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AAA Case Summaries:
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I. JURISDICTIONAL ISSUES: GENERAL

Partial Final Award with Reservations Not Final Under New York Law. New York's highest court ruled that an arbitration panel had the authority to "correct" its partial final award and in doing so alter its findings without violating the doctrine of *functus officio*. During oral argument before the arbitration panel, one of the panelists inquired whether a "partial summary disposition was in the cards" but only one party acknowledged that that might make sense. A majority of the panel issued a "Partial Final Award" based on a summary disposition motion and later issued a "Corrected Partial Final Award". In doing so, the majority rejected the notion that the *functus officio* doctrine precluded issuance of the subsequent partial final award. The New York Court of Appeals agreed. The Court held that the *functus officio* doctrine did not apply here because it only applies to final awards and the Partial Final Award here was not final. According to the Court, to be final an award must be "coextensive with the issues submitted to the arbitrators by the parties" and to be final an award must "generally [be] one that resolves the entire arbitration." The Court acknowledged that federal courts have treated partial final awards as final where both parties have asked the panel to issue a partial award finally resolving some aspect of the case, for example, liability. The Court did not decide that issue, but commented that even "assuming that parties to an arbitration may agree to the issuance of a partial determination that constitutes a final award, the parties here, as the arbitration panel below concluded, did not reach any such agreement." Since there was no agreement or mutual understanding that the proceeding would be bifurcated and no agreement that a partial binding determination would be issued "the *functus officio* doctrine would have no application in this case" and therefore the panel did not exceed its authority by reconsidering its initial partial final award. *American International Specialty Lines Ins. Co. v. Allied Capital Corp.,* 2020 WL 2066743 (N.Y.).

Arbitration Subpoena Enforced. The arbitration panel issued *subpoenas deuces tecum* to non-parties to appear before it and to produce documents. The party seeking the documents let it be known that no one need appear at the hearing if the requested documents were produced. A date was set for the hearing. The parties negotiated the scope of the document production but could not ultimately agree. The subpoenaed party did not appear at the hearing. The district court refused to quash the subpoena and the Second Circuit affirmed. The court rejected the argument that the subpoenas improperly sought pre-hearing discovery, noting that a hearing had been set for these purposes. The court also saw no problem with, and rejected defendants' subterfuge argument based on, the offer to avoid appearing at the hearing if the documents were produced beforehand. "A properly issued summons is not rendered invalid by a Claimant's offer, a Respondent's offer or a joint agreement to produce documents without a hearing." The court was also not persuaded by the argument that the documents sought were "immaterial" and too

numerous. The court saw no basis to conclude that the subpoena did not comply with the requirements of Section 7 of the FAA, namely, requiring only that the documents being sought "may be deemed material as evidence in the case." For these reasons, the court affirmed the district court's enforcement of the subpoenas. *Washington Nat'l Ins. Co. v. OBEX Grp. LLC,* 958 F.3d 126 (2d Cir. 2020).

Subpoena for Foreign Arbitration Enforced. A contractor brought a private arbitration in the United Kingdom against Rolls Royce relating to a dispute involving the manufacture of a jet engine for the Boeing Dreamliner. The contractor filed an *ex parte* application in federal court seeking authorization to serve subpoenas under 28 U.S.C. § 1782 on Boeing employees in the United States with knowledge of the facts underlying the dispute. The court concluded that the U.K. arbitration was a "foreign or international tribunal" for purposes of § 1782. The court reasoned that arbitration, both in the U.K. and U.S., is a product of government-conferred authority. The authority in the US being the FAA, and in the U.K. it is the Arbitration Act of 1996. In so ruling, the Fourth Circuit joined the Sixth Circuit in interpreting § 1782 as applying to foreign arbitrations. The court dismissed Boeing's concerns that an expansive view of § 1782 would add unnecessary delay and expense to arbitration by noting that the exercise of § 1782 is in the full discretion of the federal courts, not the parties. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020). See also *HRC-Hainan Holding Co. v. Hu*, 2020 WL 906719 (N.D. Cal.) (California federal district court joins Sixth Circuit in finding 28 U.S.C. §1782 authorized production of discovery for foreign private arbitration before the China International Economic and Trade Arbitration Commission). But see *In re Application of Ewe Gasspeicher GMBH*, 2020 WL 1272612 (D. Del.) (application under 28 USC §1782 for discovery in aid of German arbitration denied as court concludes this was not a tribunal for purposes of the statute as no judicial review of the arbitration was permitted).

Petition to Enforce Foreign Arbitral Award Dismissed for Lack of Personal Jurisdiction. A Houston-based company's action to confirm a foreign arbitral award was dismissed by a Texas district court on the grounds that it lacked personal jurisdiction over respondent, a Russian oil-production company. The court noted that, while the "[New York] Convention does not list personal jurisdiction as a ground for denying enforcement, the Due Process Clause requires that a court dismiss an action, on motion, over which it has no personal jurisdiction." Relying on the Fifth Circuit decision in *Moncrief Oil Int'l, Inc. v. Gazprom*, 481 F.3d 309 (5th Cir. 2007), the court held that minimum contacts did not exist for the court to exercise personal jurisdiction over respondent. "Petitioner executed an Agreement in Russia, with Russian oil-production company [respondent], concerning a joint venture located in Russia, to develop a Russian oil field. Additionally, the Agreement provides that disputes are to be settled by arbitration under Swedish law in Stockholm, Sweden. Although [respondent's] executives visited Houston to initiate conversations about the joint venture, negotiate aspects of the Agreement, and attend a board meeting, the hub of the parties' activities was clearly outside of Texas." For these reasons, the court concluded that

it lacked jurisdiction to rule on the motion to confirm. *First National v. Oas Tyumenneftegaz*, 2020 WL 1188447 (S.D. Tex.). See also *Washington Nat'l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126 (2d Cir. 2020) (when ruling on arbitration subpoenas for purposes of diversity (rather than federal question) jurisdiction a federal court will only consider parties with respect to the petition before it and not "look through" to the parties in the underlying arbitration).

Case Shorts:

- *Estus v. ISS Facility Services,* 2020WL 2745545 (5th Cir.) (Section 1 exemption under the FAA for transportation workers did not apply to manager of airport services where plaintiff's duties were to load and unload airplane and therefore she was "not engaged in an aircraft's actual movement in interstate commerce").
- *Cunningham v. Lyft, Inc.*, 2020 WL 1503220 (D. Mass.) (FAA transportation worker exemption held to apply to Lyft drivers transporting principally passengers rather than goods).
- *Lesser v. TIAA Bank FSB,* 2020 WL 2570352 (S.D.N.Y.) (stay of litigation denied where stay will "hamper the progress" of a class and collective action and the arbitrable claims are "a *portion* of a *portion* of the claims in this case").
- *Certain Underwriters at Lloyd's, London v. Century Indemnity Co.*, 2020 WL 1083360 (D. Mass.) (preclusive effect, if any, of earlier arbitration award and question whether one or more arbitration panels should be selected are issues for the arbitrator rather than the court to decide).
- *New York District Council of Carpenters v. Tried N True Interiors*, 2020 WL 1809323 (S.D.N.Y.) (interest awarded for period between issuance of award and its confirmation at New York statutory rate of 9%).
- *New York District Council of Carpenters v. Tried N True Interiors*, 2020 WL 1809323 (S.D.N.Y.) (post-judgment interest awarded under 28 U.S.C. § 1961 at statutory rate for period following confirmation of award until payment made).
- *ExxonMobil Oil v. TIG Insurance,* 2020 WL 2539063 (S.D.N.Y.) (interest not included in cap on "damages" and therefore party confirming award entitled to award of pre-judgment and post-judgment interest at the New York statutory rate of 9%).
- *Capriole v. Uber Technologies*, 2020 WL 1323076 (D. Mass.) (Uber drivers failed to show irreparable injury warranting injunctive relief based on claim that misclassification of independent contractors degrades Massachusetts economy by reducing the state's tax benefits and causes undue injury to employers who comply with wage and hour laws).
- *Rockefeller Tech. Investments (Asia) VII v. Changzhou SinoType Tech. Co.*, 9 Cal. 5th 125 (2020) (service of motion to confirm award by courier to party in China constitutes effective service where the parties' agreement so provided and therefore provisions of Hague Service Convention did not apply).

- *OJSC Ukrnafta v. Carpatsky Petroleum Corp.,* 955 F.3d 465 (5th Cir. 2020) (Swedish arbitration award upheld under Convention on the Recognition and Enforcement of Foreign Arbitration Awards where parties were represented by counsel, submitted evidence, briefed issues, and held four days of an evidentiary hearing).
- *Ashford v. PricewaterhouseCoopers LLP*, 954 F.3d 678 (4th Cir. 2020) (Franken Amendment barring arbitration of employment disputes in defense contracts no longer applicable where employer ceased to be a defense contractor).
- *Taylor v. Pilot Corp.,* 955 F.3d 572 (6th Cir. 2020) (court's denial of motion to compel without prejudice so discovery regarding prospective collective action opt-ins is not final and not subject to appellate review).
- *Diaz v. Nintendo of America*, 2020 WL 996859 (W.D. Wash.) (arbitration agreement lawful under California's *McGill* rule where agreement placed no restriction on arbitrator's authority to award public injunctive relief).
- *Boss Worldwide v. Crabill*, 2020 WL 1243805 (S.D.N.Y.) (claims under Digital Millennium Copyright Act subject to arbitration).

II. JURISDICTIONAL CHALLENGES: DELEGATION, ESTOPPEL, AND WAIVER ISSUES

Supreme Court Rules Equitable Estoppel Principles Apply to New York Convention.
The Supreme Court resolved a conflict among the circuit courts by ruling that domestic equitable estoppel principles apply to the New York Convention on Recognition and Enforcement of Foreign Arbitration Awards. As a result, the Court reversed the Eleventh Circuit ruling to the contrary with direction that the court determine whether a non-signatory to a commercial contract, GE Energy, could invoke that contract's arbitration clause in a dispute with a signatory. The signatory, Outokumpu Stainless USA, sued GE Energy contending that the engines it supplied to the general contractor, who in turn installed the engines in a steel plant for Outokumpu, were defective. The arbitration clause here was in the agreement between Outokumpu and the general contractor, not in an agreement signed by GE Energy. The Supreme Court found nothing in the New York Convention that conflicted with the FAA or general principles of equitable estoppel under United States law. Noting that the Convention was silent on the issue of non-signatory enforcement, the Court found that this "silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic estoppel doctrines." The Court rejected Outokumpu's remaining arguments against arbitration of the dispute, observing that "[c]herry-picked 'generalization[s]' from the negotiating and drafting history cannot be used to create a rule that finds no support in the treaty's text . . ." For these reasons, the Court remanded the dispute to the Eleventh Circuit with instructions that it resolve whether GE Energy "could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that interpretation." *GE Energy Power v. Outokumpu Stainless USA*, 2020 WL 2814297 (U.S.).

AAA Rules Not Sufficient to Support Delegation of Arbitrability Question. Most courts, including several federal circuit courts, have ruled that an arbitration agreement's incorporation of the AAA's rules constitutes clear and unmistakable evidence that arbitrability questions are for the arbitrator to decide. A Florida Court of Appeal took a different path in a case involving a couple who were secretly videotaped while staying in an AirBnB rental unit. The AirBnB on-line agreement included arbitration in its 22-page terms of service. Defendants argued that by clicking "I accept" the plaintiffs agreed to arbitrate their claims. The arbitration agreement provided for administration by the AAA in accordance with its Commercial Rules. The lower court granted the motion to compel, concluding that incorporation of the AAA rules required the issue of arbitrability to be submitted to the arbitrator for resolution. The Court of Appeal reversed. The appellate court framed the question as "whether a contract's arbitration provision's reference to an arbitration rule that *does* grant an arbitrator the authority to decide arbitrability clearly and unmistakably supplants a court's power to rule on the issue of arbitrability. In this case, we hold it does not." The court emphasized that the agreement was silent on the question of delegation. The court reasoned that the reference to the AAA rules presumed that an arbitration had already been filed in which case the AAA rules would govern. The court noted that defendants relied on the AAA rule which confers on arbitrators the authority to rule on their own authority which the court found "confers an adjudicative power upon the arbitrator but it does not purport to make that power exclusive. Nor does it purport to contractually remove that adjudicative power from a court of competent jurisdiction." The court concluded that the AirBnB clickwrap agreement "fell short of the clear and unmistakable evidence of assent" required to delegate to arbitrators the question of arbitrability. The court acknowledged that its decision was an "outlier" and contrary to most courts addressing the issue. In rejecting their holdings, the Court of Appeal concluded that "none of these cases have examined how or why the mere 'incorporation' of an arbitration rule such as the one before us . . . satisfies the heightened standard" required to overcome the presumption that the question was for a court to decide. *Doe v. Wayne Natt*, 2020 WL 1486926 (Fla. App.). Cf. *Communication Workers of America v. AT&T*, 2020 WL 1821112 (D.D.C.) (incorporation of AAA rules not sufficient to refer arbitrability issue to arbitrator where AAA rules incorporated only for a narrow issue to be arbitrated; *Richardson v. Coverall North America*, 2020 WL 2028523 (3rd Cir.) (incorporation of AAA rules sufficient to delegate arbitrability issues to arbitrator where remainder of agreement is not "so ambiguous or unclear that the meaning of the AAA Rules becomes murky"); *Sitzer v. National Association of Realtors,* 2020 WL 2787725 (W.D. Mo.) (incorporation of AAA rules not sufficient to refer arbitrability question to arbitrator in class action context as compared to bilateral arbitration context where it would be); *Sitter City, Inc. v. Carlson*, 2020 WL 1902419 (Sup. Ct. N.Y. Cty.) (issues related to arguably unconscionable online arbitration provision for arbitrator to decide under applicable AAA rules). But see *McKellar v. Mithril Capital Management*, 2020 WL 1233855 (N.D. Cal.) (waiver issue delegated to arbitrator

where incorporation of AAA rules constitutes clear and unmistakable evidence of delegation).

No Waiver Where Motion to Compel Made After Class Certified. A class action was brought against Goldman Sachs in 2010. Goldman made clear in its initial pleading that it intended to compel arbitration and repeated its intent at various points throughout the litigation. A class was certified in 2018, notice was issued, and the opt-out period expired in January 2019. Goldman served individual arbitration demands in February 2019 and then moved to compel arbitration for certain members of the class. Plaintiffs' argument that Goldman waived its right to arbitrate was rejected. The court acknowledged that significant time had passed since the initiation of the action and that "44 fully-briefed motions had been filed, over 100 letters, 26 court appearances, and hundreds of thousands of pages of discovery production" had occurred. The court added that "[j]udicial economy dictates that parties may not burden the courts, only to then jump ship to arbitration when the strategic timing suits their interests." But that was not the case here, the court concluded. The context here that mattered to the court was that Goldman could only compel arbitration after the class was certified and the class members determined. Moreover, in this case the litigation would continue as the motion to compel encompassed only part of the class. The other factors weighing against waiver was the lack of prejudice to the plaintiffs and the fact that discovery exchanged in the litigation was also available in arbitration. The court also rejected plaintiffs' argument that arbitration is a "friendlier-forum" for employers, citing Second Circuit authority to the contrary in doing so. For these reasons, the court denied plaintiffs' waiver argument and granted the motion to compel in significant part. *Chen-Oster v. Goldman, Sachs & Co.*, 2020 WL 1467182 (S.D.N.Y.). See also *Cornelius v. Wells Fargo Bank*, 2020 WL 1809324 (S.D.N.Y.) (bank did not waive right to arbitrate by enforcing restraint on bank account as the New York information subpoena and restraining notice was obtained in court by creditors, not the bank enforcing the restraining notice). Cf. *Lee v. Evergreen Hospital,* 2020 WL 2970610 (Wash.) (employer waived right to arbitrate where, despite raising arbitration as an affirmative defense in its answer, it waited nine months before seeking arbitration which was inconsistent with seeking to arbitrate dispute and caused plaintiffs severe prejudice).

Arbitration Award Collaterally Estops Bankruptcy Claim. An arbitrator ruled that O'Melveny & Myers did not engage in legal malpractice or breach its fiduciary duties in representing its client Aletheia which later filed for Chapter 7 bankruptcy. The bankruptcy trustee pursued fraudulent transfer claims against O'Melveny alleging that Aletheia did not receive reasonably equivalent value in exchange for the fees paid to the firm. The court concluded that the arbitration award served to collaterally estop the trustee from pursuing his claim here. The court noted that the trustee sought the disgorgement of legal fees in the arbitration and that the arguments supporting the claims in the arbitration "regarding damages are consistent with the theory of damages that [the bankruptcy trustee] now advances with respect to his fraudulent transfer claims." The court added that the trustee

had a full opportunity to litigate his claims before the arbitrator and the issues contested in this action were necessarily addressed and decided in the arbitration. As the arbitration award was confirmed by the court, it constituted a "final judgment" for collateral estoppel purposes. For these reasons, the court concluded that the arbitration award "is entitled to preclusive effect pursuant to the doctrine of collateral estoppel, barring [the bankruptcy trustee] from relitigating, in the context of his fraudulent transfer claims, the issue of whether Aletheia received 'reasonably equivalent value' in return for its remuneration to O'Melveny." *Golden v. O'Melveny & Myers*, 2020 WL 1640020 (C.D. Cal.). Cf. *Nelson Construction v. Britt, Peters and Associates*, 2020 WL 2027218 (S. D. Miss.) (collateral estoppel based on prior arbitration award between parties to same underlying dispute denied where award was "cursory", arbitration pleadings not provided to court, and the court not provided with "the legal standard applied by the arbitration panel, or the facts they considered").

Case Shorts.

- *Washington Nat'l Ins. Co. v. OBEX Grp. LLC,* 958 F.3d 126 (2d Cir. 2020) (when reviewing a petition to enforce arbitration subpoenas a federal court will defer to the arbitrator on questions of scope and alleged burdensomeness of the subpoenas at issue).
- *Nicosia v. Amazon, Inc.,* 2020 WL 2988855 (2d Cir.) (challenge to contract on illegality grounds is not "a threshold question of arbitrability" and therefore "should be considered by the arbitrator in the first instance").
- *Earth Science Tech, Inc. v. Impact UA, Inc.*, 2020 WL 1861402 (11th Cir.) ("the parties' incorporation of the UNCITRAL Rules in the [applicable agreement] constitutes clear and unmistakable evidence that the parties agreed to arbitrate the issue of arbitrability").
- *International Energy Ventures Management v. United Energy Group*, 2020 WL 1333163 (S.D. Tex.) (courts rather than arbitrators must decide whether litigation constituted waiver of right to arbitrate).
- *Sun Coast Res., Inc. v. Conrad*, 956 F.3d 335 (5th Cir. 2020) (issue of delegation of arbitrability questions to arbitrator found to have been forfeited twice where first raised before court of appeals and not with either arbitrator or district court).
- *Peter v. DoorDash*, 2020 WL 1967568 (N.D. Cal.) (while a court will generally resolve "ambiguities in arbitration agreements in favor of arbitration, it resolves ambiguities as to the delegation of arbitrability in favor of court adjudication").
- *The Chemours Co. v. Dow DuPont*, 2020 WL 1527783 (Del. Chanc. Ct.) (subsidiary's challenge on unconscionability grounds to delegation clause in agreement with parent company rejected where challenge really is to the arbitration agreement itself and not solely to the delegation clause as argument of an imbalance in power can be made to the arbitrator).

- *Williams v. Fidelity Warranty Services*, 2020 WL 2086655 (S. D. Tex.) (removal from state court and procedural motion to dismiss did not constitute waiver of right to arbitrate).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Limited Procedural Unconscionability Insufficient to Deny Enforcement of Arbitration Agreement. Goldman Sachs' equity awards incorporated by reference a stock incentive plan that included an arbitration provision. In 2016, in the midst of a class action Goldman amended the process by which equity award recipients accepted the terms of the award. As described by the court, to view the full terms of the acceptance document the "employee had to scroll through six frames of fine-print and would have had to make it to the last frame to find its sweeping arbitration provision." Moreover, the revised arbitration provision was broader and, in the court's view, "the particular transgression here is that Goldman did not indicate in any way to employees that the scope of the arbitration provision in the [acceptance document's] terms was far broader than the limited arbitration provision associated with the equity program agreements" and employees were not alerted that they were now agreeing to arbitrate all employment-related claims. By burying this provision and failing to properly alert employees of the change in scope of the arbitration provision, the court ruled that the revised arbitration provision was "tainted by procedural unconscionability." However, the court emphasized that for the agreement to be ruled unenforceable it would also have to be found to be substantively unconscionable. The court found no substantive unconscionability here "particularly in light of changing law." Even though Goldman revised its arbitration agreement years into the litigation, the court noted that the mere fact that a lawsuit is pending does not "bar Goldman from altering its business practices, arbitration policies, or form agreements." The court noted that the new arbitration agreement was not targeted at potential class members and was introduced six years after the litigation began. The court concluded that "because there is at most procedural but not substantive unconscionability, the arbitration clauses are not unenforceable as unconscionable." *Chen-Oster v. Goldman, Sachs & Co.*, 2020 WL 1467182 (S.D.N.Y.).

Case Shorts:

- *Ashford v. PricewaterhouseCoopers LLP*, 954 F.3d 678 (4th Cir. 2020) (substantive unconscionability claim rejected and Title VII dispute ordered to arbitration where express exclusion of Title VII disputes in the arbitration agreement was no longer applicable as the firm was no longer a defense contractor covered by the restriction in the Franken Amendment).
- *Parrott v. D. C. G., Inc.*, 2020 WL 1876096 (N. D. Tex.) (unconscionability claim denied where illegal provision barring award of fees to prevailing party as applied to FLSA case can be severed).

- *Rojas v. Gosmith*, 2020 WL 831585 (N.D. Ind.) (arbitration agreement that granted only one-party discretion to elect arbitration not unconscionable; contracts "do not need to impose identical duties on all parties.")

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

DoorDash On-line Subscribers Put on Inquiry Notice of Arbitration. DoorDash customers brought a nationwide class action against the service alleging unfair trade practices and unjust enrichment. DoorDash's motion to compel arbitration was granted as the court concluded that the plaintiffs had been placed on inquiry notice of the arbitration provision in the terms and conditions of DoorDash's on-line application. In so finding, the court emphasized that: applicants were required to acknowledge their agreement to DoorDash's terms and conditions; the words "terms and conditions" were in blue text and hyperlinked although the subscribers were not required to click through the terms and conditions; the screens were "uncluttered and wholly visible," and; the relevant text "contrasts clearly with the background and is plainly readable." For these reasons, the court concluded that plaintiffs "were on inquiry notice of DoorDash's [terms and conditions] and that they are bound by its terms." *Peter v. DoorDash*, 2020 WL 1967568 (N.D. Cal.). See also *Nicosia v. Amazon, Inc.,* 2020 WL 2988855 (2d Cir.) (Amazon consumer put on inquiry notice after making at least 27 purchases through Amazon.com after receiving notice of arbitration agreement in 2014 by letter motion in this litigation). Cf. *LIU v. TD Ameritrade*, 2020 WL 2113219 (E.D.N.Y.) (bank customer not on inquiry notice regarding arbitration provision in succeeding bank's agreement where arbitration provision was a "confusing maze of links and forms [which] falls far short of the 'clearly and reasonably conspicuous' notice on 'uncluttered' pages that courts have previously held sufficient to bind a party to an arbitration agreement").

Employer's Signature Not Required for Enforceable Arbitration Agreement. Simmons signed her employer's arbitration agreement, but the employer did not even though the agreement had a signature line for it. Simmons sued the employer for discrimination and opposed the employer's motion to compel arbitration, arguing that no contract was entered into due to the employer's failure to countersign the agreement. A Texas appeal court rejected Simmons' argument and, in doing so, reversed the trial court's denial of the employer's motion to compel. The appellate court began by noting that the FAA did not require the parties to sign an arbitration agreement as long as it is written and agreed to by the parties. A signature is required, the court reasoned, only where the agreement itself requires a signature. "We agree with other courts that a blank signature block alone does not establish that a signature is a condition precedent to the agreement's enforceability." The court found sufficient indicia in the text of the agreement itself as it expressed the parties "mutual desire" to submit disputes to arbitration. The court was further persuaded by the mere fact that the employer drafted the arbitration agreement, maintained it as a

business record, and moved to enforce it. In the absence of evidence that a signature was a condition precedent for enforceability of an arbitration agreement, the court concluded that as a matter of law the employer intended to be bound to arbitrate disputes. *SK Plymouth v. Simmons*, 2020 WL 1879653 (Tex. App.).

Lack of Signed Agreement Precludes Arbitration. A server sued her employer for wage and hour violations. The restaurant, in response, cited its arbitration policy but failed to produce a copy of the policy signed by the server. The district court denied the motion to compel, and the District of Columbia Court of Appeals affirmed. The circuit court noted that the party moving to compel bears the burden of proof. The restaurant's general manager attested to his practice of presenting arbitration agreements to new employees and confirmed "virtually every" employee signed the arbitration policy. The court reasoned, however, that a reasonable jury "could just as easily conclude that, while most employees signed the arbitration policy, [plaintiff] slipped through the cracks." Evidence that the restaurant's database indicated "yes" next to the field for arbitration agreements accompanying plaintiff's name yielded no better results, as the court emphasized that the server's affidavit clearly stated that he did not see or sign such an agreement. That was sufficient, according to the court, enough to deny summary judgment in favor of the restaurant. Beyond the server's affidavit, the "company's failure to produce an arbitration agreement containing [the server's] signature after the company searched for a document makes it more likely that no such document exists, which in turn makes it less likely that [the server] agreed to arbitrate disputes." The court also rejected the restaurant's implied contract claim where there was no evidence that "a manager or a co-worker discussed the arbitration agreement with him. In the absence of this or similar evidence, a reasonable fact finder could conclude that [the server] was unaware of the agreement during the course of his work" at the restaurant. For these reasons, the court affirmed the district court's denial of the motion to compel. *Camara v. Mastro's Restaurants LLC*, 952 F.3d 372 (D.C. Cir. 2020).

Misleading Arbitration Agreements Voided in Context of Class Action. In the midst of a class action, Goldman Sachs expanded the scope of its arbitration agreement for equity award recipients, including class members, to include all employment-related claims including those encompassed by the class action. The court found that Goldman obtained acceptance from its equity award recipients of its revised arbitration agreement by means of a "new electronic procedure that obfuscated the expanded scope of mandatory arbitration" and was procedurally unconscionable. The court rejected the argument that the equity award agreements were obtained by coercion or deception but rather were procured "in a confusing and potentially misleading fashion." As a result, the court was not prepared to void the arbitration agreements but ruled that the "potential for confusion or being misled" warranted the exercise of the court's discretionary authority in the context of a class action to warrant the remedy of allowing the affected class members to choose to opt-out of Goldman's arbitration program. In this way, the court reasoned, class members will have "the opportunity to opt out of arbitration and remain in the class litigation." The court

explained that in its view "pre-emptively concluding that all relevant Class Members will prefer class action litigation to individual arbitration is presumptive and broader than necessary." The court ordered the parties to meet and confer with respect to the notice to be given class members that would notify them that they would have 45 days to opt-out of Goldman's arbitration program. *Chen-Oster v. Goldman, Sachs & Co.*, 2020 WL 1467182 (S.D.N.Y.).

Arbitration Denied Where Web Site Notice Inconspicuous. Subway ran an internet promotion that texted discounts to customers who signed up. In exchange for a free 6-inch sub, plaintiff received regular, unsolicited texts. She filed a class action under the Telephone Communication Protection Act and Subway moved to compel arbitration. The court denied the motion, finding that Subway "did not provide reasonably conspicuous notice to [plaintiff] that she was agreeing to arbitration and because Subway has not shown that [plaintiff] unambiguously assented to arbitration." The print and digital ad contained a "roughly 100-word small-font black-on-white disclaimer stating in part, 'Terms and Conditions at subway.com/subwayroot/TermsOfUse.aspx,' and '[t]o opt-out, text STOP to 782929.'" The terms of use consisted of many screens of fine print, section 14 of which contained the arbitration provision. Plaintiff opted into the program by texting a code and then replying, when prompted, with her zip code. She never expressly agreed to the program's terms and conditions. Among the hurdles placed in the way of a prudent consumer, the court found, was: the disclaimer was in small print which was "dwarfed by the surrounding colorful text and imagery"; conflicting language stating that consent was not required to buy goods which was accompanied by vague references to terms and conditions, and; the "consumer would have to have typed each character of the tiny URL – which spills over from the second into the third line of the disclaimer – into a web browser on her smart phone, typo-free and in a Subway store with decent cell or internet service, or else recorded the URL and accessed it elsewhere." In conclusion, the court denied the motion to compel where "the notice was sandwiched (so to speak) between roughly 100 words of small black text compared to which it was unimpressive, was tucked away at the bottom corner of the advertisement relatively distant from the offer, and contained no express language explaining that by accepting the offer, a consumer was agreeing to be bound by the terms." *Soliman v. Subway Franchisee*, 2020 WL 1061328 (D. Conn.). See also *Murray v. Grocery Delivery E-Services USA,* 2020 WL 2543170 (D. Mass.) (contract not properly modified to add arbitration where hyperlinked terms were "hidden in small print in a paragraph of other text and there was nothing to draw attention to them or to suggest a change").

No Arbitration Agreement Formed. In January 2017, plaintiff created an online account with Hello Fresh, a meal delivery service, and agreed to the terms and conditions effective as of that date. Plaintiff deactivated her account shortly thereafter but reactivated it in January 2019 when she placed an order. Plaintiff subsequently received several phone calls from the company soliciting her business, prompting her to file a class action lawsuit alleging

violations of Minnesota's equivalent to the TCPA. Hello Fresh moved to compel arbitration. The company asserted that plaintiff's consent to its January 2017 terms and conditions, which gave Hello Fresh the unilateral right to amend its terms, made lawful the February 2017 addition of an arbitration clause and June 2018 addition of a class action waiver provision. Furthermore, Hello Fresh argued that it sent approximately 50 emails to plaintiff between 2017 and 2019, each one containing a hyper-link to its current terms and conditions. Plaintiff countered that she did not have notice of or agree to the revised terms. Applying New York law, as required by the terms and conditions, the court noted that a unilateral right to revise a contract does not make a contract illusory, but held that the plaintiff here did not agree to anything beyond the original terms and conditions. The court found that the emails sent to plaintiff were promotional emails, not notices of changes in the terms and conditions and that the link to the terms and conditions "appears in small print at the bottom of the page, beneath the email's main promotional content, beneath hyperlinks to download HelloFresh's "app," beneath hyperlinks to HelloFresh's social media sites, and beneath a lengthy disclaimer regarding the promotional offer. It is not clear and conspicuous. It is buried at the bottom of the page, where a recipient is not likely to see it and less likely to understand its significance." There was also no evidence plaintiff assented to the revised terms and conditions in 2019. Therefore, the court held that the parties did not agree to the modified terms and conditions and the motion to compel arbitration was denied. *Engen v. Grocery Delivery E-Servs. USA Inc.,* 2020 WL 1816043 (D. Minn.). See also *Lesser v. TIAA Bank FSB,* 2020 WL 2570352 (S.D.N.Y.) (later agreement without arbitration clause did not succeed or displace prior arbitration provision where later agreement expressly became "effective" on a designated date and therefore dispute arising prior to effective date was arbitrable).

Subsidiary Bound to Arbitrate Under Agreement Drafted by Parent. Chemours was made a wholly owned subsidiary of DuPont by means of a Separation Agreement signed in 2015. It was later spun off as an independent entity. Chemours inherited from DuPont assets with environmental liabilities and Chemours sued DuPont in Delaware's Chancery Court alleging that DuPont wrongfully underestimated these liabilities when it became a subsidiary. The Separation Agreement included an arbitration provision and DuPont moved to compel arbitration. Chemours opposed the motion but the Chancery Court concluded that the Separation Agreement clearly assigned the question of arbitrability to the arbitrator and granted the motion. In doing so, the court rejected the argument by Chemours that it did not truly consent to the terms of the Separation Agreement because it had no opportunity to bargain with DuPont which determined the terms and conditions related to the creation of it as a subsidiary. The court reasoned that while "Chemours challenges its consent to arbitration in this 'real-world' or intuitive sense, it cannot show that it did not consent in the *contractual* sense required by the FAA . . . simply because the parent dictates terms to its wholly-owned subsidiary is *not* grounds under Delaware law to infer lack of consent such that the contract would not be enforceable." The court, applying normal

contract principles, concluded that Chemours agreed to the arbitration agreement, including its delegation provision, and gateway questions were therefore for the arbitrator to determine. *The Chemours Co. v. Dow DuPont*, 2020 WL 1527783 (Del. Chanc. Ct.).

Estoppel on Agency Grounds Rejected for Party's Parent Company. Trina Solar sold solar panels to JRC Services. The agreement identified the parties as Trina and JRC and identified JRC's parent company, Jasmin Solar, as the guarantor of payments owed by JRC. During the life of the agreement Trina acknowledged that it had no agreements with Jasmin. A dispute arose and Trina brought an arbitration against both JRC and Jasmin, with the latter denying it was subject to arbitration as a non-signatory to the agreement. The arbitrator rejected Jasmin's argument, as did the district court in confirming the award that found JRC and Jasmin jointly and severally liable for breach of the agreement. The Second Circuit reversed, finding that Jasmin was not bound by the arbitration provision in the agreement. In doing so, the Second Circuit rejected both grounds offered by the district court, namely agency principles and the direct benefit doctrine. In rejecting Trina's agency argument, the court noted that the agreement specifically identified Trina and JRC as the parties, and to include Jasmin as a party would "deprive several of the Contract's provisions of coherence." For example, Jasmin would be serving as its own guarantor. The court also cited the agreement's third-party beneficiary clause which recognized that no entity other than the parties could enforce the contract terms. "It would be odd to conclude that the Contract nevertheless burdens some additional, Unnamed entity with obligations as a silent principal rather than, for example, a guarantor for one of the parties, as explicitly provided here." The Second Circuit rejected the direct benefit theory because Jasmin neither invoked the agreement to demand delivery of the solar panels by Trina nor did it ever "invoke Trina's duties under the Contract to seek or obtain a benefit." For these reasons, the Second Circuit reversed the district court's confirmation of the award with respect to Jasmin. *Trina Solar U.S. v. Jasmin Solar PTY*, 954 F. 3d 567 (2d Cir. 2020). See also *KPMG LLP v. Kirschner*, 182 A.D.3d 484 (N.Y. App. Div. 2020) (investor's interests in common law misrepresentation claims were "merely indirect" and not directly connected to engagement letter between accounting firm and its client which contained the arbitration provision and therefore direct benefit estoppel argument fails).

Non-Signatory Credit Reporting Agencies Not Bound to Arbitrate. Chirag Patel sued Regions Bank relating to two unauthorized charges on his credit card. He also sued various credit reporting bureaus who provided credit history reports involving this dispute. Regions Bank moved to compel arbitration based on an arbitration provision in its credit card agreement with Patel. Patel moved to compel the credit reporting bureaus to arbitrate these disputes based on their contractual relationship with Regions Bank. The district court granted the Bank's motion to compel but denied Patel's motion to compel against the credit reporting agencies. The Fifth Circuit affirmed. Under Alabama's equitable estoppel and third-party beneficiary doctrines, a non-signatory can only be made to arbitrate where it receives a direct benefit from the agreement containing the arbitration clause or where

claims are asserted under the agreement. The credit reporting bureaus here neither gained any benefits from nor asserted any claims under the agreement. The "bottom line" from the court's perspective was that the credit reporting bureaus "have no claims against Regions or Patel that they seek to resolve by arbitration" but rather Patel wants "to resolve the claims he has against them". For these reasons, the court concluded that neither the underlying agreement nor Alabama law authorized arbitration by Patel against the non-signatory credit reporting agencies. *Patel v. Regions Bank*, 2020 WL 1933949 (5th Cir.). Cf. *5556 Gasmer Management v. Underwriters at Lloyd's London,* 2020 WL 2813599 (S.D. Tex.) (non-signatory may not force into arbitration claims brought in court by signatory on direct benefit estoppel grounds where no interpretation of the applicable agreement necessary to adjudicate misrepresentation claims brought by signatory against non-signatory); *ExxonMobil Canada Holdings v. Lasco Development*, 2020 WL 1667319 (S.D. Tex.) (non-signatory bound to arbitrate under terms of collateral contracts where it seeks payments and rights under those contracts); *Canady v. Bridgecrest Acceptance Corp.*., 2020 WL 1952566 (D. Ariz.) (wife not bound to arbitrate TCPA dispute under Florida's equitable estoppel doctrine because she was not seeking to exploit benefits of underlying retail purchase agreement associated with the purchase of the truck at issue). See also *B. F. and A. A. v. Amazon.com*, 2020 WL 1808908 (W.D. Wash.) (non-signatory parent of minor cannot be compelled to arbitrate disputes under equitable estoppel theory where they did not knowingly exploit the agreement containing the arbitration agreement or directly benefit from it); *Cho v. Cinereach*, 2020 WL 1330655 (S.D.N.Y) (claims against company's Executive Director were covered by arbitration agreement even though he was not a signatory where there was "no question that the subject matter of the dispute between [the plaintiff] and [employer] is factually intertwined with the dispute between [the plaintiff] and [Executive Director].").

Relationship to Signatory Must be Disclosed for Estoppel to Apply. The Trump Organization promoted and endorsed ACN, a marketing company which signs up and charges "Independent Business Owners" ("IBO") for the right to sell ACN Products. The agreement between ACN and its IBOs included an arbitration provision. Plaintiffs brought a putative class action against the Trump Organization alleging unfair trade practices and racketeering and alleged that they relied on Donald Trump and the Trump children's allegedly independent endorsement of the products in deciding to become IBOs. In fact, the Trump Organization was being paid to endorse ACN and this fact was not disclosed. Eight months after the litigation commenced, the Trump Organization moved to compel arbitration, relying on the arbitration agreement between ACN and the IBOs. The court, applying North Carolina law, denied the motion. The court reasoned that the plaintiffs could not be compelled to arbitrate on equitable estoppel grounds based on the ACN arbitration agreement because defendants were alleged to have wrongfully held themselves out as offering an independent endorsement of ACN and plaintiffs were not aware of the pay relationship between ACN and the Trump Organization. The court also rejected

defendants' agency argument as no evidence was presented that ACN and the Trump Organization had a principal/agent relationship or control over each other. In any event, the court concluded that defendants waived any obligation to arbitrate by waiting eight months to make their motion after having aggressively litigated the case to that point. *Doe v. The Trump Organization*, 2020 WL 1808395 (S.D.N.Y.).

Question of Fact Regarding Acceptance of Terms Requires Trial. A customer applied and received a Wells Fargo credit card. The bank represented that: the card was mailed with a consumer account agreement which referenced a customer agreement containing an arbitration clause that was mailed one month later; it mailed updated customer agreements to the customer, and; it mailed new cards to the customer over the years to the same address which was used by the customer for receipt of the credit cards. The customer denied ever receiving the customer agreements. The customer sued alleging violation of the TCPA, and Wells Fargo moved to compel arbitration. While the bank tracked online activity, it did not track when the customer agreements were allegedly mailed to plaintiff. The court concluded that the online application was a hybrid browsewrap. In particular, while a hyperlink was provided to the terms and conditions and later asked the customer to acknowledge that he had reviewed the terms and conditions, plaintiff "could have clicked that acknowledgment even without clicking on the hyperlink and linking to the different web page containing the agreements and disclosures." Under these circumstances, the court concluded that a fact question existed as to whether a valid arbitration agreement existed as Wells Fargo "has not sufficiently proven that Plaintiff received and was aware of the terms of any of Customer Agreement purportedly provided to him." As a result, the court ordered an evidentiary hearing as to whether a valid arbitration agreement existed. *Card v. Wells Fargo Bank*, 2020 WL 1244859 (D. Oreg.).

Arbitration Agreement Contained in Personnel Policy Enforceable. Plaintiff sued her former employee after being terminated and the employer moved to compel arbitration. Plaintiff's former employer argued that plaintiff was bound by the arbitration agreement contained in its Personnel Policy. The court agreed, finding that although plaintiff's offer letter did not specifically reference arbitration, it did reference the Personnel Policy. Prior to beginning work, plaintiff received the Personnel Policy, which included the company's arbitration agreement, and she signed the acknowledgment form in connection with it. Plaintiff argued the agreement was unenforceable because the Personnel Policy contained a disclaimer that "[n]othing in this personnel policy is to be construed as a binding contract with [Employer] or a guarantee of continuity of employment, benefits or rights." She also argued that the provision allowing the employer to unilaterally modify the Personnel Policy rendered the arbitration agreement illusory and unenforceable. The court rejected both arguments, stating that where, as here, an "arbitration agreement included in an employee handbook with language 'providing that the handbook does not constitute . . . a contract of employment or that the arbitration policy may be amended' is enforceable when the language of the arbitration agreement is 'distinct and mandatory' and when the employee is

advised of the policy and 'that compliance with it [is] a condition of employment.'" Turning to the unilateral modification point, the court noted that the presence of that provision does not, by itself, invalidate the contract since all contracts in New York are subject to an implied duty of good faith and fair dealing. The court also noted that there was no evidence that the former employer contemplated or attempted to modify the agreement, and in any event, that the provision could be severed from the agreement. Accordingly, the court held that the parties entered into a binding contract and arbitration was compelled. *Cho v. Cinereach*, 2020 WL 1330655 (S.D.N.Y.). See also *Miracle-Pond v. Shutterfly*, 2020 WL 2513099 (N.D. Ill.) (employer's right to unilaterally modify arbitration agreement did not make the agreement illusory under Illinois law even where subsequent modification is not affirmatively accepted by employee); *Dunn v. JP Morgan Chase Bank*, 2020 WL 1984328 (E. D. La.) (employee consented to arbitration by signing offer letter which incorporated by reference contract containing arbitration provision).

No Acceptance of Clickwrap Offer. Plaintiff registered for an account on defendant's job-posting website. In doing so, he was able to see an arbitration clause adjacent to a "See Job Matches" button. The check box next to the arbitration clause was pre-checked and plaintiff only checked the "See Job Matches" button. When a dispute arose, defendant moved to compel arbitration. The district court denied the motion, finding that there was no language such as "I Accept" that could put plaintiff on notice that he was agreeing to the arbitration clause and "no evidence shows any indication that Plaintiff was advised to read the entirety of the webpage or that he needed to opt out of the agreement." As such, the court held that the clickwrap agreement here was not accepted and no agreement was formed. The parties were ordered to litigate their dispute in court. *Rojas v. Gosmith*, 2020 WL 831585 (N.D. Ind.). Cf. *Miracle-Pond v. Shutterfly*, 2020 WL 2513099 (N. D. Ill.) (tapping web site "Accept" button by which Shutterfly user agreed to "use" its services in accordance with Shutterfly's Terms of Use constituted acceptance of agreement to arbitrate contained within the linked Terms of Use).

No Acceptance of On-line Arbitration Agreement. A California district court held that customers of Intuit's TurboTax service were not bound by an arbitration provision in Intuit's software license agreement because the terms were "too inconspicuous to give plaintiffs constructive notice that they were agreeing to be bound." Finding that the hyperlink leading to the terms of service was in a light blue font and not underlined, as is usually the case with hyperlink formatting, the court found it was not clearly displayed and therefore customers were not bound to arbitrate their claims. *Arena v. Intuit,* 2020 WL 1189849 (N.D. Cal.). See also *Theodore v. Uber Technologies*, 2020 WL 1027917 (D. Mass.) (links to online terms and conditions for Uber account appearing in blue text against white backdrop and where hyperlinks did not appear with underlines "were not conspicuous enough reasonably to communicate the existence or terms of the agreement").

Case Shorts:

- *Boss Worldwide v. Crabill*, 2020 WL 1243805 (S.D.N.Y.) (permissive language providing that the parties "may" submit claims to arbitration did not suggest alternative remedy and motion to compel granted).
- *McKellar v. Mithril Capital Management*, 2020 WL 1233855 (N.D. Cal.) (the AAA's current Employment Arbitration Rules, which represent that arbitrability issues are delegated to the arbitrator, govern despite agreement's reference to earlier National Rules for the Resolution of Employment Disputes where latter rules "provide for application of the most up-to-date version of the rules").
- *Taylor v. Pilot Corp.*, 955 F.3d 572 (6th Cir. 2020) (Sixth Circuit, in *dicta*, suggests that "the district court has the authority to determine whether the signature on an arbitration agreement is valid in advance of compelling arbitration in accordance with that agreement").
- *Almoudheji v. Automobiles of Southwest Houston*, 2020 WL 1987492 (S.D. Tex.) (provision in arbitration agreement violating substantive rights under the FLSA severed and motion to compel granted).
- *Parrott v. D. C. G., Inc.*, 2020 WL 1876096 (N.D. Tex.) (provision in arbitration agreement barring award of attorneys' fees to prevailing party is illegal and void under the FLSA but is non-essential and is therefore severed allowing dispute to proceed to arbitration).
- *Almoudheji v. Automobiles of Southwest Houston*, 2020 WL 1987492 (S.D. Tex.) (improper cost-sharing provision in employment arbitration agreements mooted by employer's offer to pay arbitration costs in full for FLSA plaintiffs).
- *Parrott v. D. C. G., Inc.*, 2020 WL 1876096 (N.D. Tex.) (declaration by a sworn affiant accompanied by signed copy of arbitration agreement sufficient to authenticate agreement under Federal Rules).
- *BLW Motors v. Vicksburg Ford Lincoln Mercury*, 2020 WL 1584402 (S.D. Miss.) (party may not compel arbitration against opposing party in contract for sale of land that did not contain an arbitration agreement based on arbitration provision in an asset purchase agreement relating to sale of car dealership located on the land being sold).
- *Page v. Alliant Credit Union*, 2020 WL 2526488 (N. D. Ill.) (plaintiffs' failure to read arbitration agreement and opt out under it "did not relieve them" of their obligation to arbitrate dispute with defendants).
- *Dunn v. JP Morgan Chase Bank*, 2020 WL 1984328 (E.D. La.) (failure to provide employee with hard copy of arbitration agreement did not bar its enforcement as it was plaintiff's "duty to either request a hard copy or review the agreement on the web site").

V. CHALLENGES TO ARBITRATOR OR FORUM

Collateral Attack for Arbitrator Misconduct Rejected. Two members of an arbitration panel appointed by the American Arbitration Association were accused of intentionally and unethically hiding conflicts of interest. The AAA declined to remove the arbitrators when they were challenged, but the panel later disbanded when one of the arbitrators was accused of making sexually offensive comments and the remaining two arbitrators resigned. The awards issued by the panel were vacated subsequently. One of the parties then sued the AAA and the two arbitrators with conflicts of interest seeking $12,000,000 in damages alleging fraudulent conduct in connection with the arbitration. The trial court granted defendant's motion to dismiss on arbitral immunity grounds, and the Fifth Circuit affirmed. The circuit court reasoned that the challenges here constituted collateral attacks on the arbitration awards that were not permitted under the Federal Arbitration Act. The wrongdoing alleged in this action, the court explained, was the same wrongdoing that resulted in the vacatur of the underlying awards. The court observed that "Congress identified some potential problems that may arise in arbitration in Section 10 of the FAA and provided a limited remedy. The relief, purported harm, and alleged wrongdoing here show that [the plaintiff's] claims, at heart, are in fact an unauthorized collateral attack on the arbitration." For these reasons, the Fifth Circuit concluded that dismissal of plaintiff's claims against the AAA and the arbitrators was required. *Texas Brine Co., L.L.C. v. Am. Arbitration Ass'n, Inc.,* 955 F.3d 482 (5th Cir. 2020)

Case Shorts:

- *Atlantic Specialty Insurance v. Anthem,* 2020 WL 2526000 (S.D. Ind.) (whether mediation sufficed as condition precedent is for arbitrator to decide where, as here, "conditions precedent are conditions to the right or obligation to arbitrate under an already-existing arbitration agreement" rather than as to whether arbitration agreement existed).
- *Home Care Providers of Texas v. Blue Cross and Blue Shield*, 2020 WL 1819984 (N.D. Tex.) (question whether mediation was condition precedent to arbitration is for arbitrator to decide where, as here, valid arbitration agreement is present).

VI. CLASS & COLLECTIVE ACTIONS

Group Filing Ruled Not to be De Facto Class Arbitration. Postmates' Fleet Agreement requires prospective couriers to consent to arbitrate disputes and to waive class claims. The American Arbitration Association received 10,356 demands for arbitration from Postmates' couriers asserting various wage and hour claims. Postmates sought injunctive relief claiming that the couriers were seeking impermissible "de facto class arbitration." The California district court here refused to grant the injunctive relief, finding that Postmates would not likely succeed on the merits of its claim. In the first instance, the court ruled that

the question whether the group filing constituted a de facto class arbitration was delegated to the arbitrator to determine. On the merits, the court emphasized, as the AAA found, the claims filed were individual and not class claims. Each demand was filed on behalf of an individual claimant as he or she was required to do under the terms of the Fleet Agreement. The court also found no irreparable harm present. In particular, the arbitrators' fees were comparable to litigation costs which traditionally have not been found by the courts to constitute irreparable injury, nor do the costs related to arbitrating disputes that may not ultimately be recoverable. Finally, the court noted that Postmates did not contend that the claims were not arbitrable but rather took issue with the tactics of the couriers' counsel. The court concluded that it could not find "that the balance of equities tips in favor of enjoining Defendants from arbitration, and while Plaintiff contends that Defendants would 'not be precluded from arbitrating the dispute in the manner required by the parties' agreements,' Plaintiff does not explain what kind of injunction Plaintiff would craft or how Defendants would be required to proceed." *Postmates, Inc. v. 10,356 Individuals*, 2020 WL 1908302 (C.D. Cal.).

Arbitrator's Ruling in Favor of Class Arbitration Upheld. The Fifth Circuit ruled that an arbitrator's clause construction award in favor of class arbitration interpreted the parties' agreement and must be upheld. The court noted that vacatur under the FAA would only be warranted if the arbitrator failed to interpret the applicable agreement. In this case, the arbitrator based his ruling in favor of class arbitration on the agreement's breadth of claims subject to arbitration and the broad remedies available to the parties. The arbitrator also relied on the fact that the applicable AAA rules permitted class arbitration. The court concluded that "whatever the merits of the arbitrator's analysis" it was sufficient that he interpreted the text of the arbitration clause, adding, "whether correctly or not makes no difference." *Sun Coast Res., Inc. v. Conrad,* 956 F.3d 335 (5th Cir. 2020)

Arbitration Agreement Issued During Pendency of Collective Action Ruled Unenforceable. Plaintiffs brought a class and collective action against Agilant Solutions and moved for conditional certification of the collective action. Agilant issued a new policy after the filing of the motion but before it was granted requiring employees to sign an arbitration agreement as a condition of employment. Agilant's counsel in the litigation drafted the agreement. Agilant's executive director then notified managers that they were required to procure signed arbitration agreements within four days. The employees were not informed that by signing the arbitration agreement they would be forfeiting their rights to participate in the pending litigation. After the court intervened, Agilant changed its position and declared that the arbitration agreements were not conditions of employment. The court granted plaintiff's motion to invalidate the arbitration agreement. The court stated that it had discretionary authority to oversee the notice provided to potential claimants in a collective action. Here, the court found Agilant's communications with its employees to be misleading and coercive. "Moreover, Defense counsel in this litigation was intimately involved in the rollout of the Arbitration Agreement. That fact, and the e-mail

evidence [supporting this], supports the conclusion that [Agilant's] management instituted its novel arbitration policy for the purpose of foreclosing plaintiffs from participating in this litigation." The court emphasized that its ruling was limited to the applicability of the arbitration agreements to the putative collective members in this action. With respect to those individuals, the court concluded that the arbitration agreement was unconscionable and not subject to enforcement. *OConnor v. Agilant Solutions*, 2020 WL 1233749 (S.D.N.Y.).

Class Action Waiver Did Not Render Arbitration Agreement Ambiguous. The agreement here submitted "any claim, dispute, or controversy" to arbitration and waived any court proceedings. The same provision precluded class arbitration or consolidation of claims with another arbitration. A motion to compel was denied by the New Jersey trial court which found the arbitration provision ambiguous because it barred class action arbitration but did not address class actions in court. The appellate court rejected this reasoning and ordered the dispute to arbitration. The appellate court saw no ambiguity where "plaintiffs waived their right to bring any claims that arose under the agreement, including class actions, in court and waive their rights to pursue a class action in arbitration." Overall, the court found "sufficient clarity and consistency" to hold that the parties reasonably understood that they waived their rights to pursue their claims in court. *Curiale v. Hyundai Capital America*, 2020 WL 1983231 (N.J. Super. Ct.).

Case Shorts:

- *Cunningham v. Lyft, Inc.*, 2020 WL 1503220 (D. Miss.) (class action waiver not enforceable under Massachusetts's Uniform Arbitration Act).

VII. HEARING-RELATED ISSUES

FINRA Panel's Premature Closing of Hearing Does Not Warrant Vacatur. A broker-dealer alleged that its former employee, a trader, wrongfully solicited its customers and absconded with confidential information. The trader, proceeding pro se, counterclaimed including a claim for an unpaid bonus. The arbitration hearing proceeded before a FINRA panel and the broker-dealer presented its case on the first day of hearing. During the second day of hearing, the trader was being cross-examined when the panel informed him that his bonus claim was not properly before it at which point the trader had an emotional outburst, turned to the window behind him, and threatened to commit suicide. The hearing was adjourned, and the panel later notified the parties that the hearing had been concluded and requested a two-page closing summation. The panel issued an award denying all claims by both sides. The broker-dealer moved to vacate arguing that by closing the hearing before he was able to complete cross examination of the claimant, the hearing was rendered fundamentally unfair in violation of the FAA. The court rejected the broker-dealer's argument and confirmed the award. The court emphasized that arbitrators are "afforded great deference in their evidentiary determinations, and a court's review of such

decisions is limited to 'determining whether the procedure was fundamentally unfair.'" (citation omitted). The court found that the broker-dealer in fact had a fair opportunity to present its evidence. The court noted that counsel for the broker-dealer, before beginning cross-examination of the trader, commented "I actually don't have all that much." The court added that in its closing the broker-dealer "did not raise any argument about the nature of the arbitration proceeding, the evidence presented, or the way in which the hearing ended at that point bolsters the conclusion that the proceeding was not fundamentally unfair." The court also rejected the broker-dealer's argument that the panel exceeded its authority as it "has not identified any authority that was improperly exercised by the panel." For these reasons, the court denied the broker-dealer's motion to vacate and confirmed the award. *Laidlaw and Co. v. Narinaccio*, 2020 WL 1151323 (S.D.N.Y.).

Case Shorts:

- *Mid Atl. Capital Corp. v. Bien*, 956 F.3d 1182 (10th Cir. 2020) (proper venue for action seeking to enforce a subpoena is the location where arbitrators are sitting, that is, where the hearing is to be held with respect to the subpoenas even if the panel sat in another jurisdiction for a separate purpose or summons).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Tenth Circuit Rules Miscalculation Must Be on Face of Award. Plaintiffs' damages expert offered alternative measures of damages and the FINRA arbitration panel ruled in plaintiffs' favor, but in doing so awarded both sets of damages. The district court confirmed the award and the Tenth Circuit affirmed. The court joined the Fourth, Sixth, and Eleventh Circuits in adopting the "face of the award" approach to correct an "evident material miscalculation of figures" in an award as permitted by the FAA. The court focused on the word "evident" in the statute and noted that "devoid of context" a miscalculation could be obvious on the face of the award or upon review of the record. "Fealty to text, however, is more than blind adherence to dictionary definitions; we must consider context." The court reasoned that "reading this statutory term 'evident' as relating to a material miscalculation that appears on the face of the award furthers the FAA's purposes. A face-of-the-award limitation preserves the integrity of the parties' bargain. Specifically, it preserves the parties' deal for an arbitrator's, rather than court's, resolution of their dispute." The court rejected the argument that the only way a miscalculation can be determined to be material is by reviewing the arbitration record, reasoning that material miscalculations may be evident on the face of the award. The court pointed out that the FAA authorizes courts to review an arbitration award, not an arbitration record. The court concluded that the FAA "allows courts to correct only those evident material miscalculations that appear on the face of the award." *Mid Atlantic Capital Corp. v. Bien*, 956 F.3d 1182 (10th Cir. 2020). See also *OJSC Ukrnafta v. Carpatsky Petroleum Corp.,* 957 F.3d 487 (5th Cir. 2020) (arbitration panel not

limited to the party's own damages calculations but can reach own damages determination based on the evidence before it).

Interim Award Did Not Preclude Enforcement of Final Award. The panel in this reinsurance dispute issued an interim award which granted requests for payment of defense costs under one reinsurance agreement but denied them with respect to five others. The panel directed the parties to meet and confer in an effort to resolve the remaining issues between them otherwise further submissions would be required, and a final award would be issued. A final award was in fact issued and the parties disagreed about the scope of the rulings in the interim award with one party seeking to confirm the interim award and the other party seeking to confirm the final award. The court noted that while the interim award was "not a model of clarity" the ruling was limited to the issue of defense costs and not the broader issues raised by the parties. The court found it not to be strange for the panel to proceed in the manner that it did under the circumstances presented to it. The court explained that "it was logical for the panel to (1) make a narrow ruling based on what the parties knew at the time; (2) order the parties to meet and confer; and (3) wait to see if the parties could work out the rest on their own. This is particularly true given that, generally, the parties pay the full cost of arbitration themselves, so they may prefer for arbitrators to issue narrow rulings and leave fine details to the parties themselves." While the issues decided in the interim award were finally resolved, other issues remained open. As a result, in "the Final Award, the panel only decided issues that it had not yet decided, so its decision was not *functus officio*." *Allstate Insurance Co. v. Amerisure Mutual Insurance Co.*, 2020 WL 1445615 (N.D. Ill.).

Award Still Not "Final" After Remand to Arbitrator. The court remanded an award to the arbitrator, finding that damages could not be properly calculated and therefore the award was not final. The arbitrator issued a clarification to his award noting that the announcement of the dividend relevant to the valuation of the warrants at issue came after the close of evidence in the hearing but before the award was issued. On this basis, the arbitrator declined to value the warrants due to the lack of evidence in the arbitration record. The court once again remanded the case, finding that the award was still not final. The court rejected the notion that it could determine the value of the warrants as that would affect the merits of the controversy which was outside the court's purview. The court noted that the parties did not bifurcate this matter and the damages aspect of the case was properly before the arbitrator. The court added that the arbitrator could have concluded that the warrants had no value due to a lack of evidence but did not do so. Acknowledging that it was a case of "déjà vu all over again" the court remanded the matter back to the arbitrator to "limit his decision to the terms of the Second Award – that is, to the dollar amount to which [claimant] is entitled that reflects the economic value today of the relevance of the warrants at issue." *Three Brothers Trading v. Generex Biotechnology Corp.*, 2020 WL 1974243 (S.D.N.Y.).

Case Shorts:

- *Earth Science Tech, Inc. v. Impact UA, Inc.*, 2020 WL 1861402 (11th Cir.) (an arbitration panel did not make a "material mistake" in calculating damages where panel deliberately rejected challenges to calculations and, in any event, challenges to the panel's damages methodology and factual findings do not permit vacatur).
- *Sun Coast Res., Inc. v. Conrad*, 956 F.3d 335 (5th Cir. 2020) (clause construction award finding class arbitration encompassed in arbitration agreement upheld where arbitrator reviewed and interpreted text of arbitration clause – whether or not the arbitrator's analysis was correct).
- *In the Matter of the Arbitration between Finkel and Allstate Electric Corp.*, 2020 WL 1864877 (E.D.N.Y.) (attorneys' fees and costs awarded to parties confirming award where losing party fails to abide by arbitration award without justification).
- *Elder v. Albertson's, LLC*, 2020 WL 2042343 (N.D. Tex.) (arbitrator's granting of summary judgment is based on "reason and fact" and on this basis award confirmed).

IX. ADR – GENERAL

FINRA Award Challenged in Part Due to Inattentiveness of Panel During Zoom Hearing. A petition to vacate an award issued by a FINRA panel was filed alleging, among other things, that the panel was "inattentive" during a Zoom hearing day. For example, one arbitrator was accused of "looking at other screens, typing, and eating during the course of the presentation." A second arbitrator was accused of "block[ing] her screen during the hearing, preventing the parties from confirming that she was even participating." Further, it was alleged that the Chair "at one point during closing arguments" walked "away from his screen" delaying the presentation until he "returned to his screen." The case, *Wunderlich Securities v. Dominick & Dickerman,* Civ. Action 1:20-cv-3507 (S.D.N.Y), is pending in the Southern District of New York.

DOJ Uses Arbitration for The First Time to Block Merger. The DOJ objected to a merger between Novelis, a world leader in aluminum rolling and recycling, and another global supplier of aluminum-rolled products, concluding that the merger would harm competition in the North American market for aluminum auto body sheet (ABS) products in violation of Section 7 of the Sherman Act. The key dispute between the parties was how to define the product market. The parties agreed to send the dispute to an arbitrator. They also agreed upfront on the effects of the arbitrator's final decision: if the arbitrator agreed with the company's definition, DOJ would drop the case but if the arbitrator agreed with the DOJ, the company's would have to divest certain facilities in order to complete the transaction. The arbitrator ultimately sided with the DOJ's narrow view of the market. As a result, Novelis had to divest the target's entire aluminum ABS operations in North America. The DOJ has

had the power to invoke arbitration since the mid-1990's, but this was the first time it had done so.

Case Shorts:

- *White v. Chevron Phillips Chemical Co.,* Case No. 4:19-cv-00187 (S.D. Tex. May 4, 2020) (sanctions motion against law firm partner accused of shaking his "butt" in mediation denied as judge observed that that behavior was "clearly outside professional bounds" but added that "neither counsel was a role model of professional conduct").

X. COLLECTIVE BARGAINING SETTING

Bargaining Unit Dispute Not Subject to Arbitration. The Communication Workers Union and AT&T entered into a memorandum of agreement ("MOA") regarding neutrality and other issues. Subsequently AT&T and Time Warner merged, and the question as to the proper bargaining unit classification of the Time Warner employees arose. The union argued that the MOA required that the dispute be arbitrated, and AT&T countered that the issue was for the courts to decide. The union's motion to compel was denied. The court reasoned that the arbitration provision in the MOA did not apply to all disputes. The court emphasized that the MOA had a specific provision relating to new acquisitions that did not mention arbitration. In contrast, under the MOA issues related to the termination of bargaining units were subject to arbitration. In the court's view, disputes relating to organizational changes cannot "encompass the acquisition of a new entity like Time Warner; the agreement uses different terms and provides separate procedures and requirements for these two different events." *Communication Workers of America v. AT&T*, 2020 WL 1821112 (D.D.C.).

Award Under CBA Reducing Termination to Suspension Upheld. A union employee covered by a collective bargaining agreement was terminated for insubordination and for using his cell phone in violation of company policy. The collective bargaining agreement grievance procedure, among other steps, provided that the union and management attempt to settle a dispute within seven days after a failure to resolve it at a local level and that the grievance must be submitted to arbitration within 30 days thereafter. The collective bargaining agreement also provided the time limits "shall be absolutely mandatory and failure to comply will mean the grievance is void and no consideration will be given to it." The dispute was submitted to an arbitrator who reduced the termination to a one-month suspension. The employer challenged the award arguing that the arbitrator lacked authority to rule because the arbitration was untimely filed. The court disagreed and affirmed the award. The court explained that disputes "over the timeliness of arbitrations are resolved by arbitrators, not courts." The court also ruled that it was not authorized to review the merits of the award because the arbitrator decided the issue submitted to him. For these reasons,

the court confirmed the award. *Waveseer of Nevada v. United Food and Commercial Workers*, 2020 WL 1676954 (D. Nev.).

Case Shorts:

- *New York District Council of Carpenters v. Tried N True Interiors*, 2020 WL 1809323 (S.D.N.Y.) (attorneys' fees and costs awarded under the Labor Management Relations Act to union confirming arbitration award by court employing its equitable powers where defendant signed the collective bargaining agreement but failed to participate in the arbitration or in the court proceeding).
- *Samuels v. Urban American Management*, 2020 WL 2066326 (Sup. Ct. N.Y.Cty.) (statutory discrimination claims dismissed where union member failed to exhaust procedures available under the applicable collective bargaining agreement).
- *Lallo v. New York City Department of Education*, 2020 WL 1811323 (Sup. Ct. N.Y.Cty.) (arbitrator's consideration of a teacher's performance evaluation that respondent agreed would not be considered did not constitute a violation of due process "because there was sufficient evidence in the record to support the arbitrator's findings independent of the evaluation").

XI. NEWS AND DEVELOPMENTS

Supreme Court to Decide Key Delegation Question. Court have reached different conclusions as to whether a court or arbitrator must determine arbitrability where a carve out for injunctive relief is present in the arbitration agreement. The Supreme Court has agreed to decide that issue in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, Case Nos. 19-963 and 19-1080 (June 15, 2020). The Fifth Circuit, upon remand from the Supreme Court in *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019), ruled that the carve out for injunctive relief in an arbitration agreement with an otherwise valid delegation clause required the court rather than the arbitrator to decide whether the dispute was arbitrable.

OFCCP Directive Implements A Formal Mediation Program to Resolve Allegations of Discrimination. The Office of Federal Contract Compliance Programs issued three new directives on April 17, 2020. Directive 2020-03, probably the most significant, formalizes a mediation process for federal contractors and the OFCCP to resolve findings of discrimination prior to the OFCCP referring the case to the Office of the Solicitor for enforcement. The Directive outlines suggested procedures to be followed including selection of a mediator, appropriate submissions, attendance at the mediation as well as when and where it should be held. The OFCCP stated that the mediation process is voluntary but it provides an "opportunity for resolving matters before significant time and resources are spent in the enforcement process."

FINRA Proposes Amendments to its Rules Related to Arbitration. FINRA has adopted amendments to its Membership Application Program to further promote its arbitration program. Among the proposals are the requirements that applications for membership disclose any arbitration claims in which they or their associated persons are involved and created a rebuttable presumption against membership if the applicant or associated person is subject to a pending arbitration claim. The amendments also require applicants subject to an arbitration claim to demonstrate their intention and ability to pay any claim in the arbitration. The final rule is scheduled to go into effect on September 14, 2020.

XII. TABLE OF CASES