation%20Confidentiality%20Meaningful%20but%20Not%20Absolute.pdf

3. ***Hydroscience Technologies, Inc. v. Hydroscience, Inc.***, 401 S.W.3d 783 (Tex. App. 2013).
    a. **Background**: "The plaintiff claimed that there was an agreement made in a mediation to transfer certain shares of stock, and that the agreement had not been honored." The plaintiff was not a party to the mediation and there was no written agreement about a transfer. Plaintiff sought to introduce evidence of communications that took place during the mediation to prove the existence of an oral agreement.
    b. **Holding**: Mediation communications can be used to support a subsequent claim *only if* someone is seeking to assert a new and independent tort, "the pursuit of which would not disturb the settlement reached at the mediation proceeding".
    c. http://www.orlofskylaw.com/2013/07/when-can-conduct-in-mediation-be-the-basis-for-a-tort-claim/

**CASE LAW SYNOPSIS**: In the area of mediation, courts seek to maintain the sanctity of mediation by preserving confidentiality and promoting the free flow of information during such proceedings. The Texas Court of Appeals answers the question of when conduct in mediation can be a basis for a tort claim.

## III. Legislative Developments

### A) Federal: PASSED

1. H.R. 152: "**Sandy Recovery Improvement Act of 2013**"
   a. The act amends Title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act
   b. It requires that alternative dispute resolution procedures, including binding arbitration, be established to resolve any questions related to who is eligible for disaster relief assistance.

2. S.47: "**Violence Against Women Reauthorization Act of 2013**"
   a. The act prohibits any entity that supports families in the justice system from requiring "mediation or counseling involving offenders and victims being physically present in the same place.
   b. It applies in cases where domestic violence, dating violence, sexual assault, or stalking is alleged.

### B) Federal: PENDING

1. Senate Bill 725: "**The Small Business Taxpayer Bill of Rights Act of 2013**"
   a. It would permit small business owners to elect to use mediation or arbitration to resolve tax disputes with the Internal Revenue Service (IRS), amending Section 7123 of the IRS Code of 1986.
   b. http://www.jamsadr.com/files/uploads/Documents/ADR-Updates/JAMS-ADR-News-and-Case-Updates.pdf

2. Senate Bill 878: "**The Arbitration Fairness Act of 2013**"
   a. The act was introduced in May 2013 and aims at removing mandatory arbitration from antitrust, consumer, employment, and civil rights contracts. http://www.bressler.com/pub/files/Publications/CongressAgainConsidersTheArbitrationFairnessAct.pdf
   b. For the government press release *see* http://hankjohnson.house.gov/press-release/rep-johnson-re-introduces-bill-protect-legal-rights-consumers

3. H.R. 4181
   a. The bill seeks to amend title 9, United States Code, to exclude employment contracts and employment disputes. The bill would ban most employment-related pre-dispute arbitration agreements.
   b. http://www.lexology.com/library/detail.aspx?g=24053be5-a74e-41b7-91f9-e9fcf2d8c7be

4. H.R. 169: "**Labor Relations First Contract Negotiations Act of 2013**"
    a. The act amends the National Labor Relations Act to require mediation and, if necessary, binding arbitration of initial contract negotiation disputes.
    b. http://www.disputingblog.com/2011-12-u-s-legislation-on-arbitration-and-mediation/

C) **State Legislation**

1. California
    a. There is currently efforts made, specifically by the CA State Bar Board, to submit into the law making life cycle potential legislation designed to facilitate conducting international commercial arbitrations in California.
    b. The proposed legislation seeks to amend CA's International Arbitration & Conciliation Statute by adding language to Title 9.3 of the CA Code of Civil Procedure, to expressly state that "in an international commercial conciliation or arbitration proceeding, the person representing a party to the conciliation or arbitration is not required to be a licensed member of the State Bar".
    c. The proposed legislation also calls on the CA Supreme Court to amend rule 9.43, to exclude international arbitration, and also would require the State Bar to exclude international arbitration from the *pro hac vice* process.
    d. The intent of the drafters is to clear the ambiguity in the current version of Title 9.3. Also, the expected benefit is for CA to become a major center for international commercial arbitration, instead of outsourcing to foreign venues.

2. Connecticut: H. 6549
    a. It allows the Connecticut State Insurance Department to set up a mediation program for insurance claims arising from a catastrophic event.
    b. http://www.insurerereport.com/2013/06/27/new-connecticut-law-allows-disaster-mediation-program-for-property-insurance-claims/

3. New York: Governor's Program Bill #21R
    a. In 1974, the State of New York amended its law on collective bargaining for public employees (the Taylor Law) by imposing compulsory interest arbitration to resolve bargaining impasses in police officer and firefighter bargaining units.
    b. This amendment to the Taylor Law was intended to be temporary," but with this bill extends binding arbitration for

police officer and firefighter unions for three more years, until July 1, 2016.
   c. http://www.goldbergsegalla.com/resources/news-and-updates/new-york-renews-binding-arbitration-three-more-years

4. North Carolina:
   a. H. 343: It eliminates arbitration caps in district court
   b. S.B. 452: It makes arbitration mandatory in certain civil cases, and provides guidance to the court for the assessment of court costs and attorneys' fees in small claims matters when an arbitrator's decision in favor of the appellee is affirmed on appeal.
   c. http://www.ncleg.net/documentsites/legislativepublications/Effective%20Dates/2013%20Effective%20Dates/2013EffectiveDates.pdf

5. Rhode Island: H.B. 5335
   a. It creates a temporary foreclosure mediation program. "Requires mortgagees or their agents to provide borrowers who are not more than 120 days delinquent written notice that foreclosure cannot proceed without the borrower first having an opportunity to participate in a mediation conference.
   b. The law establishes the procedures and requirements for such conferences and prohibits a mortgagee from proceeding with a foreclosure action until the mediator certifies that, after good faith effort by the mortgagee, the parties could not reach agreement."
   http://www.lexology.com/library/detail.aspx?g=a940c7fd-ef0c-497e-bb50-c41f4f48aba7

6. South Carolina: H. 3924 Family Law Arbitration Act
   a. The act provides for arbitration as a means of resolving certain matters related to marital separation and divorce; provides for default rules for conducting arbitration proceedings; assures access to the family courts of this state for proceedings ancillary to arbitration.
   b. http://www.scstatehouse.gov/billsearch.php?billnumbers=3924&session=120&summary=B

7. Texas: S.B. 1255
   a. The bill relates "to binding arbitration of an appraisal review board order determining a protest of an unequal appraisal of the owner's property."
   b. http://www.disputingblog.com/texas-legislative-roundup-april-3-2013/

8. Washington: HB1065
    a. It amends the state's Uniform Arbitration Act to allow statues of limitations to apply to arbitral proceedings. It passed the Washington House unanimously and came into effect on July 28, 2013.
    b. "The bill was purportedly filed in response to the holding in *Broom v. Morgan Stanley DW, Inc.* which said a Financial Industry Regulatory Authority panel exceeded its authority when it dismissed arbitral claims based on expiration of the applicable statue of limitations." http://www.disputingblog.com/washington-legislature-says-statute-of-limitations-applies-to-arbitration-proceedings/.

## IV. Future Policy Issues

### A) Domestic

1. **The American Law Institute ("ALI) Project**
    a. The project is Restatement Third, The U.S. Law of International Commercial Arbitration.
    b. The council approved the start of the project in December 2007, and will conclude soon.
    c. The expected Restatement will cover: "Arbitration agreements; Conduct of and the judicial role in international arbitral proceedings in the United States; awards; recourse from and enforcement of international arbitral awards rendered in the United States; the judicial role in international arbitral proceedings abroad; enforcement of international arbitral awards rendered abroad; the preclusive effect of international arbitral awards; and ICSID Convention arbitration."
    d. http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20

2. **Government & Regulatory Organizations Opting for ADR & Mediation**
    a. "US Department of Labor's OSHA announces alternative dispute resolution pilot program for whistleblower complaints" https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=23079
    b. "New Jersey Department of Banking and Insurance Announces Mandatory Mediation Program for Superstorm Sandy Claims" http://www.goldbergsegalla.com/resources/news-and-updates/nj-dobi-announces-mandatory-mediation-program-superstorm-sandy-claims

c. Financial Industry Regulatory Industry (FINRA) Considering Opening up it's Forum for Arbitration between customers and Investment Advisers *see* http://www.bressler.com/pub/files/Publications/ComplianceReporter.pdf
d. Home Foreclosures Mediation Updates across the U.S. *see* **http://www.mediate.com/mobile/article.cfm?id=8542**

3. **New Court Mediation Programs**
   a. Mediation Now Mandatory in Western District of New York *see* http://www.goldbergsegalla.com/resources/news-and-updates/mediation-now-mandatory-western-district-new-york
   b. Mandatory Mediation Program in Brooklyn Supreme Court *see* **http://www.brooklyneagle.com/articles/brooklyn-becomes-first-borough-require-mediation-civil-cases-2013-06-14-130000**
   c. U.S. Bankruptcy Court for the Southern District of Florida Adopted a Loss Mitigation Mediation Program *see In re Implementation of Loss Mitigation Mediation Program*, Admin. Order 13-01 (U.S. Bankr. Ct. S.D. Fla., February 26, 2013).

4. **ADR in Entertainment Industry**
   a. "A Comparative Analysis of the Uses of Mediation in the Entertainment Industry" http://www.cornellhrreview.org/a-comparative-analysis-of-the-uses-of-mediation-in-the-entertainment-industry/.
   b. "Taking advantage of ADR in the Entertainment Industry" http://www.jamsadr.com/files/Uploads/Documents/Articles/Grubman-IC-Entertainment-2013-04-16.pdf
   c. "Mediating Entertainment Industry Trademark Claims" http://www.jamsadr.com/files/Uploads/Documents/Articles/Friedman-Grossman-Entertainment-DJ-2013-02-08.pdf

**B) International**

1. **Increase in International Arbitration as Dispute Resolution Mechanism**
   a. New cases registered by major arbitral institutions around the world:
      - ICC: from 593 in 2006 to 794 in 2010;
      - LCIA: from 137 in 2007 to 224 in 2011;
      - SCC: from 141 in 2006 to 197 in 2010;
      - DIAC: from 77 in 2007 to 186 in 2010;
      - SIAC: from 90 in 2006 to 198 in 2010;
      - HKIAC: from 394 in 2006 to 624 in 2010;
      - ICDR (AAA): from 580 in 2005 to 888 in 2010.
   b. 106 Am. Soc'y Int'l L. Proc. 289 2012

2. **International Centre for the Settlement of Investment Disputes (ICSID)**
    a. Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), *available at* http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf
    b. found that arbitrators at the World Bank's International Centre for the Settlement of Investments Disputes ("'ICSID") have authority to hear an investment treaty claim brought by a class of 60,000 holders of defaulted Argentine debt.
        i. "Unprecedented in ICSID's 45-year history, the Abaclat decision upholds the tribunal's jurisdiction to hear mass claims alleging breach of the 1990 Italy-Argentina bilateral investment treaty ("BIT") and in the process makes several remarkable jurisdictional findings."
        ii. http://www.asil.org/insights111121.cfm

3. **Argentina-U.S.**
    a. United States Initiates Suspension of Argentina's Trade Benefits Because of Nonpayment of U.S. Companies' Arbitration Awards.
    b. 106 Am. J. Int'l L. 643, 678-9 (2012).

4. **European Union**
    a. "EU Seeing Growth of Mediation Clauses in Commercial Contracts"http://www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2012-12.pdf
    b. New German Mediation Act *see* http://www.shearman.com/files/Publication/9e56ee02-b60c-49e1-9edc-5a9567dec977/Presentation/PublicationAttachment/88313fcf-e1a6-49e4-ab17-607ad68a8a3a/The-New-German-Mediation-Act-17-09-12.pdf
    c. The Italian Constitutional Court declared Italy's mandatory civil and commercial mediation legislation unconstitutional last October because it exceeded the scope of both the E.U. Mediation Directive (2008/52/EC) and the Italian government's authority to adopt mediation procedures by making them mandatory. (June 13, 2013) http://www.internationallawoffice.com/newsletters/detail.aspx?g=0790064d-6a5a-4f84-afc1-be0fd526c80b

## V. NAFTA Country Negotiations

### A) U.S.-Canada Softwood Lumber Agreement (SLA) Extended until October 2015

1. "The SLA 2006 settled ongoing litigation between the United States and Canada in a number of forums, including NAFTA, the WTO, and U.S. federal courts."
2. On July 18, 2012, an arbitral tribunal issued a final award dismissing claims brought by the United States against alleged circumvention of the SLA 2006 by British Columbia.
   http://www.americanbar.org/content/dam/aba/publications/international_lawyer/til_47_1/inl_yir47_cpy.authcheckdam.pdf

### B) Canada & U.S. Negotiating to Improve Cross-border Tax Compliance Through Enhanced Information Exchange under the Canada-United States Income and Capital Tax Treaty (1980)

http://www.ipolitics.ca/2013/07/04/canada-expected-to-accept-tax-reporting-deal-with-u-s-in-fall/

### C) Canada & Mexico Join Trans-Pacific Partnership (TPP) Trade Negotiations

### D) Possibility of Trade Diversion away from Mexico & Canada due to U.S.-E.U. Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations

http://www.gedproject.de/fileadmin/uploads/documents/pdf/study_transatlantisches_freihandelabkommen_en.pdf

### E) E.U. & Canada are Currently Negotiating Free Trade Agreement a.k.a. the Comprehensive Economic and Trade Agreement (CETA)

http://europa.eu/rapid/press-release_MEMO-13-573_en.htm

## VI. Useful Resources

### A) Primary Sources

1. 9 U.S.C. – Arbitration (FAA)
2. 9 U.S.C. Chapter 2 – Convention on Recognition & Enforcement of Foreign Arbitral Awards
3. 28 U.S.C. Chapter 44 – Alternative Dispute Resolution
4. Uniform Arbitration Act
5. Judicial Case Law
6. State Statutes
7. UN Convention on the Recognition & Enforcement of Foreign Arbitral Awards
8. UNCITRAL
9. NAFTA Ch.20

### B) Associations & Organizations

1. American Arbitration Association (AAA); especially the International Center of Dispute Resolution (ICDR).

2. JAMS Arbitration, Mediation, and ADR Services
3. American Bar Association- Section of Dispute Resolution (ABA)
4. Association for Conflict Resolution (ACR)
5. Association for International Arbitration (AIA)
6. International Institute for Conflict Prevention & Resolution (CPR)
7. American Society of International Law (ASIL)

**C) University Institutes**

1. Program on Negotiation - Harvard Law School
2. Pepperdine's Straus Institute for Dispute Resolution
3. Center for the Study of Dispute Resolution - University of Missouri School of Law
4. Dispute Resolution Institute – Hamline University School of Law
5. Cardozo's Kukin Program for Conflict Resolution – Yeshiva University NY
6. UC Hastings College of Law Center for Negotiation and Dispute Resolution
7. Willamette College of Law Center for Dispute Resolution
8. Scheinman Institute on Conflict Resolution- Cornell

**D) Journals, Law Reviews and Treatises, Reports, etc.**

1. American Law Institute, RESTATEMENT OF LAW (Third), THE U.S. LAW OF INTERNATIONAL ARBITRATION
2. *Harvard Negotiation Law Review*
3. *Cardozo Journal of Conflict Resolution*
4. *Journal of Dispute Resolution*
5. *Ohio State Journal on Dispute Resolution*
6. *Pepperdine Dispute Resolution Law Journal*
7. *American Journal of Mediation*
8. *Dispute Resolution Journal- AAA*
9. *American Journal of International Law*

**E) Websites & Noteworthy Blogs**

1. ABA Journal- Dispute Resolution News http://www.abajournal.com/topic/alternative+dispute+resolution/
2. ADR Times http://www.adrtimes.com/articles/
3. New York Convention Guide 1958 http://www.newyorkconvention1958.org/
4. International Law Office http://www.internationallawoffice.com/
5. Mediate.com http://www.mediate.com/
6. Global Arbitration Review http://globalarbitrationreview.com/
7. Resolution Systems Institute http://courtadr.org/index.php
8. ADR Prof Blog http://www.indisputably.org/
9. Cal Mediation & Arbitration http://www.calmediation.org/

10. Leonard, Street, & Deinard Arbitration Blog
    http://arbitrationnation.com/
11. Karl Bayer's Mediation & Arbitration Blog
    http://www.disputingblog.com/
12. Marc J. Goldstein Arbitration Commentaries http://arbblog.lexmarc.us/