

**ARBITRATION SUBCOMMITTEE REPORT  
FALL 2007 CONFERENCE**

**1. Key Developments**

U.S. Supreme Court agreed this term to hear two cases involving arbitration. The court granted a petition for a writ of certiorari in ***Preston v. Ferrer***, No. 06-1463, on September 25, 2007. This involves a decision from a California state court of appeals that affirmed a lower court's judgment that an arbitration provision within petitioner's written contract was invalid. The court determined that California's Labor Commissioner had exclusive jurisdiction over the dispute.

The case has received some publicity because it involves Fox Television personality "Judge Alex." The show is hosted by Alex E. Ferrer, a former Florida state court judge. During the television show he acts as an arbitrator/judge, deciding disputes argued before him.

Preston initiated an arbitration against Ferrer claiming that the television arbitrator failed to pay Preston fees based on Ferrer's television earnings. The two had signed a few years previously a management contract calling for binding arbitration with the American Arbitration Association.

Ferrer moved to stay Preston's arbitration request and asked California's Labor Commissioner to stay the arbitration and decide the dispute.

Judge Alex had asked the trial court to stay the arbitration pending the Commissioner's decision. The arbitrator did decide to stay the arbitration and await a decision from the Labor Commissioner.

In part, Judge Alex contended that Preston was an unlicensed talent agent contrary to the law in the State of California and therefore their agreement was void. The appellate court held that the validity of Preston's argument that he was a manager as well as the validity of the contract itself were properly submitted by Ferrer to the state Labor Commission.

The appeals court also rejected Preston's Federal Arbitration Act preemption argument. Preston argued that federal law preempts a California law requiring the Labor Commission to rule on the contract's legality.

The other case on review by the United States Supreme Court is ***Hall Street Associates LLC v. Mattel Inc.*** This case involves a contract that called for heightened judicial review of arbitration decisions. The question is whether the parties can contractually agree that an arbitration decision may be subject to more judicial review than is allowed by state law or by the Federal Arbitration Act. In other words, can parties contractually vest in a court greater jurisdiction than exists under statutory law?

Presently, there is a split amongst the circuits as to whether expanded judicial review of an arbitrator's decision is possible. The First, Third, Fourth, Fifth and Sixth Circuits hold that parties can agree to expand judicial review and grounds for vacating an award. The Ninth and Tenth Circuits hold that parties are constrained to the statutory basis for vacating an award. It does not appear that the Eighth Circuit has ruled on this issue.

The case emanates from the Ninth Circuit that held in 2003 that parties cannot expand the basis for a court to review an arbitration award beyond the statutory limits set out in the Federal Arbitration Act. The U.S. Supreme Court declined to hear that decision, but now is availing itself of an opportunity to review the law set forth in the Ninth Circuit as well as other circuits that have ruled on this matter.

The last arbitration case decided by the U.S. Supreme Court was ***Buckeye Check Cashing, Inc. v. Cardegna***, 546 U.S. 440 (2006). This case held that a challenge to the validity of a contract as a whole, and not specifically to an arbitration clause in the contract, must go to the arbitrator, not to the court, for decision. This was a vote of major confidence for arbitration and the ability of arbitrators to decide and determine how to enforce contracts.

## **2. Trends and Issues**

I attach a recent article in *The Wall Street Journal* discussing various efforts within Congress to generate and support legislation cutting back, if not eliminating, the rights to arbitrate in various instances. There is definitely a movement afoot by a growing number of concerns that arbitration should be curtailed and replaced with traditional litigation. It will be interesting to see how this trend plays out over the next year as we enter the campaign season.

## **3. Recommended Resources**

An excellent overview of arbitration, along with some in-depth chapters on various stages of arbitration, is the loose-leaf "The

Alternative Dispute Resolution Practice Guide” by Roth, Wulf and Cooper (Thompson West, 2005). As a loose-leaf, updates appear annually.

A number of publications are contained within the website for the American Arbitration Association at [www.adr.org](http://www.adr.org). Move to the tab labeled “Education” and within it you will see listings for a variety of subjects, including

- Alternative Dispute Resolution
- Commercial Finance
- Construction
- Consumer
- Employment
- Insurance
- Intellectual Property
- International
- Olympic and Professional Sports
- State-Based Dispute Resolution

#### **4. Upcoming Trainings**

Regrettably, because of a training session today, I am not able to give my report in person. A combined training session by USA&M and the American Arbitration Association took place at Washington University School of Law to discuss arbitrator training. The topics and presenters were:

**What is Arbitration and how does the role of the Arbitrator differ from the role of a judge?** (Robert Hughes)

**The Arbitration Agreement as the Basis for Jurisdiction** (Tom Blumenthal)

**Rules and Pleadings in Arbitration** (Rob Litz)

**Subjects for Prehearing Conference** (Jim Keller)

**Specific Arbitration Problems** (Rob Litz)

**Conducting an Arbitration Hearing** (Susan Carlson)

**Ethical Consideration for Arbitrators** (Tom Blumenthal)

It is anticipated that about 200 persons will attend this seminar. If anyone here is aware of any other upcoming programs, please let me know and I will include them on subsequent updates.

Respectfully submitted,

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