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AAA Case Summaries:
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I. JURISDICTIONAL ISSUES: GENERAL

ERISA Claim Ruled Not Arbitrable Because Not Related to Employment. Plaintiff brought a putative class action under ERISA against a third-party investment advisor retained by his employer alleging various claims including breach of fiduciary duty and mismanagement of the profit-sharing plan. The defendant, Ruane Cunniff, moved to compel arbitration under plaintiff's arbitration agreement with the employer. The question posed for the Second Circuit was whether ERISA claims are encompassed within the scope of the arbitration agreement's terms, namely, whether they are "related" to plaintiff's employment. The majority determined that they are not. In doing so, the majority overturned the lower court's ruling that but for plaintiff's employment the ERISA claims would not have arisen. The court emphasized that none of the facts relevant to plaintiff's ERISA claims related to his employment. The majority pointed out that plaintiff's "claims hinge entirely on the investment decisions made by Ruane; the substance of his claims has no connection to his own work performance, his evaluations, his treatment by supervisors, the amount of his compensation, the condition of his workplace, or any other fact particular to [plaintiff's] individual experience" with his employer. The court noted that non-employees, such as spouses and heirs, could have brought the same claims against Ruane. The court concluded "in the context of an employment arbitration agreement, a claim will 'relate to' employment only if the merits of that claim involve facts particular to an individual plaintiff's own employment." *Cooper v. Ruane Cunniff & Goldfarb*, 990 F.3d 173 (2d Cir. 2021).

Airport Ramp Supervisors Exempt Under Transportation Worker Exemption. Airport ramp supervisors oversee and assist airport ramp agents who physically load and unload planes with passengers and commercial cargo. Saxon sued her employer, Southwest Airlines, and Southwest moved to compel arbitration. The district court granted the motion, finding that Saxon did not qualify under the FAA's exemption for transportation workers. The district court reasoned that her work was too removed from interstate commerce to qualify for the exemption. The Seventh Circuit reversed. The appellate court reasoned that "[a]irplane cargo loaders, as a class, are engaged in [interstate] commerce, in much the same way that seaman and railroad employees were, and Saxon and the ramp supervisors are members of that class." The court pointed out that the exemption applies to a "class of workers" and therefore the inquiry was "not whether Saxon is engaged in commerce, but whether a given class of workers is engaged in commerce and whether Saxon is a member of that class." The court explained that to determine whether this class of worker "engaged in commerce" it must look to see if that work is analogous to what seamen and railroad workers performed. "Ramp supervisors and ramp agents alike spend a significant amount of their time engaged in physically loading baggage and cargo onto planes destined for, or returning from, other states and countries, and that cargo-loading work is interstate or

foreign commerce." The court concluded with the "firm conviction" that ramp supervisors who load and unload cargo are engaged in commerce for purposes of the transportation exemption and therefore Saxon is not required to arbitrate her claims against Southwest. *Saxon v. Southwest Airlines Co.*, 993 F.3d 492 (7th Cir. 2021). Cf. *Aleksanian v. Uber Technologies*, 2021 WL 860127 (S.D.N.Y.) (Uber drivers do not qualify under the FAA transportation worker exemption as they are not class of workers engaged in interstate commerce focused on connecting passengers on interstate transportation hubs); *Immediato v. Postmates, Inc.*, 2021 WL 828381 (D. Mass.) (food delivery workers not subject to FAA transportation worker exemption as the goods they delivered did not travel in flow of interstate commerce).

Lyft Drivers Compelled to Arbitrate Under New York State Law. Lyft drivers brought a putative class action for breach of contract and Lyft moved compel arbitration under the FAA and New York State law. The court concluded that the drivers fell within the transportation workers exemption under the FAA. The court posed the question under the FAA "how much interstate movement is enough?" The court found that even though only 2-3% of the drivers' trips were interstate this did not render them incidental given that the ride-sharing platforms provide hundreds of millions of rides a year in the United States. The court also concluded that the transportation worker exemption applies to the transportation of passengers and not merely goods. However, the court found that there was no exemption under the New York State's Arbitration Law, which it found applied here, and granted Lyft's motion to compel. In doing so, the court discounted the fact that the arbitration agreement here provided that it was "governed by the FAA". The court reasoned that the fact that the arbitration was governed by the FAA "does not plausibly suggest that the parties intended for the clause to be discarded in the event that the FAA was found inapplicable." From this, the court concluded that the "effect of the FAA being found inapplicable is only that the arbitration clause contains no choice-of-law provision, and therefore that 'the law of the jurisdiction having the greatest interest in the litigation will be applied.'" As New York arbitration law did not exempt the arbitration of disputes involving transportation workers and New York had the greatest interest in this dispute, the court concluded that arbitration of the drivers' claims was warranted. *Islam v. Lyft, Inc.*, 2021 WL 871417 (S.D.N.Y.).

Bartender on Cruise Ship is "Seaman" for purposes of FAA. An Indiana district court denied an employer's motion to compel arbitration on the ground that plaintiff, who was employed as a bartender on employer's river boat cruise ship, is a "seaman" for purposes of the FAA. The court's analysis focused on whether Section 1 of the FAA, which excludes from the FAA's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce", applied to plaintiff's bartending job. Noting that Congress did not define "seamen," the court reasoned that the key to determining who qualifies as a seaman turns on their "employment-related connection to a vessel in navigation." That determination is tied to two elements: the

worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and; the worker must have a connection to a vessel in navigation . . . that is substantial in both its duration and its nature." Finding that "plaintiff's duties as a bartender contribute to the entertainment function provided for passengers by the cruise boats . . . [and that] she performs her duties aboard the cruise boats, on which she remains and lives for six-week intervals while the boats navigate various bodies of water," the court concluded that plaintiff's "connection to these vessels is substantial both in nature and duration." Accordingly, the court held that plaintiff was a "seaman" for purposes of the FAA and therefore exempt from the FAA's coverage. The employer's motion to compel was therefore denied. *Rodgers-Rouzier v. American Queen Steamboat Operating Co.*, LLC, 2021 WL 914015 (S.D. Ind.).

Disqualification of Counsel Motion in Arbitration for Court to Decide. The court here made it clear that "[a]ttorney disqualification is better decided by courts rather than arbitrators." The core issue in this case was which court should make that decision. Two class actions, one in New York and a second one in Missouri, were brought alleging ERISA violations against various parties responsible for significant losses in a corporate profit-sharing program. In addition, hundreds of plan participants signed arbitration agreements and these claims were being addressed individually in arbitration proceedings around the United States. A motion was made to disqualify one of the plaintiffs'/claimants' law firms which also represented three former members of the profit-sharing plan's advisory council. The court had already granted the disqualification motion for the New York federal court action. The question here was whether those firms should be disqualified in the arbitration proceeding as well. The New York court concluded that it was not best positioned to decide the motion because only those plaintiffs who opted out of arbitration were before the court. The Missouri court, in contrast, had compelled arbitration and was charged with ruling on those claims subject to arbitration. On this basis, the New York court decided that "the Western District of Missouri, is better positioned to rule on disqualification in the arbitration proceedings." The court concluded that if defendant feels "disqualification is warranted in individual arbitrations, it must raise the issue independently in a court authorized to preside in some capacity over these extra-judicial proceedings." *Canfield v. SS&C Technologies Holdings, Inc.*, 2021 WL 1022698 (S.D.N.Y.).

Case Shorts:

- *In re Application of Food Delivery Holding*, 2021 WL 1964486 (C.D. Cal.) (subpoena sought under Section 1782 rejected where arbitration before Dubai International Finance Centre - London Court of International Arbitration ruled to be private commercial arbitration rather than a proceeding before a foreign or international tribunal).

- *Polyflow v. Specialty RTP*, 993 F. 3d 295 (5th Cir. 2021) (courts can "look through" petitions seeking to compel arbitration to determine whether federal question jurisdiction exists).
- *Rollag vs. Cowen, Inc.*, 2021 WL 807210 (S.D.N.Y.) (New York law barring arbitration of statutory discrimination claims "is plainly inconsistent with the FAA and the Supreme Court's interpretation of that federal law" and is therefore preempted).
- *Anderjaska v. Bank of America*, 2021 WL 841661 (S.D.N.Y.) (court cannot compel arbitration for out-of-jurisdiction plaintiff but can stay litigation pending completion of arbitration).
- *Protostorm, Inc. v. Foley and Lardner*, 2021 WL 1305031 (N.Y. App. Div. 1st Dep't) (client's non-arbitrable legal malpractice action stayed and law firm's related arbitrable unpaid fee claim compelled where "non-arbitrable issue can be decided in an arbitration when it is inextricably intertwined within an arbitrable issue, particularly where, as here, the determination of the arbitrable unpaid fees claim may dispose of the non-arbitrable malpractice claim.").
- *Georgetown Home Owners Association v. Certain Underwriters at Lloyd's, London*, 2021 WL 359735 (M.D. La.) (the McCarran-Ferguson Act does not serve to reverse-preempt the New York Convention).
- *Tenaris v. Bolivarian Republic of Venezuela*, 2021 WL 1177996 (D.D.C.) (post-judgment interest awarded at rate set under Section 1961(a) rather than rate set in arbitration award for post-arbitration interest as court distinguishes post-award interest from post-judgment interest).
- *Walsh v. Arizona Logistics*, 2021 WL 1972613 (9th Cir.) (Secretary of Labor not bound by employees' arbitration agreement where the Secretary may have "interests independent of the aggrieved employee when seeking employee-specific relief, including deterring other employers from violating the FLSA and protecting complying employers from unfair wage competition with non-complying employers").
- *Sullivan v. Feldman*, 2021 WL 1517903 (S.D. Tex.) (challenge to class arbitration on emergency, interim basis rejected; "judicial review is appropriate after a final award is issued, but not after interim procedural decisions. The court tasked with the final-award review will meet the challenge, at the appropriate time and with a complete record.").
- *Rosales v. Uber Technologies*, 2021 WL 1711585 (Cal. App.) (question whether Uber's drivers who are aggrieved under PAGA may not be submitted to arbitrator as the PAGA claim could not be extinguished without involvement of the real party in interest which is the state of California).

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

Fourth Circuit Enforces Waiver of Appellate Review of Award. The arbitration agreement here declared that the award is final "and enforceable in any court of competent jurisdiction without any right of judicial review or appeal." The district court ruled that a clause prohibiting appellate review of an award is unenforceable. On appeal, the Fourth Circuit held, on a matter of first impression, that parties can waive under the FAA their right to judicial appellate review of an arbitration award following confirmation. The court noted that the right to waive appellate review exists where the stakes are even higher such as with the waiver of appellate review of criminal plea agreements. The court opined that "enforcing the waiver in this context furthers the FAA's policy objectives." The court noted that appeals from arbitration awards have been almost reflexive recently and a common course rendering the arbitration itself a "precursor" to litigation. "The reflexive appeal of an arbitration award is all the more lamentable when the parties have expressly waived that right." The court concluded that it found no cause to reject the parties' agreement to waive appellate review of the award. *Beckley Oncology Associates v. Abumasmah*, 993 F.3d 261 (4th Cir. 2021).

Waiver Claim Rejected. An employer waited eight months before moving to compel its former employee's FLSA case into arbitration. During that time, it participated in a global mediation to resolve this case and a related case and moved to dismiss in favor of an earlier-filed related litigation in another jurisdiction. The employee opposed the motion to compel arguing that the employer waived its right to arbitration. A majority of the Third Circuit panel rejected the employee's waiver claim and granted the motion to compel. The majority emphasized that the motion to dismiss did not go to the merits of the employee's claim. The majority found no prejudice to the plaintiff as "[n]o discovery was conducted. And, the record lacks any evidence that [the employee] would have to duplicate her efforts during arbitration. Instead, most of [the employee's] work focused on the quasi-jurisdictional issue, not the merits of the case." For these reasons, the court concluded that the employer did not waive its contractual right to invoke arbitration. *Morgan v. Sundance, Inc.*, 992 F.3d 711 (8th Cir. 2021). See also *Anderjaska v. Bank of America*, 2021 WL 841661 (S.D.N.Y.) (motion to remove case to federal court did not constitute waiver for purposes of subsequent motion to compel); *Murray v. DCH Toyota City*, 2021 WL 150074 (S.D.N.Y.) (auto dealer's litigation seeking to collect unpaid fees did not constitute waiver of right to arbitrate statutory claims brought by customer where the two disputes "are simply not the same dispute and do not embrace the same or even similar legal issues" and no prejudice shown to customer); *Maldonado v. Firstservice Residential*, 2021 WL 966064 (S.D. Tex.) (filing of counterclaim seeking injunctive relief not substantial invocation of litigation process sufficient to constitute waiver of right to arbitrate); *Roark v. Keystate Homes*, 2021 WL 929163 (Ohio App.) (filing of mechanic's lien, in action brought by homebuilders against developer and others alleging claims under the contract between the parties, did not

constitute waiver of arbitration where no delay in seeking arbitration was present and no prejudice to homebuilders shown).

General Reference to AAA Rules Not Sufficient for Delegation. Most courts have ruled that incorporation of the rules of the American Arbitration Association constitutes a clear and unmistakable referral of arbitrability issues to the arbitrator. Florida has traveled a different path. In this case, the Florida appeals court ruled that a reference generally to the AAA Rules in an arbitration agreement "left ambiguity as to whether the arbitrator has authority to decide arbitrability to the exclusion of the trial court." The court cautioned, however, that a court's jurisdiction may not be exclusive. "As we see it, there can be instances, depending on the language of the arbitration agreement, in which the court and the arbitrator or arbitration panel can have *concurrent* jurisdiction to decide arbitrability." On this basis, the court concluded that the trial judge in this case was correct in making the preliminary determination that the dispute was subject to arbitration while properly leaving "the final decision as to what was arbitrable to the arbitrator." The court reasoned that this "approach is an efficient and economical manner to decide the multitudinous disputes in this case and does not violate the contract to arbitrate." *Fallang Family Ltd Partnership v. Privcap Companies*, 2021 WL 1115388 (Fla. App.). Cf. *Rollag vs. Cowen, Inc.*, 2021 WL 807210 (S.D.N.Y.) (FINRA Rules, unlike AAA Rules, do not clearly and unmistakably delegate arbitrability question to arbitrator where underlying issue is a matter of New York law and not an issue under the FINRA Code); *Predmore v. Nick's Management, Inc.*, 2021 WL 409736 (N.D. Tex.) (challenges to arbitration agreement as a whole and not merely to delegation clause for arbitrator to determine where applicable AAA Commercial Rules govern and delegates arbitrability issues to the arbitrator); *KPA Promotion and Awards v. JP Morgan Chase and Company*, 2021 WL 1317163 (S.D.N.Y.) (arbitrability question for arbitrator to decide where JAMS or AAA rules would govern proceeding and arbitration provision makes subject to arbitration "any" claim regarding the applicability of the arbitration clause); *Performance Builders v. Lopas*, 2021 WL 2177057 (Ala.) (arbitrability issue for arbitrator to decide as "a reference to the Rules of the American Arbitration Association . . . in an arbitration provision demonstrates the intent of the parties to submit all issues of arbitrability to an arbitrator").

Arbitrator to Decide Whether Second Arbitration is Collateral Attack on First. Claims relating to the dissolution of a company were submitted to and resolved by a JAMS arbitrator. In that arbitration, the arbitrator acknowledged that Credit Suisse, whose actions were at issue in the underlying dispute, was "not a party before me." A second arbitration was filed by the party who lost in the first arbitration raising additional claims and including Credit Suisse as a party. Credit Suisse moved to stay and enjoin the second arbitration on the ground that it was a collateral attack on the award previously issued. A preliminary question for the court was who was to decide this issue – the court or the arbitrator in the second case. "The role of the federal court when a party files such a second arbitration is limited. The question for the Court is not whether the second arbitration constitutes a

collateral attack on the first arbitration, but instead whether the second arbitration falls within the terms of a valid arbitration agreement." The court concluded that, as there was no question of an enforceable arbitration agreement here and that a question of arbitrability was raised, the dispute was properly submitted to the arbitrator for resolution. In the court's view, this approach honors the strict limits imposed by the FAA in challenging awards and discourages collateral attacks on arbitration awards. "Both as a matter of efficiency and as a matter of respecting the parties' agreement, the arbitrator is better equipped than the Court to determine whether the second arbitration is duplicative of the first and it should make that determination." *Credit Suisse v. Graham*, 2021 WL 1315812 (S.D.N.Y.).

Failure to Raise Arbitration in Responsive Pleading Does Not Constitute Waiver. In an issue of first impression, the Oklahoma Supreme Court held that the right to compel arbitration is not waived by failing to raise it as an affirmative defense in a responsive pleading. Oklahoma's Pleading Code §2008 provides that all affirmative defenses must be raised in a responsive pleading and specifically enumerates "arbitration and award" as one such defense. However, this section of the Pleadings Code conflicts with Oklahoma's version of the Uniform Arbitration Act. The court reasoned that the term "arbitration and award" relates to a claim that has already been resolved by an award in arbitration, not whether the parties' claims should be adjudicated in court or through arbitration. On this basis, the court held that the right to compel arbitration is not waived by the failure to assert it as a defense in the answer. To hold otherwise, the court reasoned, would contradict Oklahoma's public policy favoring arbitration. *Howell's Well Service, Inc. v. Focus Group Advisors*, LLC, 2021 WL 1976158 (Okla.).

Case Shorts:

- *Swiger v. Rosette*, 989 F.3d 501 (6th Cir. 2021) (provision requiring the arbitration of "any issue concerning the validity, enforceability, or scope of this Agreement to Arbitrate" clearly and unmistakably delegates to the arbitrator issues of arbitrability).
- *Bergassi Group, LLC v. Allied World Insurance Co.*, 193 A.D.3d 524 (N.Y. App. Div. 1st Dep't 2021) (gateway issue for arbitrator under New York law where arbitration agreement submits to arbitrator disputes including "a dispute or disagreement as to [the agreement's] formation or validity").
- *Baldwin v. Beeche*, 2021 WL 1377149 (E.D. Tex.) (arbitration agreement provision stating that arbitrator would "clarify doubts as to the scope of the agreement" constitutes an enforceable delegation provision).
- *Jaramillo v. TXU Energy*, 2021 WL 1177888 (W.D. Tex.) (defendants' failure to pay AAA fees were result of hospitalization due to COVID of defendants' counsel and not disinclination to arbitrate disputes and, therefore, claim of waiver of arbitration denied).

- *Swiger v. Rosette*, 989 F. 3d 501 (6th Cir. 2021) (failure to specifically challenge an enforceable delegation clause mandates that arbitrator rather than court decide gateway questions including enforceability of the arbitration agreement itself).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Notice of Arbitration on MLB Ticket Insufficient. Laiah Zuniga was seriously injured by a batted ball at a Chicago Cubs game. She brought a personal injury action, and the Cubs moved to compel arbitration. The Cubs argued that the notice of arbitration on the back of the ticket, in four-point font and in one of six paragraphs, constituted sufficient notice of Zuniga's obligation to arbitrate her claims. The Illinois trial court denied the Cubs motion to compel, finding the Cubs agreement procedurally unconscionable, and the appellate court affirmed. In the appellate court's view, "nothing about this notice draws a ticketholder's attention specifically to the fact that he or she is agreeing to give up important legal rights by using the ticket or to the need to read the terms and conditions to understand the legal rights that he or she is waiving by using the ticket." The court emphasized that, unlike the situation where an online user is asked to view terms and conditions while on a website, the "overreaching is the fact that the Cubs sought to bind the plaintiff, merely through her use of a baseball ticket to enter Wrigley Field, to an extensive eight paragraph arbitration provision that was not provided to her, which she could read only by accessing the Cubs' website (while likely being in the commotion outside the baseball stadium when she recognizes the need to do this, where it is not necessarily easy or practical to read an Internet website) or by visiting the Cubs' administrative office (despite her ticket containing no information about where that office could be found)." The court found the Cubs efforts to place Zuniga on notice of her obligation to arbitrate insufficient "to have the effect of actually causing a reasonable consumer in the plaintiff's position to learn of and read the full arbitration provision to which he or she is purportedly assenting by using a baseball ticket to enter Wrigley Field." In addition, the court found the seven-day period to opt out of arbitration to be substantively unconscionable. For these reasons, the lower court's denial of the Cubs' motion to compel was affirmed. *Zuniga v. Major League Baseball*, 2021 Il. App (1st) 201264 (2021).

Shortened Statute of Limitations Not Unconscionable. Plaintiff's offer letter with About, Inc., included an arbitration provision that required claims to be filed "within six (6) months of the time when the event or occurrence giving rise to the dispute arose or will be waived by you." About moved to compel plaintiff's discrimination and wage and hour claims and plaintiff opposed the motion on unconscionability grounds. The court rejected plaintiff's argument, ruling that New York courts enforce reasonable contract provisions shortening statute of limitations. The court noted that prior courts had upheld six months limitations periods for statutory discrimination claims as is the case here. The court acknowledged that the shortened limitations period impacted only claims brought by plaintiff but noted that

both parties were bound to arbitrate their claims and About agreed to pay the costs of the arbitration. Under these circumstances, the court rejected plaintiff's substantive unconscionability argument. The court also dismissed plaintiff's procedural unconscionability arguments, finding "no high-pressure tactics or disparity in bargaining power." Finally, the court rejected plaintiff's arguments on the judicially-created "effective vindication" doctrine. In doing so, the court noted that About waived the shortened statute of limitations as applied to plaintiff's FLSA claims and that the effective vindication doctrine relating to shortened statutes of limitation has not been successfully applied to Title VII and state law claims. *Keller v. About, Inc.*, 2021 WL 1783522 (S.D.N.Y. 2021).

Case Shorts:

- *AJZ's Hauling v. TruNorth Warranty Programs*, 2021 WL 1310508 (Ohio App.) (procedural unconscionability found where "the arbitration agreement was on the last page of the warranty agreement that [claimant] received via e-mail four days after" the purchased item was delivered).
- *Keller v. About, Inc.*, 2021 WL 1783522 (S.D.N.Y. 2021) (court rejected unconscionability challenge to JAMS arbitration but noted that in the event JAMS decides not to administer the case because its "Minimum Standards" are not met plaintiff could "move the Court for appropriate relief").
- *Donelson v. Ameriprise Financial Services*, 2021 WL 2231396 (8th Cir.) (unconscionability claim rejected despite fact that investment advisor firm not required to arbitrate all claims while investor was required to do so).
- *Jules v. Andre Balazs Properties*, 2021 WL 2183098 (S.D.N.Y.) (arbitration agreement not procedurally or substantively unconscionable where employment conditioned on execution of arbitration agreement and employee given 30 days to opt out of arbitration).
- *AJZ's Hauling v. TruNorth Warranty Programs*, 2021 WL 1310508 (Ohio App.) (substantive unconscionability found where court determined it "would be unreasonable, unjust, and prohibitively expensive to require [claimant] to travel to North Carolina [from Pennsylvania], and bear the costs of transporting witnesses and legal representation to North Carolina, for the in-person arbitration hearing").

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Arbitration Denied Where On-Line Notice Not Reasonably Conspicuous. The Second Circuit, applying California law, affirmed the denial of Subway's motion to compel a putative class action under the Telephone Consumer Protection Act. Subway relied on the reference to terms and conditions found on an in-store print advertisement viewed by the plaintiff relating to a special offer it was promoting. The consumer was directed to view the terms and conditions on the web address provided. The Second Circuit concluded that Subway

"failed to demonstrate that such terms and conditions would be clear and conspicuous to a reasonable" consumer. In doing so, the court cited several deficiencies in Subway's notice, including its failure to provide evidence of the size of the advertisement, the fact that the terms and conditions were buried in a paragraph with a small font surrounded by unrelated information, and the requirement that the consumer was required to type the URL text provided into an Internet browser on her cell phone to access the terms and conditions. The court saw no reason to distinguish its precedent in the on-line context with the print advertisement at issue here. The Second Circuit "reiterated our well-settled view that, regardless of the medium, we must look at both the design of the screen (or, in this case, print advertisement) and the particular language used in relation to the hyperlinked or otherwise-referenced terms and conditions." The court found "the importance of signaling that a consumer is about to agree to something is even more pronounced" in the context where the consumer might reasonably assume the terms and conditions apply to the promotional offer only as opposed to the making of a broader commitment. The Second Circuit concluded by noting the "somewhat obvious reality that companies relying on the mixed-media incorporation of contractual terms involving a combination of a print advertisement, text messaging, and a website (rather than a purely paper or purely web-based medium) must take into account the practical obstacles in each situation relating to the conspicuousness of the notice, as well as access to the terms and conditions, that may be created by the various modes of communication being utilized." *Soliman v. Subway Franchisee Advertising Fund Trust,* 2021 WL 2324549 (2d Cir.). Cf. *Zheng v. Live Auctioneers*, 2021 WL 2043562 (S.D.N.Y.) (clickwrap agreement enforced where the arbitration provision on the website "was not hidden" but rather "it was given its own section with a bolded and numbered heading entitled 'arbitration'" and the "font of the section was not smaller than any of the other text of the Terms & Conditions"); *Thornton v. Uber Technologies*, 2021 WL 1960199 (Ga. App.) (sufficient notice of terms and conditions including arbitration provision found where the "terms are clear against the white background and the blue hyperlink draws attention to the terms and conditions, such that a reasonable smartphone user would know that more information would be found if he clicked upon the hyperlink").

Non-Parties Bound to Arbitrate Under Direct Benefits Theory. Expro and Chevron entered into an agreement relating to offshore well maintenance. The parties' agreement contained an indemnification and arbitration provision. Chevron also contracted with Supreme Service and Oceaneering to perform additional services. An Expro employee was injured and sued all the parties performing services on behalf of Chevron. Supreme Service and Oceaneering brought a third-party claim against Expro seeking to be indemnified under the Chevron agreement, and Expro moved to compel. The Louisiana federal court granted the motion under the direct-benefits estoppel theory adopted by the Fifth Circuit. The court emphasized that the third-party plaintiffs were seeking to enforce the indemnification provision in the Chevron-Expro agreement. The court concluded that "it would be 'manifestly inequitable' to permit Oceaneering and Supreme to claim they are non-

signatories to the Chevron-Expro contract to sidestep arbitration and at the same time enforce the indemnity provision of the contract against Expro in federal court." On this basis, the court ordered Oceaneering and Supreme Service, despite being non-signatories to the Chevron-Expro agreement, to arbitrate their indemnification claims. *Pelsia v. Supreme Offshore Services*, 2021 WL 411450 (E.D. La.). See also *Franklin v. Community Regional Medical Center*, 2021 WL 2024516 (9th Cir.) (nurse obligated to arbitrate dispute with non-signatory hospital based on her arbitration contract with staffing agency that employed her where the staffing agency was responsible for: obtaining meal period waivers; compensating employees for missed meal breaks; reviewing time keeping records, and; raising any discrepancies with the hospital and employee/plaintiff); *Trujillo v. Volt Management Corp.*, 846 App'x 233 (5th Cir. 2021) (employee's disability discrimination claim against signatory employer was so intertwined with her claim against non-signatory client for whom she performed services as to require arbitration of her claim against non-signatory client). Cf. *Ohanian v. Apple, Inc.*, 2021 WL 871501 (S.D.N.Y.) (non-signatory may not invoke arbitration where plaintiff's claim did not presume the existence of agreement with arbitration provision and no concerted misconduct between non-signatory defendant and signatory to agreement present); *Jules v. Andre Balazs Properties*, 2021 WL 2183098 (S.D.N.Y.) (individual and entity with ownership interests in employer can move to compel arbitration even though not signatories to the arbitration agreement; otherwise "permitting Plaintiff to evade arbitration by filing claims against non-signatories to the Arbitration Agreement would create the unfair result that adoption of equitable estoppel is intended to prevent"); *West Virginia Department of Health and Human Resources v. Denise,* 2021 WL 2217488 (W. Va.) (consultant not required under estoppel principles to arbitrate statutory discrimination claims against third party to where she was assigned where her claims did not involve terms of consulting agreement which contained arbitration provision); *Crystal Point Condominium v. Kinsale Insurance Co.*, 466 N.J. Super. 471 (N.J. App. 2021) (non-signatory not compelled to arbitrate where "arbitration clause in its policy does not reference third-party actions such as this, making it unlikely defendant relied to its detriment on the clause to defend third-party claims such as this").

Evidence of Notice of Arbitration on Web-Based Agreement Lacking. Plaintiff brought this putative class action against a financial institution alleging improper charging of overdraft and related fees. Defendant moved to compel arbitration and relied on its web-based application. The court concluded that defendant failed to demonstrate that plaintiff was given actual notice or put on inquiry notice of her obligation to arbitrate. In particular, the court ruled that defendant did not demonstrate "that the design and content of the registration interface provided plaintiff reasonable notice of the mandatory arbitration provision." The court emphasized that defendant did not explain: how users were directed to relevant contract terms; whether users were required to scroll through multiple screens to reach the relevant language, and; "whether the hyperlink to the Account Agreement or language directing the user thereto are a different color, font, bolded, or underlined." For

these reasons, the court concluded that "a reasonably prudent user would not understand that by clicking 'I agree' to the terms of the Internet Banking Agreement, he or she was agreeing to arbitrate or waive any ability to maintain a class action pursuant to provisions added to the Account Agreement." Defendant's motion to compel arbitration was on these grounds denied. *Zachman v. Hudson Valley Federal Credit Union*, 2021 WL 1092508 (S.D.N.Y.). Cf. *Thornton v. Uber Technologies*, 2021 WL 1960199 (Ga. App.) (question of fact precludes enforcement of arbitration provision in Uber's online registration process where paralegal's affidavit only affirmed that e-mail was sent to plaintiff with updated terms and conditions but no record evidence that e-mail was actually delivered was proffered).

Uber Must Litigate Claims by Wheelchair Users Who Did Not Download App.
Motorized wheelchair users brought a class action against Uber alleging the ride-sharing company's failure to provide wheelchair accessible vehicles violated the Americans with Disabilities Act. Uber moved to compel arbitration, arguing that plaintiffs' claims implicated the terms of service, which included an arbitration clause, because they could not have utilized Uber vehicles without accepting them. Therefore, Uber argued, plaintiffs were equitably estopped from rejecting its arbitration clause. The district court denied the motion to compel, holding that plaintiffs did not accept Uber's terms of service and therefore were not bound to arbitrate their claims. The Third Circuit affirmed, stating that Uber's "strained argument is belied by the complaint, which describes Uber's 'on-demand transportation service' without any reference to the Terms of Use . . . and alleges that Plaintiffs have not downloaded Uber's app, used its service, or otherwise availed themselves of any aspect of Uber's service agreement. Indeed, the crux of their claim is that Uber's unlawful discrimination has prevented them from partaking in or benefitting from that service agreement in the first place." Therefore, because there "is no evidence that Plaintiffs 'availed themselves' of Uber's service agreement" the court affirmed the district court decision that Uber's arbitration agreement did not apply to Plaintiffs. *O'Hanlon v. Uber Technologies, Inc.*, 990 F.3d 757 (3d Cir. 2021).

Unilateral Right to Modify Agreement Renders Delegation Clause Illusory. The employer here reserved the right to modify its arbitration agreement without notice and with immediate effect. The agreement incorporated the AAA's Rules and normally the question whether the agreement was illusory would have been for the arbitrator to determine. Here, the court reasoned that the employer's right to unilaterally modify the agreement made the delegation clause within the agreement illusory as well and therefore the enforceability of the arbitration agreement was for the court to decide. The court concluded that since the employer could unilaterally modify the agreement without notice, the arbitration obligation was rendered illusory under Texas law and the arbitration would not be compelled. *Simpson v. Synergenx Health Kingwood*, 2021 WL 765410 (S.D. Tex.).

No Assent to Amendment Adding Arbitration Provision. The Sixth Circuit held that bank account holders did not assent to an amendment adding an arbitration provision and therefore could not be compelled to arbitrate. The account holders had opened high interest accounts with First National Bank which was later acquired by Branch Banking and Trust Company (the "Bank"), the defendant in this action. The Bank sent a Bank Services Agreement (the "BSA") to each of the account holders stating that continued maintenance of an account with it would be deemed acceptance of the BSA's terms. Those provisions included that the BSA could be amended by BBT, the amendments would be promulgated by written notice, and continued use of an account after receipt of notice constituted acceptance of the amendment(s). The account holders claimed that the Bank breached the BSA and BBT moved to compel arbitration based on an amendment to the BSA that added an arbitration provision. On appeal of the district court's order compelling arbitration, the 6th Circuit applied Tennessee law to find there was no mutual assent. Fundamental to its analysis was the fact that the amendments, including the addition of the arbitration provision, were so substantial that they transformed the original 2-page agreement to a 30-plus page agreement that drastically exceeded the scope of the original. Finding that these were not "modification[s] whose general subject matter was anticipated when the contract was entered into" coupled with the fact that there was no opt-out opportunity, the court held that the amendments were unreasonable and that the Bank violated its covenant of good faith and fair dealing. The district court's order compelling arbitration was reversed, and the case was remanded. *Sevier County Schools Federal Credit Union v. Branch Banking and Trust Company*, 990 F.3d 470 (6th Cir. 2021). See also *Cottrell v. Holtzberg*, 2021 WL 2009036 (N.J. App.) (arbitration agreement relating to 2017 admission to nursing facility does not apply to later admission where no evidence of an arbitration agreement was provided or of assent to arbitration of claims relating to later admission). Cf. *Donelson v. Ameriprise Financial Services*, 2021 WL 2231396 (8th Cir.) (mutual assent present where investment account application expressly incorporated by reference arbitration agreement in Ameriprise client agreement).

Release Agreement Supersedes Arbitration Obligation. An AT&T employee, who was subject to an arbitration agreement, was terminated and signed a General Release Agreement which provided that it constituted the entire agreement between the parties. The employee later sued AT&T on age discrimination grounds and argued that the Release Agreement was invalid with respect to her age discrimination claim. AT&T moved to compel, arguing that the underlying arbitration agreement governs in any event even if the Release Agreement was invalid as it could not supersede the earlier arbitration agreement. The court rejected AT&T's argument and denied the motion to compel. The court reasoned that both the arbitration agreement and general release addressed the same subject matter, "claims arising out of [the plaintiff's] employment and termination of employment." The court rejected the notion that the two agreements could be harmonized. "The General Release's purported extinction of claims arising from or relating to termination of

employment is in conflict, not harmony, with the promise to arbitrate those claims" in the arbitration agreements. The court ruled that by its own terms, the Release Agreement superseded any prior contract as it purported to constitute the "entire agreement" between the parties. Finally, the court rejected AT&T's contention that the Release Agreement cannot supersede the arbitration agreement because it was challenging its validity. Rather, the court pointed out that plaintiff "contends only that the General Release is not a valid and enforceable waiver of her rights and claims under the ADEA." Further, the Release Agreement itself provided that should any part of it be found to be invalid the remainder of the agreement remains enforceable. For these reasons, the court concluded that plaintiff's age discrimination claim must be decided by the court. *Kantz v. AT&T, Inc.*, 2021 WL 1061190 (E.D. Pa.).

Pre-Arbitration Discovery Regarding Existence of Agreement Denied. Under Texas procedural law, pre-arbitration discovery is warranted "only when it is reasonably necessary to allow the trial court to fairly and properly decide a motion to compel." Here, plaintiff sued her former employer in Texas court alleging discrimination and retaliation. The employer moved to compel arbitration pursuant to the arbitration clause in the Employee Handbook. The employer's motion was accompanied by a Declaration signed by a "Human Resources Generalist" and supported by various authenticated documents including plaintiff's signed Employee Handbook Acknowledgment and Agreement, email exchanges between plaintiff and human resources, and paperwork documenting plaintiff's hire and termination. Plaintiff denied the existence of an enforceable agreement and moved to compel pre-arbitration discovery. The matter wound its way up and down the Texas court system but eventually the motion for pre-arbitration discovery was granted. On appeal, the Supreme Court of Texas noted that "although [plaintiff] generally denied the existence of an enforceable arbitration agreement, she made no factual assertions in support of that claim . . . Notably, [plaintiff] did not deny (1) receiving the agreement, (2) signing the agreement, (3) sending or receiving the various emails attached to the [human resource generalist's] declaration in which [plaintiff] confirmed receiving and signing the agreement, or (4) continuing to work after she received the agreement." Accordingly, the court found that plaintiff "failed to provide the trial court with a reasonable basis to conclude that it lacks sufficient information to determine whether her claims against [employer] are arbitrable" and held that the trial court "clearly abused its discretion by ordering pre-arbitration discovery." Concluding that the employer demonstrated its entitlement to mandamus relief, the lower court was ordered to vacate its discovery order and rule on employer's motion to compel arbitration. *In re Copart, Inc.*, 619 S.W.3d 710 (Tex. 2021).

Case Shorts:

- *Bannister v. Marinidence Opco, LLC*, 2021 WL 2036529 (Cal. App.), as modified, May 21, 2021 (proof of acceptance of arbitration agreement found lacking during on-

boarding process where employer failed to authenticate electronic signature and HR manager's account of events ruled not credible).

- *Jules v. Andre Balazs Properties*, 2021 WL 2183098 (S.D.N.Y.) (fact that employer prepared and submitted arbitration agreement to employee sufficient to demonstrate intent to arbitrate even though only employee signed agreement).
- *Roark v. Keystate Homes*, 2021 WL 929163 (Ohio App.) (claims by builders against home developer and developer's representatives alleging various fraudulent acts, slander of title, malicious prosecution, and other claims were rooted in the contract between the parties containing a broad arbitration agreement and therefore were arbitrable).
- *Jacobowitz v. Experian Information Solutions*, 2021 WL 651160 (D. N.J.) (arbitration clause in credit card agreement that required arbitration of "claims and disputes relating to any Account or agreement you have or had with us" ruled not "so broad and unacceptable that no reasonable consumer would agree to it, especially given its similarity to language in arbitration agreements that have been upheld as valid in this District recently.").
- *West Virginia Department of Health and Human Resources v. Denise,* 2021 WL 2217488 (W. Va.) (statutory discrimination claims against third party to which consultant assigned not subject to arbitration where arbitration provision in consulting agreement specifically limited to disputes between consultant and consulting company that employer her).
- *Arredondo v. SNH SE Ashley River Tenant*, 856 S.E.2d 550 (S. Car. 2021) (general durable power of attorney and healthcare power of attorney did not confer authority on agent for resident of assisted living facility to enter into binding arbitration agreement where agreement to arbitrate was not a prerequisite for admission to the facility and the language of the power of attorney did not support such authority).
- *Stafford v. Rite Aid Corp.*, 2021 WL 2024511 (9th Cir.) (customer class action against pharmacy alleging fraudulently inflated prescription price is not subject to third parties' arbitration agreement where customers' claims were based on the common law and not any contractual rights).
- *Georgetown Home Owners Association v. Certain Underwriters at Lloyd's, London*, 2021 WL 359735 (M.D. La.) (arbitration agreement ruled not a contract of adhesion where it applied equally to both parties).
- *Phillips v. Weatherford US*, 2021 WL 1647761 (W.D. Tex.) (motion to compel denied where questions of fact with respect to receipt of arbitration agreement present based on plaintiff's submitted declaration denying receipt of the agreement coupled with another declaration and evidence of an irregularity in the mailing process).
- *Spliethoff Transport v. Phyto-Charter, Inc.*, 2021 WL 1947772 (S.D.N.Y.) (one sentence arbitration provision enforced where language found to be sufficiently "indicative of an agreement to arbitrate").

- *Maldonado v. Fast Auto Loans*, 60 Cal. App. 5th 710 (2021), review denied (April 28, 2021) ("poison pill" language providing that class action waiver is not severable from arbitration agreement is enforceable and motion to compel denied).
- *Hearn v. Comcast Cable Communications*, 992 F.3x 1209 (11th Cir. 2021) (dispute arising after termination of Comcast agreement subject to arbitration where subscription agreement expressly provided that "claims that arise after the expiration of this agreement" were subject to arbitration).
- *Baldwin v. Beeche*, 2021 WL 1377149 (E.D. Tex.) (fraudulent inducement claim going to entire agreement subject to arbitration where arbitration clause found to encompass claims regarding execution of agreement).
- *Miller v. Ewing Buick-Plano*, 2021 WL 1550810 (E.D. Tex.) (limited partnership entitled to enforce arbitration agreements signed as successor by predecessor company following statutory conversion from corporation to limited partnership).
- *Keeling v. Preferred Poultry Supply*, 2021 WL 1152915 (Mo. App.) (lack of mutuality in the parties' options to pursue other remedies outside of arbitration did not invalidate arbitration agreement as consideration was present for the agreement).

V. CHALLENGES TO ARBITRATOR OR FORUM

Challenge to Arbitrator Selection for Court. The collective bargaining agreement provided that grievances were to be submitted to a Licensed Personnel Board comprised of four members with management and the union each selecting two members. An arbitrator serves as "chair" of the Personnel Board. The parties ignored this provision of the collective bargaining agreement for many years and instead repeatedly selected an AAA labor arbitrator to resolve disputes. Management invoked the Personnel Board procedures over the union's objection. The union ultimately agreed to participate, and the Personnel Board was constituted. However, the two management board members scheduled an arbitration without the participation of the union board members who objected due to the union attorney's unavailability. The question as to who was to decide the issue of the validity of the arbitrator's appointment was raised – a court or the arbitrator. The district court ruled the arbitrator could decide the question; the D.C. Circuit reversed. The appellate court relied on the Supreme Court's instruction that such gateway issues turn "on whether the parties would likely have expected a court or instead an arbitrator to decide the issue." The court acknowledged that parties could delegate certain gateway issues to arbitrators for resolution. But the court found that was not the case here. The court noted that arbitration "essentially presupposes a consensually chosen arbitrator. In the event of a disagreement between the parties over whether an arbitrator was consensually chosen in accordance with the terms of their contract, it is unlikely that the parties would have expected resolution of the dispute by the disputed arbitrator herself." In making this point, the court posited a situation where each party has selected an arbitrator and dispute which one was

appropriately appointed. "If the validity of an arbitrator's appointment were deemed an issue for the arbitrator herself to resolve, which of the two disputed arbitrators would decide the matter?" For these reasons, the D.C. Circuit remanded the matter back to the district court to determine the question whether the arbitrator was validly appointed. *District No. 1 v. Liberty Maritime Corp.*, 2021 WL 2096367 (D.C.).

Case Shorts:

- *Georgetown Home Owners Association v. Certain Underwriters at Lloyd's, London*, 2021 WL 359735 (M.D. La.) (arbitrator selection process which permitted selection of "persons employed or engaged in a senior position in insurance underwriting or claims" ruled not biased in context of insurance coverage dispute where homeowner could select brokers or agents and need not select employees of insurance companies).
- *Baldwin v. Beeche*, 2021 WL 1377149 (E.D. Tex.) (challenge to forum selection provision requiring arbitration in Costa Rica rejected where the objecting party offered "no other reason for why Costa Rican arbitration presents unique difficulties, and conjecture on potential biases cannot be enough to render an arbitration venue unreasonable.").
- *Northrop Grumman Ship Systems v. Ministry of Defense*, 2021 WL 921298 (5th Cir.) (contractual forum selection clause designating Venezuela as site for arbitration deemed impractical due to unforeseen deterioration of Venezuelan court system resulting from "Bolivarian revolution" and systematic removal of judges).
- *Off-SPEC Solutions v. Salvador*, 2021 WL 1990796 (Idaho) (forum selection provision requiring arbitration in California violates Idaho public policy precluding arbitrations from being held out of state).

VI. CLASS, COLLECTIVE, AND GROUP FILINGS

Postmates and Couriers Withdraw Appeals in Mass Arbitration Cases. Couriers have filed over 5,000 individual arbitrations against Postmates which has objected to payment of the substantial amount of arbitration and administrative fees associated with those arbitrations. District courts in the Seventh and Ninth Circuits have rejected Postmates' arguments and ordered it to pay the requisite fees. Postmates appealed these findings. In April, plaintiff's counsel and Postmates agreed to the withdrawal of both appeals. Terms were not disclosed nor the reasons for the withdrawal of the appeals shared.

Case Shorts:

- *Donelson v. Ameriprise Financial Services*, 2021 WL 2231396 (8th Cir.) (motion to strike class action claims as part of motion to compel did not constitute substantial invocation of litigation machinery sufficient to constitute waiver of right to arbitrate).

VII. HEARING-RELATED ISSUES

Defaulting Party Cannot Seek Belated Adjournment. Bartlit Beck LLP, a nationally recognized law firm, initiated an arbitration against Respondent Kazuo Okada, its former client, after he refused to pay Bartlit Beck its $50 million success fee agreed to in the parties' engagement letter. After months of preliminary proceedings, a hearing before a panel of arbitrators was set for October 2019. However, late on the Friday preceding the Monday hearing, Okada informed the panel that he was refusing to attend because the Bartlit Beck engagement letter was invalid and unenforceable. In response, the Panel informed Okada that "his failure to show up for a duly and long noticed hearing [was] material[] and may result in the Panel finding him in default." Okada responded that he was "ill" and "unable to make the long journey to the USA." Respondent then directed his counsel to inform the panel that they were "not authorized to attend the arbitration because [Respondent] rejects the validity of the engagement letter." The Panel found Okada in default, proceeded to the merits, and entered judgment in Bartlit Beck's favor. Bartlit Beck moved to confirm the arbitral award in the Northern District of Illinois. Okada opposed, contending that the panel's refusal to postpone the hearing or to consider his proffered evidence denied him a fair hearing. The court flatly rejected Okada's position, noting that federal courts are not permitted to vacate arbitral decisions if a reasonable basis for the decision exists. Turning to the facts at hand, the court held that the panel had a reasonable basis to conclude that Okada "had no intention of participating" in the hearing. Moreover, the court found that the Panel's consideration of the record evidence before issuing its 59-page Award was in compliance with the rules governing default proceedings. Stating that Okada's "risky strategy was of debatable wisdom," the court concluded "but it is not debatable . . . that Respondent should now be bound to the results of the strategy he chose." The petition to confirm was granted. *Bartlit Beck LLP v. Okada*, 2021 WL 949980 (N.D. Ill.).

Case Shorts:

- *Smarter Tools v. Chongqing Senci Import and Export Trade Co.*, 2021 WL 766258 (S.D.N.Y.) (manifest disregard claim rejected where arbitrator was free to determine that evidence of oral agreement was not credible and therefore barely colorable justification for outcome existed).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Arbitrators "Bizarre" Behavior Warrants Vacatur. A labor arbitration was held on a Costco employee's grievance challenging his termination for allegedly selling drugs on premises. As described by the majority of a Ninth Circuit panel, this is when "matters took a bizarre turn." The arbitrator took it upon himself to make an unauthorized *ex parte* settlement proposal of $6,000 to the grievant and union and then rendered his decision in "a vague and bizarre e-mail" that he sent only to the union, finding for the grievant based

on the "Union's arguments as to double jeopardy." The e-mail ended "So that I can look at myself in the mirror, my resignation is effective today." The majority, while acknowledging that the standard for vacating awards is high, concluded that an award can be vacated, as here, where the proceedings "violate the rule of fundamental fairness." The majority pointed to the arbitrator's extensive post-hearing ex parte communications with the union and grievant, including an unauthorized settlement proposal and vague award which left Costco "with uncertainty as to the parameters of the remedy ordered by the arbitrator." The majority rejected the dissenter's contention that the award drew its essence from the collective bargaining agreement. "But there was no essence of the decision because there was no decision rendered and no reasoning proffered. For all we know, the arbitrator flipped a coin, consulted a Ouija Board, or threw darts at a dartboard to determine the outcome. He certainly gave no explanation to the parties of his decision despite a request from Costco that he do so." Finally, contrary to the dissenter, the majority found the record evidence supported clear bias on the part of the arbitrator, noting that "ex parte communications and an unauthorized settlement offer reflect consummate bias and lack of commitment to a transparent proceeding." *Costco Wholesale Corp. v. International Brotherhood of Teamsters*, 2021 WL 944206 (9th Cir.).

Vacatur Rejected Based on Arbitrator Taking Pain Medication. Repeatedly during a nine-day hearing the arbitrator let the parties know that due to a personal injury he was taking painkillers. It was alleged that the arbitrator stated that the drugs were so powerful that they "would knock a horse out." The parties did not complain during the hearing about the arbitrator's remarks but after issuance of the award the losing party sought to vacate the award alleging that the arbitrator was unable to "properly perceive the evidence" because of his announced use of painkillers. That party and counsel averred that the arbitrator acted confused at times and since the parties had made significant payments to the arbitrator there "was little choice but to finish the arbitration hearing and hope for the best." The court denied the motion to vacate. The court emphasized that "plaintiffs did not make a demand at any point to disqualify the arbitrator, nor did they even question the arbitrator's ability to conduct the hearing. Indeed, plaintiff's counsel made a strategic decision to 'finish the arbitration hearing and hope for the best.'" Under these circumstances the court concluded that plaintiffs forfeited any right they may have had to challenge the award on these grounds. In any event, the court's review of the hearing transcript and the award demonstrated that the arbitrator was fully engaged and validated the view that the arbitrator could "perceive the evidence and to apply the law." As to the arbitrator's remark that the painkillers could "put down a horse", the court concluded that it was "obviously humorous hyperbole that no one would have taken seriously (indeed, neither plaintiffs nor their attorneys took the comment seriously)." *Alper v. Rotella*, 63 Cal. App. 5th 1142 (2021, reh'g denied (May 27, 2021).

Vacatur Ordered Based on *Ex Parte* Comments to Counsel. The court here noted that arbitrator disclosure rules in California "are strict and unforgiving." The arbitrator in this case was recorded speaking on a break with counsel for the respondent hospital questioning how the *pro se* claimant could proceed without an attorney, adding that claimant "picked one of the toughest, factual cases I've ever dealt with" not to have counsel. The arbitrator ruled in favor of the hospital on causation grounds. The claimant moved to vacate the award, arguing that the arbitrator's "yukking it up" with the hospital's counsel showed disrespect for and bias against her. The trial court rejected claimant's assertion, but the court of appeals reversed. The court began with the premise that the arbitrator's *ex parte* communications with counsel were "unethical" and noted that under California law it is not necessary to show that the arbitrator was actually biased. The court held "a person aware of the *ex parte* communication could reasonably entertain a doubt that the arbitrator would be able to be impartial." In the court's view, the arbitrator's comments were evidence that he concluded that claimant was not an "effective advocate" for herself. "While this conclusion may not necessarily evince bias in and of itself, the arbitrator's decision to share his conclusion with [the hospital's] counsel certainly does. The arbitrator plainly felt a connection to [the hospital's] counsel, which made him comfortable enough to violate ethical rules and comment on [the hospital's] opponent." The court concluded that it did not matter whether "it was nervous laughter at the ethical transgression that had just occurred, disbelieving laughter that [the claimant] was so unable to represent herself, or derisive laughter about [the claimant's] perceived incompetence, it highlights the reasons why the ex parte communication was improper." *Grabowski v. Kaiser Foundation Health Plan*, 64 Cal. App.5th 67 (2021).

Attenuated Business Connection Fails to Constitute Evident Partiality. Arbitrator Osimetha was part of a panel that unanimously rejected claimant's claims against respondent UBS. Following the arbitration, claimant moved to vacate on evident partiality grounds, based on arbitrator Osimetha's failure to disclose certain connections during the arbitration between his employers and UBS. In particular, claimant cited arbitrator Osimetha's failure to disclose that: his employer performed undefined legal services for UBS at an indefinite time period; a UBS affiliate earned commissions for locating an insurance carrier for an entity for which arbitrator Osimetha served as General Counsel, and; UBS had less than 0.05% ownership interest in arbitrator Osimetha's employer for a brief period during the arbitration. The First Circuit made clear and that a court would "have to conclude" that the arbitrator was partial to grant vacatur on evident partiality grounds. The court held the connections between arbitrator Osimetha and UBS "whether viewed singly or in combination, are far too indirect and tenuous to demonstrate evident partiality." The court noted that arbitrator Osimetha did not participate in the undefined legal services performed for UBS by one of Osimetha's employers. Similarly, arbitrator Osimetha was not involved in the single engagement where his employer sought to secure an insurance carrier for a UBS subsidiary. With regard to UBS's ownership interest in a former employer of

arbitrator Osimetha, the court emphasized that "UBS's ownership interest in Osimetha's former employer is both indirect and nominal, representing less than 0.5% of [the employer's] shares. Specifically, UBS was among more than 500 institutional investors holding shares in another publicly traded company . . . and that company owned shares in [the employer]. It strains credulity to argue that this attenuate connection is more than trivial." In sum, the court concluded that arbitrator Osimetha's failure to disclose was not sufficient to warrant vacatur. *UBS Financial Services v. Asociación de Empleados*, 997 F.3d 15 (1st Cir. 2021).

Case Shorts:

- *HDI Global SE v. Phillips 66 Co.*, 840 Fed. App'x 647 (2d Cir. 2021) (manifest disregard claim rejected even if court disagreed with panel's reading of applicable insurance policy).
- *Copragri S.A. V. Agribusiness United DMCC*, 2021 WL 961751 (S.D.N.Y.) (award vacated on manifest disregard grounds where panel failed to analyze or address arbitrability and jurisdictional arguments raised by e-mail by foreign respondents).
- *Copragri S.A. V. Agribusiness United DMCC*, 2021 WL 961751 (S.D.N.Y.) (arbitration panel exceeded authority by proceeding under bills of lading to which respondent was not a signatory rather than the underlying sales agreement which governed the dispute).
- *Gold Group Resources v. Dynaresource De Mexico*, 994 F.3d 1181 (10th Cir. 2021) (FAA vacatur standards apply to foreign arbitration award subject to the New York Convention and may be invoked in motion to confirm award).
- *BST Ohio Corp. v. Wolfgang*, 2021 WL 2148497 (Ohio) (confirmation of award need not be delayed under Ohio law for the full 90 days allotted for motions to vacate; however "a party who has the right to move the court to vacate, modify, or correct must be given a reasonable and fair opportunity to do so and also must be given notice of the time frame in which the party must operate when that time period is less than the statutorily prescribed three months").
- *Compania de Inversiones Mercantiles v. Grupo Cementos de Chihuahua*, 2021 WL 22113193 (D. Colo.) (attempt to annul award years after it was issued and confirmed rejected despite ruling by Bolivian highest court years later setting aside award where court finds "proceeding without end" to be "repugnant").

IX. ADR – GENERAL

Proof of Mailing Arbitration Agreement. Defendant Bethpage moved to compel arbitration pursuant to an arbitration agreement it claimed it mailed to plaintiff. Plaintiff opposed the motion, arguing she did not recall receiving the agreement. She also challenged defendant's declarations in support of its motion on the grounds that they

lacked "the requisite first-hand knowledge of defendant's office practice." The court disagreed, finding the declarations, when read in conjunction with the declarants' testimony and plaintiff's documentary evidence, sufficiently established that the arbitration agreement was mailed to and received by plaintiff. The court emphasized that Bethpage's proof included intelligent barcodes addressed to plaintiff, supporting the view that these documents were in the system for processing. "Plaintiff does not say that she never received these documents, but rather, she simply states she does not remember one way or another. . .. Under New York law, therefore, Defendant is entitled to the presumption of receipt. Plaintiff's arguments to the contrary do not overcome the presumption." Bethpage's motion to compel was granted on these grounds and the matter was stayed. *Flipkowski v. Bethpage Federal Credit Union*, 2021 WL 826016 (E.D.N.Y.).

Case Shorts:

- *Immediato v. Postmates, Inc.*, 2021 WL 828381 (D. Mass.) (court orders AAA to administer Postmates' mass filing, even though the respondent previously failed to pay arbitration fees in unrelated cases but retained jurisdiction "should any future dispute arise over a failure of Postmates to pay the AAA the appropriate fees and costs for its services in this matter").

X. COLLECTIVE BARGAINING SETTING

Labor Award Upheld Despite Absence of Evidentiary Hearing. The grievance here related to the proper payments to be made to school bus drivers for religious holidays when they are not required to work. The hearing before the arbitrator lasted about two hours. Joint and party exhibits were placed in evidence without objection and opening statements were made. The arbitrator, however, declined to accept the comments of the union president on parol evidence grounds. The arbitrator after hearing the parties and accepting the exhibits determined that the disputed issues were matters of contract interpretation and concluded the hearing with no objections from either party. The arbitrator's award was in favor of the union and the bus company moved to vacate the award on numerous grounds including that the arbitrator failed to conduct an evidentiary hearing. The court rejected the motion and confirmed the award. The court pointed out that the arbitrator conducted an oral hearing and accepted documentary evidence from both sides. The court noted that to the extent the bus company was challenging the arbitrator's parol evidence ruling it was clear that arbitrators are not required to follow the rules of evidence applicable in court. The court noted that no objection was lodged when the arbitrator indicated that the dispute was one purely of contract interpretation. The court added that the arbitrator "then permitted both parties to submit post-hearing briefs, in which Petitioner could have asked for an evidentiary hearing, or explained that further evidence should be considered at such a hearing, but did not." The court concluded that the bus company failed to demonstrate

that it was denied a fundamentally fair hearing and confirmed the award. *Baumann Bus Co. v. Transportation Workers Union of America*, 2021 WL 1091712 (E.D.N.Y.).

Case Shorts:

- *Baker v. Ironworkers Local 25*, 2021 WL 2177666 (6th Cir.) (benefit fund trustees must submit dispute first to "impartial umpire", thereby exhausting internal remedies, before bringing dispute to court).

XI. NEWS AND DEVELOPMENTS

Supreme Court Grants *Certiorari* in Two Important Arbitration Matters. The Supreme Court granted *certiorari* in two cases raising important issues in the arbitration field. In *Servotronics v. Rolls Royce*, the Supreme Court is being asked to determine whether Section 1782 allows federal courts to order discovery in the United States for private commercial arbitrations abroad. The federal courts of appeals have split on this issue. For example, the Fourth Circuit concluded that an arbitration before the Chartered Institute of Arbitrators could be considered an entity acting within state authority since English arbitrations are sanctioned and regulated by the government and its courts. In contrast, the Seventh Circuit concluded that a "foreign tribunal" for purposes of Section 1782 is limited to governmental, administrative, or quasi-governmental tribunals operating under a foreign countries' practices and procedures.

In the second case, *Badgerow v. Walters*, the Supreme Court agreed to determine whether federal courts have subject matter jurisdiction to confirm or vacate arbitration awards where the only basis for jurisdiction is the underlying dispute involving a federal question. The issue to be resolved here is whether a federal court may "look through" the petition to see if the underlying subject matter of the arbitration award resolves a federal question and, if the answer is yes, whether jurisdiction has been established.

Bill in New York Legislature Will Require Greater Arbitrator Disclosures. A bill is pending in the New York State legislature that would greatly expand arbitrators' disclosure obligations. Required disclosures would include the outcomes of prior arbitrations and any existing or past relationships with the parties, counsel, or other arbitrators. Challenges to service by the arbitrator making the disclosure or based on an arbitrator's failure to make the requisite disclosure may serve later as grounds to vacate. The bill would also prohibit enforcement of any pre-dispute employment or consumer arbitrations.

Amazon No Longer Requiring Consumers to Waive Class Actions and Arbitrate Disputes. Amazon, along with many other retailers, included in its standard Terms of Service a waiver of class actions coupled with a requirement to arbitrate claims. Without any fanfare, Amazon recently modified its Terms of Service to eliminate both requirements and has promptly been required to defend itself against various class actions brought in

court. Under the revised Terms of Service, claims against Amazon can be brought in federal or state courts near Amazon's headquarters in the state of Washington.

FINRA Reminds Members of Arbitration Requirements. FINRA recently reminded member firms that FINRA Rule 2268 sets minimum disclosure and other requirements that must be followed. In particular, FINRA reminded member firms that arbitration provisions in customer agreements cannot restrict the location of arbitration hearings, change FINRA's six-year statute of limitations, limit a customer's right to pursue class actions in court, or mandate indemnification or hold harmless provisions that limit a customer's ability to bring a claim against a member firm.

ABA Endorses B2B Arbitrations. The ABA House of Delegates approved a resolution supporting the "use of arbitration of business-to-business disputes, both domestically and internationally, as an efficient and economical method of dispute resolution." The Report supporting the Resolution emphasized the benefits of arbitration, including its speed, economy, the presence of knowledgeable decisionmakers, the privacy and finality of an arbitration award, and the parties' control over the selection of a forum and arbitrator. The resolution also emphasized the public benefit of the arbitration of business disputes including the ability to save judicial time and resources and reduce court backlogs.

The Resolution limits its endorsement to commercial disputes and does not address the arbitration of consumer or employee disputes.

Proposed Federal Legislation Would Overturn *Epic Systems*. A bill is pending in Congress that would, among other things, overturn the Supreme Court ruling in *Epic Systems*. The PRO Act would make it an unfair labor practice to require employees to waive their right to proceed on a class or collective basis. The proposed statute would bar employers from attempting to enforce "any agreement, express or implied, whereby prior to a dispute to which the agreement applies, an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee in any forum that, but for such agreement, is of competent jurisdiction."

XII. TABLE OF CASES

Cases