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AAA Case Summaries:
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I. JURISDICTIONAL ISSUES: GENERAL

Supreme Court Rejects NLRA Challenge to Class Action Waivers. In a 5 to 4 decision, the Supreme Court ruled that Section 7 of the NLRA does not preclude the enforcement of class action waivers in arbitration agreements. The majority reasoned "the NLRA secures to employees' rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the Courtroom or arbitral forum." The majority rejected the argument that the FAA's savings clause permits an application of the NLRA's Section 7 rights in this situation. The majority held that the savings clause only recognizes generally applicable contract defenses and not those targeting arbitration specifically as was found to be the case here. The majority also rejected the argument that class and collective actions are "concerted activities" protected by Section 7. The majority emphasized that Section 7 focuses on the right to organize unions and bargain collectively and does not address class or collective action procedures. Finally, the majority rejected the argument that the Court should defer to the NLRB's interpretation of the NLRA. In doing so, the Court reasoned that the NLRB's interpretation was not of the NLRA necessarily but of the FAA which it does not administer. Justice Ginsburg filed an opinion on behalf of the dissenters. *Epic Systems Corp. v. Lewis*, 2018 WL 2292444 (U.S.).

Supreme Court to Rule On FAA Transportation Worker Exemption. The FAA exempts contracts of employment of transportation workers from the Act's coverage. The dispute here was between a former truck driver and the trucking company for which he drove under the terms of an "Independent Contractor Operating Agreement." The driver brought a class action alleging violations of the FLSA, and the trucking company moved to compel arbitration under the arbitration provision in the Agreement. The First Circuit framed the question before it as whether the FAA exemption "extends to transportation-worker agreements that establish or purport to establish independent-contractor relationships." Here, the trucking company conceded that the driver was a transportation worker. This concession, along with the legislative history and giving the phrase "contract of employment" its ordinary meaning, led the First Circuit to conclude that "the contract in this case is excluded from the FAA's reach." The court emphasized that its holding was limited to situations in which the "arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration." The Supreme Court granted certiorari and the case will be heard during the 2018-19 Term. *Oliveira v. New Prime, Inc.,* 857 F.3d 7 (1st Cir. 2017), cert. granted, 138 S. Ct. 1164 (2018).

Equitable Estoppel Not Applicable Where Non-Signatory's Claims Fall Outside the Scope of the Agreement. Defendant hosts a website where its customers can purchase, exchange, and sell digital cryptocurrencies, such as Bitcoin. One of defendant's customers opened a cryptocurrency exchange on the website under the business name Cryptsy and allegedly stole money from its clients. Plaintiff, one of those customers, filed claims against Defendant alleging violations of the Bank Secrecy Act ("BSA"). Defendant moved to compel arbitration, arguing that equitable estoppel required plaintiff to arbitrate the claims because they were "based upon" the User Agreements that established Cryptsy's accounts on defendant's website. The district court disagreed, and the Eleventh Circuit affirmed. The court noted that, under Florida law, defendant must show both that plaintiff is relying on a contract to assert its claims and that the scope of the arbitration clause in that contract covers the dispute. Moreover, because the arbitration clause in the User Agreement was "narrow in scope," defendant was also required to show that customer's claims "have a direct relationship to [the User Agreements'] terms and provisions." The Eleventh Circuit concluded that since the customer had not raised claims concerning Cryptsy's performance of its agreement, but only claims involving the company's obligations under the BSA, equitable estoppel did not apply and arbitration was not appropriate. *Leidel v. Coinbase, Inc*., 2018 WL 1905954 (11th Cir.). See *Smith Jamison Constr. v. APAC-Atl., Inc.,* 811 S.E.2d 635 (N.C. Ct. App. 2018) (non-signatory subcontractor may not invoke arbitration agreement between general contractor and contractor where claims against the subcontractor were rooted in tort and not the agreement containing the arbitration provision).

Non-Signatory Who Is Not an Alter-Ego Has No Standing to Stay Arbitration. A non-signatory to an arbitration agreement had no standing to stay an arbitration against a defunct party even though it has a potential financial stake in the outcome of the arbitration. The arbitration agreement at issue was contained in an exclusivity agreement between Cognac Ferrand SAS, a French liquor producer, and Mystique Brands, LLC, an American importer. The agreement was terminated, and an arbitration ensued. The arbitrator ultimately dismissed Mystique's claims and granted Cognac's counterclaims. The issue of damages remained but before the arbitrator could rule Mystique filed for bankruptcy. When the bankruptcy proceeding was final, Cognac filed a new arbitration seeking damages. However, Royal Wine Corp., a non-party to the arbitration agreement, intervened in the action by filing a preliminary injunction in state court seeking to stay the arbitration and raising defenses on behalf of Mystique. Royal argued that it was not an alter-ego of Mystique but since a judgment against Mystique could potentially impact Royal, it had the right to raise defenses on Mystique's behalf. The court rejected Royal's arguments, finding first that as a non-signatory to the agreement, Royal had no standing. The court then found that where Royal denied a legal relationship with Mystique, it was

insufficient to ground its arguments on the fact that a decision in the arbitration may financially impact it. Royal's preliminary injunction action was therefore dismissed. *Royal Wine Corp. v. Cognac Ferrand SAS*, 2018 WL 1087812 (N.Y. Sup. Ct.). But see *Melendez v. Horning*, 908 N.W. 2d 115 (N.Dak.) (non-signatories can compel arbitration under equitable estoppel principles where plaintiff raises claims of intertwined conduct by the non-signatories and signatories to the operating agreement at issue).

State Statutory Limits on Arbitration Preempted. California's Ralph and Bane Acts, which protect citizens' civil rights and protects against hate crimes, were amended to invalidate any agreement limiting the right to bring such claims in court. The trial court compelled the arbitration of all claims brought by plaintiff except for those under the Ralph and Bane Acts, finding that to do so would not comply with the recent amendments to those statutes. The California appellate court reversed and ruled that the amendments limiting the non-judicial resolution of Ralph and Banes Acts claims did not comply with federal law and were preempted by the FAA. *Saheli v. White Memorial Medical Center*, 221 Cal. App. 5th 308 (2d Dist.).

Interstate Commerce Found and FAA Applies to Healthcare Practice. A physical therapist resisted a motion to compel arbitration in her employment agreement by arguing, among other things, that the FAA did not apply as her practice was locally based. The South Carolina appellate court rejected this argument, noting that the FAA applies to a transaction "involving" interstate commerce. "The proper inquiry is whether the economic activity at issue, in the aggregate, is a general practice subject to federal control." The court found that healthcare is generally an activity subject to interstate commerce and federal control. While plaintiff's physical therapy practice may have been local, her practice accepted Medicare and Medicaid and her treatments included equipment manufactured out of state. "Because the economic activity here – [plaintiff's] physical therapy practice at [the medical facility] – represents the general practice of healthcare, we find [the therapist's] employment involved interstate commerce." *Marzulli v. Tenet South Carolina*, 2018 WL 1531507 (S. Car. App.).

Bankruptcy Discharge Dispute Not Subject to Arbitration. A Chapter 7 debtor brought a class action for injuries resulting from a credit card issuer's alleged breach of a bankruptcy discharge injunction. The issuer moved to compel arbitration based on a provision in the original cardholder agreement. The bankruptcy and district judge denied the motion, and the Second Circuit affirmed. In a core bankruptcy proceeding such as a discharge in bankruptcy, the court explained, a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy is required when deciding a motion to compel. The Second Circuit concluded that arbitration conflicted with the core proceeding here. "We come to

this conclusion because 1) the discharge injunction is integral to the bankruptcy court's ability to provide debtors with a fresh start that is the very purpose of the Code; 2) the claim regards an ongoing bankruptcy matter that requires continuing court supervision; and 3) the equitable powers of the bankruptcy court to enforce its own injunction are central to the structure of the Code." The court concluded that "the bankruptcy court alone has the power to enforce the discharge injunction" and the arbitration of the claim "would thus present an inherent conflict" with the Bankruptcy Code. *In re Anderson*, 884 F.3d 382 (2d Cir. 2018).

II. JURISDICTIONAL CHALLENGES: DELEGATION AND WAIVER ISSUES

Arbitrability Question Properly Submitted to Arbitrator Before Court Ruled on Class Certification. An individual classified as an independent contractor for Doordash filed wage and hour claims in federal court and sought conditional certification of a class. Doordash moved to block class certification, dismiss the action, and to compel arbitration. The court granted the motion to dismiss and compelled arbitration. Plaintiff appealed, arguing that the district court erred in deciding arbitrability before deciding class certification and in compelling arbitration. The Fifth Circuit upheld the lower court, stating that it properly decided arbitrability before class certification because arbitrability is a "threshold question" to be determined "at the outset" of a proceeding. The Fifth Circuit also found that the parties' agreement delegated the issue of arbitrability to an arbitrator, and therefore any challenges to the arbitration agreement, including plaintiff's claims that it was unconscionable, unenforceable, and illusory, must be heard by the arbitrator. *Edwards v. Doordash, Inc.*, 888 F.3d 738 (5th Cir. 2018).

Arbitrability Question Delegated to Arbitrators. Two separate groups of former Wells Fargo employees brought wage & hour class action arbitrations before both FINRA and the American Arbitration Association. FINRA declined to process the arbitration demands as its rules preclude class proceedings. The district court concluded that the issue of arbitrability was for the arbitrator to decide and the Second Circuit affirmed. The Second Circuit noted that one set of claimants had signed agreements that incorporated by reference an earlier set of AAA Rules that were later amended. The Rules provided that the arbitrator would rule on his or her own jurisdiction. The court noted further that the AAA had subsequently adopted its Supplementary Rules for Class Arbitrations which also provided that the arbitrator would rule on the issue whether the arbitration clause permitted class arbitration. Under Missouri law, which governed this proceeding, the Second Circuit concluded that a "clear and unmistakable" agreement was present that arbitrability questions were for the arbitrator. With the second set of claimants, the court noted that the applicable arbitration agreement provided that "any action instituted as a result of any controversy" arising out of the arbitration relationship would be subject to arbitration. In addition, the provision went

on to say that any controversy relating to the validity or enforceability of the arbitration clause was for the arbitrator to decide. Once again, the court concluded that Missouri law would require that the arbitrator decide any issue of arbitrability. *Wells Fargo Advisers v. Sappington*, 884 F.3d 392 (2d Cir. 2018). See also *Galilea, LLC v. AGCS Marine Insurance Co.*, 879 F. 3d 1052 (9th Cir. 2018) (agreement to arbitrate signed by sophisticated parties "according to AAA rules is sufficient to show clear and unmistakable intent to resolve arbitrability questions in arbitration, rather than federal court" and the motion to compel here granted); *Eickoff Corp. v. Warrior Met Coal, LLC*, 2018 WL 2075985 (Ala.) ("because the parties also agreed in the master service agreements that the AAA commercial arbitration rules would govern any arbitration, and because those rules empower the arbitrator to decide questions of arbitrability, the trial court erred when it instead at least implicitly resolved the arbitrability issue in favor" of the party opposing the motion to compel and denied that motion); *Davis v. USA Nutra Labs*, 2018 WL 1583669 (D. N. Mex.) (incorporating AAA rules constitutes clear and unmistakable agreement to the delegation of arbitrability questions to the arbitrator).

Fifth Circuit Enforces Delegation Clause and Compels Arbitration: Homeaway is the owner and operator of a website facilitating short-term vacation rentals. Two separate consumers challenged Homeaway's imposition of traveler fees in two actions pending in the Western District of Texas. Both consumers had signed Homeaway's 2016 Terms and Conditions, which contained the same arbitration provision. In the first action, the court denied Homeaway's motion to compel arbitration, finding that the arbitration clause was illusory. In the second action, which only challenged the scope of the arbitration provision, the court granted Homeaway's motion to compel, finding that the claims at issue, even though they predated the 2016 Terms and Conditions, were covered by the arbitration provision. Both losing parties appealed and, although the appeals were not consolidated, the Fifth Circuit resolved both in a single opinion. The court held that both actions must be arbitrated because the arbitration provision at issue clearly and unmistakenly delegated all issues to arbitration, including any threshold issues such as validity and scope. As such, these were issues for the arbitrator to decide. *Arnold v. Homeaway*, 2018 WL 2222661 (5th Cir.). But see *Kabba v. Rent-A-Center*, 2018 WL 1778550 (4th Cir.) (no clear and unmistakable evidence of delegation of arbitrability issues to arbitrator where "a reasonable juror could find no arbitration agreement" covering the dispute).

Delegation Question in Wrongful Death Proceeding for Arbitrator. A truck driver, Perez, died in an on-the-job accident. His survivors brought a wrongful death action. The employer sought to compel arbitration under the parent company's health and safety plan. The district court denied the motion, but the Texas appeals court reversed. The issue for the court was whether the arbitrability question was for the court or the arbitrator to decide.

Perez's survivors argued that the agreement was illusory because it could be modified at the employer's discretion. The appellate court rejected this contention, concluding that "the termination provision speaks to the Plan as a whole rather than to its isolated parts of the Plan such as the arbitration clause" and compelled arbitration of the dispute. *Mission Petroleum Carriers v. Dreese*, 2018 WL 1192773 (Tex. App.).

Failure to Compel Arbitration Against Unnamed Putative Class Members Did Not Constitute Waiver. As the Eleventh Circuit put it, Wells Fargo was placed "squarely between Scylla and Charybdis" in deciding whether to move to compel arbitration of putative class members when the class had not yet been certified. On the one hand, to move to compel by making "speculative arguments about speculative customer agreements made with speculative plaintiffs, a document that could not have provided any cognizable basis upon which the District Court could have ruled (even assuming it had jurisdiction to rule – it did not)". The court here relied heavily on the fact that Wells Fargo promptly notified plaintiffs and the court that it was reserving its right to seek to compel arbitration against putative class members if the class was certified. In rejecting the waiver argument, the court stated that it found "no authority that requires a party to file a conditional arbitration motion against possible future adversaries – at a juncture in which adjudicating, much less exercising jurisdiction over, those claims is impossible – in order to avoid waving its rights with regard to those parties." *Gutierrez v. Wells Fargo Bank, N.A.*, 889 F.3d 1230 (11th Cir. 2018).

Waiver Claim Rejected. Plaintiff brought a class action against Travis Kalanick, founder of Uber, alleging price-fixing schemes violative of the Sherman Act as well as other illegal acts. Kalanick moved to dismiss. In doing so, he reserved his right to compel arbitration if the underlying Uber agreement was invoked. The motion was denied, and Kalanick moved to join Uber into this proceeding. That motion was granted, and defendants then moved to compel arbitration. The district court denied the motion, but the Second Circuit overruled the district court and compelled arbitration. Upon remand, District Judge Rakoff let his feelings about the state of the law be known. He argued that the constitutional right of trial by jury was being cast aside. He reasoned that as a result courts are now "obliged to enforce what everyone recognizes as a totally coerced waiver of both the right to a jury and the right of access to the courts – provided only that the consumer is notified in some passing way that in purchasing the product or service she is thereby 'agreeing' to the accompanying voluminous set of 'open terms and conditions'". The court added that this "being the law, this judge must enforce it – even if it is based on nothing but factual and legal fictions." Turning to the issue before the court, Judge Rakoff rejected plaintiff's argument that Kalanick had waived his right to arbitration and that that waiver should be applied to Uber. The court noted that Kalanick's actions occurred before Uber was part of

the case. The court rejected plaintiff's argument that the court should not allow for defendant's "games", adding that it was plaintiff "who started the 'game' of which he now complains by bringing his suit against Kalanick only, instead of Uber, in the first place." *Meyer v. Kalanick*, 291 F. Supp. 3d 526 (S.D.N.Y. 2018).

Company Did Not Waive Right to Arbitrate by Raising Merits-Based Arguments. A Massachusetts appellate panel ruled that a janitorial services company did not waive its right to arbitrate a former employee's claims when it raised several merits-based arguments in its combined motion to dismiss or compel arbitration. In partially vacating the lower court's order and remanding for further proceedings on the motion, the appellate panel stated that waiver occurs when a party acts inconsistently with its right to arbitrate, when all circumstances are considered. The panel found that the lower court judge did not consider the company's merits-based arguments or the 200 pages of evidence attached to its motion. Accordingly, the panel held it was an abuse of discretion for the lower court judge to rule that the company waived its right to arbitration. *Brandao v. Jan-Pro Franchising International, Inc.*, 93 Mass. App. Ct. 1103 (2018). But see *Price v. UBS Financial,* 2018 WL 1203471 (D. N.J.) (motion to compel filed after motion to dismiss denied on waiver grounds where court views as "second bite at the apple" and where motion to compel should have been joined, in court's view, with initial dispositive motion).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Arbitration Provision Agreed to by Potential Class Members After Initiation of Litigation Ruled Substantively Unconscionable. While this wage and hour class action was pending, the employer revised its handbook to include an arbitration provision on the handbook's penultimate page. The employer moved to compel arbitration for those who signed the handbook. A California trial court denied the motion, and the appellate court affirmed, finding that the arbitration provision was procedurally and substantively unconscionable. In ruling the arbitration provision procedurally unconscionable, the appellate court noted that "no style elements, such as a heading, indentations, or emphasized text, differentiated the arbitration provision from the other unrelated paragraphs on the page." The court also found the provision to be substantively unconscionable, noting that it purported to cover disputes "which may arise." "An employee, particularly one who was unaware of the pending class action, could reasonably understand this language to apply only to disputes that 'may arise' in the future rather than to disputes that already had arisen and remain ongoing. Nothing else in the text of the lengthy provision clarified that the provision was both forward- and backward-looking." For these reasons, the court concluded that "the language of the provision and the circumstances under which it was presented to putative class members rendered it unfair,

one-sided, and substantively unconscionable." *Nguyen v. Inter-Coast International Training*, 2018 WL 1887347 (Cal. App. 2d Dist.). Cf. *Davis v. USA Nutra Labs*, 2018 WL 1583669 (D. N. Mex.) (provision allowing modification or cessation of arbitration provision not substantively unconscionable where it only has prospective affect).

Finding of Unconscionability Reversed. An experienced physical therapist challenged the enforcement of an arbitration clause on unconscionability grounds and succeeded before a South Carolina trial court. The appellate court reversed. The court acknowledged that unequal bargaining positions here existed between the employer, a hospital, and the plaintiff, a former employee, but rejected the notion that the disparate bargaining power was fundamentally unfair. "Employees of large corporations almost always wield weaker bargaining tools than their employer, but that alone cannot prove unconscionability." The court noted that the therapist was a college graduate who had done graduate work and had practiced physical therapy for more than four decades. The court added that she was not pressured into signing the agreement and had the opportunity, but chose not, to retain counsel. The court also noted that the arbitration provision was in the same font size as the rest of the one-page agreement. In rejecting the unconscionability claim, the court added that an experienced arbitrator acceptable to both parties was required, all civil remedies were available to both sides, and "importantly, the Agreement stipulated any arbitration was to be administered by the American Arbitration Association, a well-respected neutral forum." Finally, the court concluded that plaintiff's defamation claim was encompassed by the broad arbitration clause which applied to "any and all claims and disputes that are related in any way" to plaintiff's employment. *Marzulli v. Tenet South Carolina*, 2018 WL 1531507 (S. Car. App.). See also *SCI Alabama Funeral Services v. Hinton*, 2018 WL 1559795 (Ala.) (overbroad arbitration terms in agreement with funeral home, by itself, did not render the agreement substantively unconscionable).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Severability Clause Did Not Save Flawed Arbitration Agreement. The loan agreement here provided for arbitration to be conducted by a representative of the Cheyenne River Sioux Tribe under the Tribe's consumer arbitration rules. No such rules exist. The agreement also provides that the American Arbitration Association or JAMS could administer the arbitration, but the Third Circuit concluded that this provision did not permit arbitration before these bodies, it only allowed them to administer an arbitration before the nonexistent Cheyenne River Sioux Tribe forum. "Given the centrality of [the Tribe's] involvement in the arbitration as reflected by the terms of the Loan Agreement, compelling arbitration before a different arbitrator and without [the Tribe's] oversight would amount to an impermissible rewriting of the contract." Because the arbitration forum clause was in fact

integral to the entire arbitration agreement, the Third Circuit concluded that it could not be severed. *MacDonald v. Cash Call, Inc.*, 883 F. 3d 220 (3d Cir. 2018).

Arbitration Compelled Based on Acceptance of On-Line Terms and Conditions. Plaintiff ordered a weight loss product on-line by opening a Groupon account. The pills she ordered caused her acute liver failure. She sued, and the manufacturer of the product moved to compel arbitration based on Groupon's Terms of Use which plaintiff was required to accept when she opened her Groupon account. The district court granted the motion to compel, finding that a "reasonably prudent internet user would have known of the existence of the terms in Groupon's Terms of Use, which were viewable through the hyperlink." The court concluded that plaintiff assented to the terms of use when she clicked the "complete order" button before completing her purchase as well as previously acknowledging her awareness and acceptance of the Terms of Use. The court rejected plaintiff's claims that she did not recall seeing the Terms of Use and even if she had she would not have understood them. "Courts routinely hold such failure of memory to be insufficient to invalidate a clickwrap agreement." The court also found plaintiff's alleged failure to understand the meaning of the Terms of Use to be "immaterial". For these reasons, the court compelled the arbitration of plaintiff's claims. *Davis v. USA Nutra Labs*, 2018 WL 1583669 (D. N. Mex.). Cf. *Jones v. Samsung Electronics*, 2018 WL 2298670 (W.D. Pa.) (Samsung may not enforce "an arbitration agreement buried inconspicuously in a booklet purporting to offer information about the product and its warranties").

Teenage Daughter Not Bound to Arbitrate Under Mother's Credit Card Agreement. A mother and daughter pre-ordered smoothies at a mall and the mother gave her daughter a credit card to pay for the smoothies. When the mother fell behind in her payments, the credit card company made calls to the daughter's cell phone seeking payment. The daughter brought a class action under the Telephone Consumer Protection Act, and the credit card company sought to invoke the arbitration provision in the mother's agreement with it. The district court ordered arbitration, but the Seventh Circuit reversed. The court concluded that the daughter was a minor and could not be an "authorized user" under the credit card agreement. The court also rejected the credit card company's effort to invoke equitable estoppel principles against the non-signatory daughter here. The court emphasized that the non-signatory must derive a "direct benefit" from the transaction in order to invoke the equitable estoppel doctrine. The court reasoned that any benefit that the daughter "received with respect to the credit card was limited to following her mother's directions to pick up the smoothies that her mother had ordered previously . . .. Her mother . . . benefited from the agreement, which allowed her, not [her daughter], to buy the smoothies." For these reasons, the motion to compel was denied. *A.D. v. Credit One Bank, N.A.*, 885 F.3d 1054 (7th Cir. 2018).

Non-Party to Agreement Cannot Compel Arbitration. Warciak was an authorized user on his mother's mobile phone agreement with T-Mobile but he himself was not a party to the agreement. He filed suit against Subway under federal and state consumer protection statutes after Subway sent him unauthorized promotional text messages. Subway moved to compel arbitration, arguing that federal estoppel law required Warciak to arbitrate the claims based on the arbitration clause contained in his mother's T-Mobile agreement. The district court granted the motion to compel and Warciak appealed. On appeal, the Seventh Circuit held that estoppel did not apply, stating that even in the arbitration context, the court must apply traditional state promissory estoppel principles to decide whether a non-party should be bound by the terms of another's contract. Finding that detrimental reliance is a necessary element of estoppel under Illinois state law and that there was no evidence of detrimental reliance here, the appellate court reversed. *Warciak v. Subway Restaurants, Inc.*, 880 F. 3d 870 (7th Cir. 2018). See also *Rahmany v. T-Mobile USA Inc.,* 717 F. App'x 752 (9th Cir. 2018) (Subway could not compel arbitration of TCPA claims brought by cell phone customer on equitable estoppel grounds based on arbitration provision in cell phone carrier's agreement with customer).

Equitable Estoppel Does Not Apply to Bind Non-Signatory to Terms of Arbitration Agreement. Plaintiff filed a putative class action against Johnson & Johnson and Kelly Services, a recruiting firm, alleging that they violated the Fair Credit Reporting Act after rescinding his job offer based on a criminal conviction found in his consumer report without properly disclosing the report's employment purposes. Plaintiff had signed an arbitration agreement with Kelly Services, but not with J&J. However, both defendants moved to compel arbitration. Kelly relied on the agreement itself and J&J argued that equitable estoppel required arbitration because plaintiff's claims arose out of the employment application process at Kelly. A Pennsylvania federal judge granted Kelly's motion but denied J&J's. Stating that the same result would be reached under either Pennsylvania or Michigan law, the court found that because plaintiff's claim was brought under the FRCA, which requires a party using a consumer report for employment purposes to provide the report "to the consumer to whom the report relates" prior to taking any adverse action based on the report, plaintiff's claim against J&J does not rely on a contractual obligation and therefore equitable estoppel is not applicable and arbitration cannot be compelled. *Noye v. Johnson & Johnson*, 2018 WL 2199911 (M.D. Pa.).

Arbitration Agreement Ruled Not Illusory. The offer letter from the successor employer here included an arbitration provision providing that the employer reserved the right to change the terms of employment at any time. The District of Rhode Island found that the reservation of rights in the offer letter did not render the arbitration agreement illusory because it was a separate document requiring a separate signature and therefore would not

be read together with the offer letter as one agreement. The court further noted that, even if the offer letter and agreement were read together, the arbitration agreement was still enforceable because it was supported by independent consideration in the form of continued employment. *Britto v. St. Joseph Health Services of Rhode Island,* 2018 WL 1934189 (D. R.I.).

Continued Employment Found Not to Constitute Acceptance of Arbitration. Two potential class members began their employment prior to the employer's implementation of its arbitration policy in 1995. The employer, in its motion to compel arbitration, argued that with respect to these two employees their continued employment after implementation of the policy constituted acceptance of it. A district court in Michigan, applying applicable Sixth Circuit law, ruled that continued employment is not sufficient to constitute acceptance of the arbitration policy here. "To the contrary, the Sixth Circuit has made clear that continued employment can manifest assent when the employee *knows* that continued employment manifests assent." Here, the court found that the language of the policy did not tell these employees that their continued employment constituted acceptance of this policy and, therefore, the arbitration policy did not apply to them. The court did, however, compel arbitration for those who began employment after the policy was implemented. *Williams v. FCA US, LLC*, 2018 WL 2364068 (E.D. Mich.).

Court May Issue Injunction Requiring Party's Performance During Dispute Resolution Process. The First Circuit upheld a district court's injunction requiring Axia, the parent company of a bankrupt telecommunications company, KCST, to continue to guarantee KCST's performance under a contract it had with MTC to operate a new broadband network. The court focused on the primary contract between MTC and KTSC which provided that in the event the dispute resolution provisions were triggered, which they were, KTSC had to "continue performing [its] respective obligations . . . while the dispute is being resolved." The court then turned to a Guaranty Agreement between KTSC and Axia, whereby Axia agreed to "perform all such obligations of" KTSC and incorporated all of the arbitration provisions between MTC and KTSC. The court concluded that the district court properly found that MTC was likely to succeed on the merits of its claim that Axia was obligated to continue to perform and upheld the injunction. *Axia NetMedia Corp. v. Massachusetts Tech. Park Corp.,* 889 F.3d 1 (1st Cir. 2018).

No Meeting of Minds Regarding Amendment Adding Arbitration Agreement. In the midst of a consumer class action relating to checking account overdrafts defendant bank amended its account holder agreement to mandate arbitration, including claims under the pending class action. Prior efforts to compel arbitration had failed. Plaintiff failed to opt-out of the amendment, and the bank moved to compel. The district court denied the motion, and the Eleventh Circuit affirmed, although on different grounds. The Eleventh

Circuit was clearly bothered by the bank's approach of requiring its customers, including plaintiffs in the pending class action, to mandate arbitration of pending claims without going through class counsel. As the court put it, it could not overlook the bank's "failure to direct its purportedly court-evicting proposed amendment through known litigation counsel." Further, the court concluded that the bank failed to demonstrate that there was a meeting of minds with respect to the amendment, noting that the plaintiff had in the context of the litigation strongly resisted arbitration. The court pointed out that the plaintiff's "uncounseled response purportedly was silence" to the amendment in contrast to his "counseled" actions which "clearly and simultaneously evinced an ongoing resistance to arbitration." Under these circumstances, the circuit court held that the bank failed to demonstrate that plaintiff agreed to the amendment and to arbitration his claims. *Dasher v. RBC Bank (USA),* 882 F.3d 1017 (11th Cir. 2018). See also *Robinson v. OnStar, LLC,* 721 F. App'x 704 (9th Cir. 2018) (mere fact that terms and conditions which included an arbitration program was "available" is irrelevant when [the consumer] had neither actual or constructive notice of their existence when she entered into the agreement); *Nguyen v. Inter-Coast International Training*, 2018 WL 1887347 (Cal. App. 2d Dist.) (employer defending wage and hour class action, which required class members to sign handbook with arbitration provision after complaint filed, "did not apprise the employees at the time of signing these agreements that their rights in the [current] class action could be affected thereby" and that as a result the arbitration term was "unfair, one-sided and substantively unconscionable").

Broad Arbitration Clause in Master Agreement Governs Dispute in Related Contract Without Arbitration Provision. Microsoft's Xbox Live's Master Services Agreement included an arbitration clause, but the agreement related to its gold subscription service did not. A class action was filed relating to the gold subscription service. Microsoft moved to compel arbitration, and the Illinois district court granted the motion. The court began its analysis by noting that "a dispute under a contract with no arbitration clause may nevertheless fall within a broadly worded arbitration clause in another agreement." The arbitration clause in the Master Services Agreement, in what the court called "refreshingly plain English", stated that it was as "broad as it can be" and covered any claim or controversy between Microsoft and the user of the service. "The claims here fall within the scope of the broad language of the [Master Service Agreement's] arbitration clause." The court concluded that any ambiguities must be construed in favor of arbitration and on this basis granted Microsoft's motion. *Maher v. Microsoft Corp.*, 2018 WL 1535043 (N.D. Ill.). See also *Lenz v. FSC Securities*, 414 P.3d 1262 (Mont. 2018) (sophisticated investors are bound by arbitration provision in investment adviser's customer agreement where there is no evidence that the agreement's conspicuous and unambiguous arbitration provision "was the product of non-disclosure, mistake, fraud, misrepresentation, coercion, or duress").

Claims Not Covered by Scope of Arbitration Agreement: Dollar General filed a criminal affidavit in municipal court leading to the arrest of its former employee, Keyes, for embezzlement. Thereafter, Keyes sued Dollar General alleging counts of malicious prosecution, infliction of emotional distress, defamation, false imprisonment, fraud, deceit, and misrepresentation. Dollar General's motion to dismiss and to compel arbitration was granted. On appeal, the appellate court reversed in part, holding that except for the defamation claim, which the agreement specifically covered, the trial court erred in compelling arbitration because the remaining claims were not within the scope of the arbitration agreement. The court focused on the fact that there was no evidence that the parties contemplated that the agreement would encompass claims arising from Keyes' arrest for embezzlement. The court also found, as a matter of first impression, that Dollar General's filing of a criminal report did not foreclose its right to arbitrate since the law does not require choosing between reporting a crime and maintaining the right to arbitrate future civil disputes that may arise. *Keyes v. Dollar Gen. Corp.,* 240 So. 3d 373 (Miss. 2018).

Motion to Compel Denied Where Question of Fact Existed Regarding Arbitration Notice. The employer emailed in 2015 a revised arbitration policy and offered proof that plaintiff had received the email transmitting the policy. Plaintiff sued for employment discrimination in 2017 and, in response to the employer's motion to compel, certified that he had "no recollection of receiving, viewing or opening" the 2015 email. The court explained that when "deciding a motion to compel arbitration, courts employ the standard for summary judgment pursuant to Federal Rule of Civil Procedure 56(c)." The court ruled that plaintiff's certification "presents a genuine dispute of material fact as to whether he was on notice of the agreement to arbitrate such that there was a meeting of the minds and he could mutually assent to the terms" of the arbitration program. *Schmell v. Morgan Stanley*, 2018 WL 1128502 (D.N.J.).

Limited Discovery Related to Notice of Arbitration Granted. Morgan Stanley moved to compel a former executive's discrimination claim. The executive denied that he received proper notice of the arbitration agreement, which was sent via e-mail. The court, applying the standard from Rule 56 of the Federal Rules of Civil Procedure, ruled that this factual dispute precluded granting of the motion to compel. Alternatively, the employer sought limited discovery on the notice question. The court granted the employer's request, finding that limited discovery and possible evidentiary hearings were appropriate when factual disputes were present as to whether there was any arbitrable issues. *Schmell v. Morgan Stanley*, 2018 WL 2427129 (D.N.J.).

V. CHALLENGES TO ARBITRATOR OR FORUM

Forum Selection and Governing Law Provisions Enforced. Plaintiff's employment agreement provided that New York law governs the agreement and any arbitration relating to the employment agreement would be held in Hauppauge, New York. During his employment plaintiff worked out of his home in New Jersey. Plaintiff was injured on the job and was later terminated and sued for discrimination under New Jersey law. The employer moved to compel, and the motion was granted by the New Jersey trial court which determined that New York law was to be applied. The New Jersey appellate court affirmed. The court found that the forum selection clause to be clear and unambiguous requiring the application of New York law to the dispute. "Consequently, plaintiff's claims are subject to binding arbitration under the rules of the American Arbitration Association, venued in Hauppauge, New York, with the Employment Agreement interpreted under New York law." *Rizzo v. Island Medical Management*, 2018 WL 2372372 (N.J. App. Div.).

VI. CLASS & COLLECTIVE ACTIONS

Class Arbitration Ordered Where Waiver Language Ambiguous. Employees at Lamps Plus were required to sign an arbitration agreement waiving the right to bring claims in court. A class arbitration was filed against Lamps Plus after employees' personal information was publicly disclosed, and Lamps Plus moved to compel bilateral arbitration. The district court refused to order bilateral arbitration and the Ninth Circuit affirmed. The court found that the terms of the arbitration agreement were ambiguous and construed it against the drafter, Lamps Plus. The arbitration provision sought to preclude court actions and required arbitration "in lieu of any and all lawsuits or other civil proceedings relating to my employment." The Ninth Circuit reasoned that "[c]lass actions are certainly one of the means to resolve employment disputes in court" and that the provision "can be a reasonably read to allow for class arbitration." The court also pointed out that "claims against the company include those that could be brought as part of a class." The court also noted that the agreement authorized the arbitrator to award any remedy allowed by law and those "remedies include class-wide relief." The court affirmed the district court's conclusion that any ambiguity is to be construed against the drafter and authorized class arbitration of this dispute. *Varela v. Lamps Plus, Inc.,* 701 F. App'x 670 (9th Cir. 2017), cert. granted, 2018 WL 398496 (U.S. Apr. 30, 2018). Cf. *Haynes v. DCN Automotive,* 2018 WL 1569338 (N.J. App. Div.) (motion to compel arbitration granted where "clear and unequivocal waiver" of right to bring class action present in car dealership retail installment sales contract).

Motion to Compel Class Action Barred by FINRA Rule. Two former UBS directors brought a class action against UBS alleging a fraudulent scheme to deny employees certain financial benefits. UBS's motion to compel was denied. The Illinois district court noted that the agreement between UBS and directors incorporated the FINRA Rules which, in turn, prohibit class proceedings. The court also rejected UBS's claim that the directors had waived their right to proceed on a class basis as such waivers were barred by the Seventh Circuit ruling in *Lewis v. Epic Systems* finding that such waivers were unenforceable under the NLRA. "Just as the *Epic Systems* waiver purported to eliminate its employees' NLRA-protected right to engage in litigation as a class, the UBS waiver is similarly inconsistent with the NLRA and thus unenforceable under *Lewis*." The court declined to stay this proceeding based on a pending but unrelated FINRA arbitration by one of the directors and moved forward with class proceedings before it. *Zoller v. UBS Securities*, 2018 WL 1378340 (N.D. Ill.). [Note: This decision was issued before the Supreme Court's ruling in *Epic Systems Corp. v. Lewis*, 2018 WL 2292444 (U.S.) was issued].

VII. HEARING-RELATED ISSUES

Second Phase of Bifurcated Hearing Not Required. The arbitration panel agreed to bifurcate the proceeding in this matter. After issuing an award on the first phase, the panel allowed briefing on the question of whether the need for a second hearing was mooted by its award. The panel ruled that the second hearing was unnecessary, and the prevailing party moved to confirm the award. The court, in confirming the initial award, noted that the panel's bifurcation order indicated that any subsequent issue to be decided will be determined later and the panel subsequently determined that the remaining claims were moot after issuance of its award. Therefore, the court concluded that a colorable basis for the award existed and it confirmed the award. The court also found that a reasonable inference could be made that the second phase of these proceedings were not required because liability was joint and several, and the panel could have but did not distinguish between the losing parties. *BSH Hausgerate GMBH v. Kamhi*, 291 F. Supp.3d 437 (S.D.N.Y. 2018).

VIII. CHALLENGES TO AWARD

Reinstatement of Harasser Violates Public Policy. Aiken, a bus operator and union delegate, was terminated for having sexually harassed his supervisor and was terminated by the New York City Transit Authority. An arbitration was filed, and the arbitrator concluded that while Aiken was in fact guilty of harassment, the misconduct did not rise to the level of a dischargeable offense and instead the arbitrator converted the termination to a ten-day

suspension with a requirement that Aiken complete sensitivity training. In so ruling, the arbitrator criticized the victim, a supervisor, for failing to report the offensive behavior earlier. The award was confirmed by the trial court, but the appellate court reversed, finding that the "award in this case is both irrational and against [New York's] strongly articulated public policy against sexual harassment in the workplace." The appellate court rejected the arbitrator's "blame the victim" mentality which "inappropriately shifts the burden of addressing a hostile work environment onto the employee." The court emphasized that the employer has the obligation of protecting against workplace harassment and implementing proportionate sanctions to deter offensive behavior. The "arbitrator's decision effectively prevents petitioners from following their policies and fulfilling their legal obligations to protect against workplace sexual harassment." The court added that the arbitrator "irrationally" found violative behavior occurred yet arrived "at the unsustainable conclusion that Aiken did not violate the workplace sexual harassment policy." Having found that the award violated public policy, the court remanded the matter to a different arbitrator to determine whether termination was warranted based on Aiken's sexual harassment. *New York City Transit Authority v. Phillips*, 2018 WL 1719789 (N.Y. App. Div.).

Award Vacated on Public Policy Grounds. The arbitrator here reinstated a police officer who: failed to report an incident where he used physical force; admitted he should have reported the incident; and had previously been disciplined, trained, and counseled for failing to adequately report prior instances of force . . .." The police department terminated his employment, and an arbitrator reinstated the police officer with only three days lost pay, finding that the force used was not excessive and that the police officer's failure to report the incident was merely a lapse in judgment. The trial court affirmed the award, but the Minnesota appellate court reversed. The court applied Minnesota's limited public policy exception for vacating arbitration awards. In doing so, the court noted that Minnesota has a well-defined policy against police officers using excessive force. The court concluded the reinstatement here "interferes with the clear public policy in favor of police officers demonstrating self-regulation by being transparent and properly reporting their use of force. Further, the arbitration award interferes with the public policy against police officers using excessive force where the only way a city and police department can successfully uphold that public policy is if they are given the opportunity to review occasions involving the use of such force." *City of Richfield v. Law Enf't Labor Servs., Inc.,* 910 N.W.2d 465 (Minn. Ct. App. 2018).

Vacatur Based on "Evident Miscalculation" Clarified. A Mississippi court modified an award in a construction dispute, finding that the arbitrator inappropriately applied the amount of retainage and double counted some labor costs. The Mississippi Supreme Court reversed. The Court, applying established Mississippi law, concluded that for vacatur to be

ordered the "miscalculation must be apparent from nothing more than the four corners of the award and the contents of the arbitration record." To allow parties to look to evidence beyond the face of the award, the Court reasoned, would allow parties to retry the matter in court and undercut the fidelity of arbitration. Here, the Mississippi Supreme Court concluded that "the trial court exceeded its jurisdiction by assuming the role of fact finder and reviewing witness testimony outside the arbitration record to determine where and to what extent a miscalculation existed." *D. W. Caldwell, Inc. v. W. G. Yates & Sons Construction Co.*, 2018 WL 2146355 (Miss.).

Arbitration Panel Did Not Exceed Authority in Calculating Damages. The Venezuelan government nationalized and expropriated gold mines owned by Rusoro Mining. An arbitration panel issued an award in favor of Rusoro under the New York Convention for $1.2 billion. Venezuela opposed confirmation of the award arguing that the panel exceeded its authority in rendering its damages award. A district judge in the District of Columbia rejected Venezuela's arguments and confirmed the award. The court observed that "Faced with the unenviable task of assessing damages for assets in a national market subject to onerous regulations, and relating to a singularly unique commodity, the Tribunal did a commendable job in reaching its damages calculation." The court noted that "curiously" Venezuela did not explain how the panel's chosen method for calculating damages exceeded its power to do so, adding "[p]erhaps it couldn't." The court concluded that Venezuela failed to offer any basis for rejecting confirmation of the award and granted Rusoro's motion to confirm. *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, 300 F. Supp. 3d 137 (D.D.C. 2018).

Sanctions for Making Motion to Vacate Denied. After losing in arbitration, Kent Building moved to vacate the award, arguing that the arbitrator acted in manifest disregard of the law. The prevailing party moved for sanctions under 28 U.S.C. §1927 arguing that the motion lacked any basis in fact or law. The court found that although it "ultimately disagreed with Kent's characterization of New York's good faith standard, it cannot be said that Kent's argument had *no basis* in law." Even if the motion lacked a colorable basis in law, the court added, sanctions would not have been appropriate because "bad faith" had not been shown. "That Kent recounted facts tending to cast its actions in a better light is neither impermissible nor particularly surprising." *Kent Building Services v. Kessler,* 2018 WL 1322226 (S.D.N.Y.).

Manifest Disregard Claim Rejected. The CEO here terminated the defendant President for "cause" which resulted in his loss of severance and equity in the company. The President demanded arbitration and prevailed on his implied covenant of good faith and fair dealing claim. The court rejected the employer's motion to vacate on manifest disregard grounds,

finding that the arbitrator "correctly identified the applicable test for breach of the covenant of good faith under New York law." The court acknowledged that the employment agreement gave the CEO discretion to evaluate the President's performance but he could not exercise "that discretion arbitrarily or irrationally." The court pointed out that the arbitrator found that the CEO made the cause determination based on business decisions not made by the President and admittedly without reviewing relevant communications underlying the matter. The court concluded that because "this testimony provides much more than a 'barely colorable justification for the outcome reached,' the arbitrator's determination that [the CEO] acted arbitrarily and irrationally must be upheld." On this basis, the President's motion to confirm was granted and the employer's motion to vacate was denied. *Kent Building Services v. Kessler,* 2018 WL 1322226 (S.D.N.Y.).

IX. ADR – GENERAL

Consent Awards Subject to Confirmation Under New York Convention. The parties in this international arbitration reached an agreement and the arbitration panel entered a consent award with those terms. One party sought to confirm the award under the New York Convention, and the second party objected, arguing that the court lacked subject matter jurisdiction because the consent award represents the parties' agreement and not the panel's findings and conclusions. The court rejected this argument and confirmed the award. The court noted that the parties did not dismiss the arbitration after they reached their agreement, but instead continued the arbitration proceedings. The court concluded that "no binding or persuasive statutory language or case law requires a court to uphold that a tribunal must reach its own conclusions, separate from the parties' agreement, to make a valid, binding award subject to the Convention." *Transocean Offshore Gulf v. Erin Energy Corp.*, 2018 WL 1251924 (S.D. Tex.).

X. COLLECTIVE BARGAINING SETTING

Collective Bargaining Agreement Does Not Require Employees to Arbitrate Class Action. An individual union employee brought a putative wage and hour class action and the employer moved to compel arbitration. The district court, finding the arbitration provision in the collective bargaining agreement to be "confusing", denied the motion. The court noted that under existing law an employee may only be obligated to arbitrate federal statutory claims if the collective bargaining agreement clearly and unmistakenly requires arbitration of those claims. The court found that the arbitration provision here failed to meet that exacting standard. The court noted that individual employees are not defined as a "party" throughout most of the grievance and arbitration procedure section of the CBA

and, where individuals are addressed, permissive language issued. For example, the CBA provides that an employee "may" submit a claim to the grievance procedure. Because there was no clear and unmistakable requirement that the employee submit statutory claims to arbitration, the court ruled that the employee was not bound to arbitrate this wage and hour class action. The court also found that the employee's due process rights were violated because the neutral had been preselected by the employer and union to hear this matter. *Abdullayeva v. Attending Home Care Services*, 2018 WL 1181644 (E.D.N.Y.).

Issues Related to Merger of Pilot CBAs Subject to Arbitration. Atlas Air and Southern Air merged. The pilots of each airline were subject to separate collective bargaining agreements with the same union, the Air Line Pilots Association. The question for the court was who decides disputes relating to the merger of the pilots' respective CBAs. The court concluded that the resulting issues constitute "minor disputes" under the Railway Labor Act and were therefore subject to arbitration. The court explained that under the RLA minor disputes grow out of grievances or the interpretation of CBAs; "major disputes" focus on the formation of CBAs. Here, the open questions derived from existing CBAs, namely, negotiate over the actual terms of the CBA. On this basis, the court compelled arbitration of the outstanding disputes. *Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 293 F. Supp. 3d 457 (S.D.N.Y. 2018).

Teacher Can Pursue Class Action Under Permissive CBA Grievance Procedure. Teachers' aides working in the Newark School District brought a class action relating to their vacation leave. The relevant collective bargaining agreement provided that it "encourages" the use of the grievance procedure and grants to the individual employee the right to pursue a grievance. The New Jersey appeals court here concluded that the teachers' aides could pursue the class action in court. "Critically, there is no language in the CBA suggesting that the [School] District could initiate, much less compel, arbitration." The court focused on whether the grievance procedure was permissive or mandatory. "If a provision allows one party to choose arbitration, but does not mandate arbitration, the provision is optional." As a result, the court concluded that the grievance here rests with the employee and not his or her union and it need not be submitted to the grievance procedure. On this basis, the court denied the motion to compel arbitration and permitted the teachers' aides' class action to proceed in court. *Hallie Torian, Norheena Thomas & Clifford Walker Jr. v. Newark School District*, 2018 WL 1512953 (N.J. App. Div.).

Teacher's Due Process Rights Not Violated. A teacher was terminated for, among other things, exposing himself to students in the boys' bathroom, improperly touching a student's knee, and using his foot to push another student. He argued that his due process rights were violated because he was not given the specific date of the misconduct and because

hearsay testimony was allowed. Under the New York Education Law, where arbitration is compulsory, judicial scrutiny of an arbitration award is stricter. Nonetheless, the appellate court upheld the hearing officer's award. The court found that the teacher had sufficient information with respect to the date of the corporal punishment at issue to allow him to mount an adequate defense. The court also noted that the hearsay evidence that was admitted was backed up by testimony from various school officials. The court found that the hearing officer's decision was supported by the record and that the hearing officer "was entitled to reject petitioner's explanations based on an assessment of his credibility." *Berkley v. New York City Dep't of Educ.*, 159 A.D.3d 525 (N.Y. App. Div. 2018).

Delegation of Arbitrability Precluded by Nebraska Arbitration Act. Nebraska's Uniform Arbitration Act limits the enforceability of mandatory arbitration of insurance policy claims, and the McCarran-Ferguson Act, under its reverse preemption principles, preempts federal law with respect to state laws regulating the insurance industry. At issue here was the validity of a delegation of arbitrability questions to the arbitrator in a reinsurance policy. The Nebraska Supreme Court concluded that the delegation provision was specifically at issue in this case and Nebraska law precluded the delegation of arbitrability questions to arbitrators in the reinsurance agreement here. The Court also ruled that an agreement that violates public policy like the arbitration agreement here is unenforceable and does not infringe on the Supreme Court's ruling in *Concepcion* because the contract principals at play here are generally applicable to all agreements, and do not disfavor arbitration agreements in particular. In sum, the Court concluded that arbitrability questions were for the court and not the arbitrator to decide. *Citizens of Humanity v. Applied Underwriters Captive Risk Assurance Co.*, 299 Neb. 545 (2018).

Defenses to an Award Can Not be Raised as Affirmative Defenses to Petition for Confirmation. A Louisiana Court of Appeal held that the statutory three-month time limit for challenging an arbitration award under the Louisiana Binding Arbitration Law cannot be avoided by raising affirmative defenses to the petition for confirmation when those defenses seek to vacate, modify, or correct the award. The court rejected defendant's argument that the defenses raised were permitted under the Louisiana Code of Civil Procedure, finding that the governing law was the Louisiana arbitration statute, not its Code of Civil Procedure. *St. George Fire Protection District No. 2 v. J. Reed Constructors, Inc.*, 2018 WL 946960 (La. App.).

XI. NEWS AND DEVELOPMENTS

New York Bans Mandatory Arbitration of Sexual Harassment Claims: New York State enacted a new law declaring mandatory arbitration clauses "null and void" as applied to sexual harassment claims. This provision was part of a larger state effort to address sexual

harassment in the workplace. The bill prohibits, except where inconsistent with federal law, the inclusion of any language in an employment contract mandating the parties to submit to arbitration to resolve allegations or claims of sexual harassment and renders such clauses null and void.

Attorneys General Want to End Forced Arbitration for Sexual Harassment. On February 12, 2018, 56 Attorneys General from the 50 states and territories signed a letter addressed to Congress stating that they support "any appropriately tailored" legislation to prohibit the use of mandatory arbitration agreements for claims involving sexual harassment. The two-page letter signed by each of the Attorneys General states that arbitration agreements are problematic regarding sexual harassment claims because they keep the claims and rulings confidential, encourage a culture of silence, and help perpetrate sexual harassment.

Law Firms Announce Withdrawal of Mandatory Arbitration Agreements. After a series of Twitter posts by Harvard Law School lecturer Ian Samuel revealed the terms of Munger, Tolles & Olson's contract for summer associates, including a mandatory arbitration agreement with a nondisclosure provision, and the social media backlash that followed, Munger quickly issued an apology and announced that it would no longer require its employees or associates to sign mandatory arbitration agreements. Since then, other law firms have followed suit, including Orrick, Herrington & Sutcliffe and Skadden, Arps, Slate, Meagher & Flom.

Law Schools Require Disclosure of Law Firm Arbitration Policies. On May 14, 2018, Yale Law School sent a survey letter on behalf of the 14 top law schools (as ranked by *U.S. News*) to every law firm recruiting on their campuses, requiring any law firm interested in interviewing their students for a summer associate position to disclose whether the law firm requires arbitration and non-disclosure agreements in its employment contracts with summer associates, as well as how the law firm handles misconduct claims. The results of the inquiry will be shared with the law students so they can consider it in connection with where they would like to start their legal careers.

Proposed Changes to NYS's Regulation of Arbitration Proceedings. A bill pending before the New York State Legislature includes proposed amendments to New York's Civil Practice Law and Rules that could significantly alter the cost and effectiveness of dispute resolution. The proposed amendments include provisions: (1) permitting vacatur of arbitration decisions using a "manifest disregard of the law" standard; (2) requiring arbitral awards to state the issues in dispute and set forth findings of fact and conclusions of law; (3) permit parties to challenge an arbitrator up until the commencement of the arbitration hearing; and (4) require that all arbitrators be "neutral" third party arbitrators.

XII. TABLE OF CASES

Federal Cases