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AAA Case Summaries:
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I. JURISDICTIONAL ISSUES: GENERAL

Public Injunctive Relief Available in Individual Arbitrations. California's *McGill* rule provides that public injunctive relief can be obtained even where claims are brought on an individual plaintiff's behalf and not on behalf of the general public. It also bars arbitration provisions that prevent an individual from seeking public injunctive relief. The question for the Ninth Circuit here was whether an arbitration agreement that prevented class actions or the joinder of claims but authorized the arbitrator to award "all [injunctive] remedies available in an individual lawsuit" violated the *McGill* rule. The Ninth Circuit ruled that it did not and upheld the lower court's granting of a motion to compel. The court reasoned that "[p]ublic injunctive relief is available under California law in individual lawsuits – not just in private-attorney general suits." The court explained that under the *McGill* rule an individual seeking individual injunctive relief may still obtain broad injunctive relief affecting the general public and the arbitration agreement here allowed the arbitrator to award such broad injunctive relief. The court explained that "the *McGill* court explicitly rejected the notion that seeking public injunctive relief meant that a plaintiff was acting 'on behalf of the general public' – the quintessential act of the standing-to-sue private attorney general." The court acknowledged that "*McGill*'s reasoning – an individual requesting relief for the entire public is suing *only* on her own behalf – is peculiar" but concluded that it reflects California law and was binding on the court. As the arbitration agreement did not violate California law, the court concluded that it was enforceable. *DiCarlo v. MoneyLion, Inc.*, 2021 WL 647502 (9th Cir.). Cf. *Olson v. Lyft, Inc.*, 56 Cal. App.5th 862 (2020) (employer may not compel individual arbitration of PAGA claim as FAA did not preempt prior California Supreme Court decision barring arbitration of PAGA claims); *Aguirre v. Prudential Overall Supply*, 2020 WL 6268532 (Cal. App. 4th Dist.) (PAGA claim not subject to arbitration as state is real party in interest in this matter).

No Jurisdiction to Confirm Award. Petitioner OGI Group moved to confirm an arbitration award issued by the ICC in Paris, France against Oil Projects Company of the Ministry of Oil, Baghdad, Iraq ("SCOP"). The court declined to do so for want of personal jurisdiction and on improper venue grounds. On the personal jurisdiction issue, the court stated the general principle that "in an 'exceptional case,' a corporate defendant's operations in another forum 'may be so substantial and of such a nature as to render the corporation at home in that State.'" Making such a determination "calls for an appraisal of a corporation's activities in their entirety." OGI argued that SCOP should be deemed "at home" because "Iraq, through the Ministry of Oil, exports significant quantities of petroleum and petroleum products to the United States." The court disagreed, finding that "Petitioner cannot exploit Iraq's composite contacts with the United States to manufacture general jurisdiction over SCOP." The court further found that OGI offered no factual allegations of SCOP's activities outside the United States that would enable the court to evaluate the significance of the company's

presence within the United States. The court concluded "without evidence of the magnitude of SCOP's contacts outside the jurisdiction, this court is unable to conclude that SCOP is at home in the United States. It would therefore be inconsistent with the limits of due process for this court to exercise general jurisdiction over SCOP." *OGI Group Corp. v. Oil Projects Company of Ministry of Oil*, 2020 WL 6342886 (D.D.C.).

Case Shorts:

- *Gilbert v. Indeed, Inc.*, 2021 WL 169111 (S.D.N.Y.) (New York statute barring arbitration of statutory discrimination claims preempted by FAA as Congress "withdrew from the states the power to adopt employment laws and to exempt from arbitration the resolution of disputes based on those laws").
- *United States v. Miraca Life Sciences, Inc.*, 983 F. 3d 885 (6th Cir. 2020) (appellate court lacks jurisdiction to review denial of motion to dismiss complaint in favor of arbitration as FAA only allows appeal for a motion to compel or to stay arbitration).
- *Gonzalez v. Lyft, Inc.*, 2021 WL 303024 (D. N.J.) (discovery related to arbitrability issue ordered where party introduced facts that placed arbitrability in dispute).
- *Barba v. Goldline, Inc.*, 2020 WL 6736169 (Cal. App. 2d Dist.) (trial court must hold evidentiary hearing rather than merely rely on allegations in complaint before considering the claim that employee was fraudulently induced into signing arbitration agreement).
- *ADT v. Richmond*, 2021 WL 129150 (N.D. Tex.) (federal court lacks jurisdiction to address motion to compel under FAA where, by "looking through" to the underlying action, it determined that complete diversity was lacking).
- *Sheppard v. Staffmark Investment*, 2021 WL 690260 (N.D. Cal.) (mail sorter did not "actually transport packages" for purposes of the FAA's transportation exemption and, therefore, must arbitrate her putative wage and hour class claims).
- *O'Shea v. Maplebear, Inc.*, 2020 WL 7490371 (N.D. Ill.) (exemption for transportation workers under the FAA does not apply to grocery store shoppers as use of interstate internet communications to place orders did not constitute the active engagement in moving goods across state lines required for the exemption to apply).
- *1010 Common, LLC v. Certain Underwriters at Lloyd's, London*, 2020 WL 7342752 (E.D. La.) (general provision providing that foreign entity submits to the jurisdiction of United States courts ruled as not overriding valid arbitration agreement).
- *Young v. Grand Canyon University*, 980 F.3d 814 (11th Cir. 2020) (arbitration of student's fraud claim barred by Department of Education regulation prohibiting enforcement of pre-dispute arbitration agreements by universities that accept federal student loan money).

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

Pre-Litigation Communications Not Sufficient to Constitute Waiver of Arbitration. The parties' agreement provided that arbitration is to follow if "either party shall notify the other that any matter is to be determined by arbitration." One party, Oro, notified the other party, Borror, that it planned "to proceed directly to litigation" but left the door open to arbitration if Borror preferred. Borror responded by initiating litigation, to which Oro responded by moving to compel arbitration. The district court ruled that Oro's pre-litigation communications served to waive arbitration; the Sixth Circuit reversed. The appellate court opined that pre-litigation correspondence are often more "rhetorical art than legal science" which serves a variety of purposes including articulating a party's concerns foreshadowing litigation or providing a path to resolution. The Sixth Circuit concluded that Oro's actions were not "completely inconsistent" with arbitration and indeed suggest that arbitration was an option it would consider. The court reasoned that to give pre-litigation communications the same legal force as would be assigned to actions in the context of the litigation "would morph the routine party-to-party letter into one laden with dramatic legal consequences." In any event, the court found no material prejudice to Borror by Oro's actions. For these reasons, the Sixth Circuit reversed the district court's finding that Oro waived its right to arbitration. *Borror Property Management, LLC v. Oro Karric,* 979 F.3d 491 (6th Cir. 2020). See also *Intuniv Antitrust Litigation*, 2021 WL 517386 (D. Mass.) (waiver claim rejected where party did not invoke litigation machinery for improper purpose or to gain strategic advantage and did so before it had a basis for knowing of existence of arbitration agreement).

Employer Found to Have Waived Arbitration Right. Drivers brought a putative wage and hour class action against their employer. The employer asserted arbitration as an affirmative defense but did not move to compel arbitration for over two years. During that time, the employer: twice represented to the court that it did not intend to arbitrate these claims; agreed to class-wide discovery; engaged in class-wide mediation, and; participated in class-wide notice process. As pointed out by the appellate court, "defendant only filed its motion to compel arbitration after it failed to settle the class-wide case and after it was served with plaintiffs' motion to compel discovery responses and for fees." Defendant's explanation for the delay was that it could not find the plaintiffs' executed arbitration agreements. The court rejected this argument, pointing out that defendant did not conduct a diligent search for the arbitration agreements and even after finding them acted inconsistently with its intent to arbitrate. For these reasons and upon a finding of prejudice to plaintiffs, the appellate court upheld the trial court's finding that defendant waived its right to arbitrate these claims. *Garcia v. Haralambos Beverage Co.*, 59 Cal. App.5th 534 (2021). See also S*abatelli v. Baylor Scott & White Health*, 832 F. App'x 843 (5th Cir. 2020) (right to arbitrate waived where plaintiff litigated discrimination claim in court and later brought an arbitration for breach of agreement where all claims were subject to arbitration).

Case Shorts:

- *Shirley v. FMC Techs., Inc.*, 2020 WL 5995695 (W.D. Tex.), report and recommendation adopted, 2020 WL 7055900 (W.D. Tex.) (incorporation of CPR Rules established clear and unmistakable evidence that the parties agreed to arbitrate arbitrability).
- *Revis v. Schwartz*, 192 A.D.3d 127 (N.Y. App. Div. 2020) (incorporation of AAA Rules into agreement under New York law constitutes clear delegation to arbitrator to decide gateway issues).
- *DNM Contracting v. Wells Fargo Bank*, 4:2020cv01790 (S.D. Tex. December 18, 2020) (question whether dispute is within the scope of the arbitration agreement is for the arbitrator to decide because "the Arbitration Agreement expressly incorporates AAA Rules" and the court found that this constitutes clear and unmistakable evidence that the parties intended to have the arbitrator decide arbitrability issues).
- *1199 SEIU United Healthcare Workers v. PSC Community Services*, 2021 WL 632188 (S.D.N.Y.) (the collective bargaining agreement's incorporation of the AAA Rules sufficient to constitute delegation of arbitrability question to the arbitrator).
- *Ownley v. Brunel Energy, Inc.*, 2020 WL 7342677 (S.D. Tex.) (claim that arbitration agreements were illusory is "a challenge to the validity, not the formation or existence, of the arbitration agreements" and therefore is for the arbitrator to decide where clear delegation of gateway issues is present).
- *Tizekker v. Bel-air Bay Club Ltd.*, 2021 WL 124495 (C.D. Cal.) (handbook language assigning to arbitrator "any issue or dispute involving any provision" of handbook served to delegate to arbitrator questions of alleged contractual ambiguities).
- *Park Plus v. Palisades of Towson*, 2021 WL 488167 (Md. App.) (arbitration compelled on contract claims outside of statute of limitations where parties "opted for a broad arbitration clause and imposed no hard deadlines on bringing claims" therefore leaving the question of timeliness of claims for arbitrator to decide).
- *In re: StockX Customer Data Security Breach Litigation*, 2020 WL 7645597 (E.D. Mich.) (unconscionability argument goes to the validity of the agreement as a whole and not specifically to the delegation clause or the formation of the agreement and therefore it is for the arbitrator to resolve).
- *Sengebush v. House Values Real Estate School*, 2021 WL 343435 (N.J. App.) (statutory civil rights claims waived by language requiring "all" disputes to be arbitrated; language expressly requiring waiver of statutory claims not required).
- *Altenhofen v. Energy Transfer Partners*, 2020 WL 7336082 (W.D. Pa.) (question whether client of staffing company may invoke arbitration clause in contract between staffing company and employee assigned to it is for arbitrator to decide).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Arbitration Selection Process Not Substantively Unconscionable. A vision care insurer terminated an optometrist's network agreement. The optometrist challenged the determination through an internal peer review process. After his claim was denied, rather than go to arbitration, he challenged in court the internal dispute resolution process and arbitration mandate as unconscionable. The trial court rejected the optometrist's claims, and the California appellate court affirmed its holding. The optometrist argued, among other things, that the arbitrator selection process was substantively unconscionable. Under the insurer's process, it would nominate five arbitration candidates with "the requisite expertise and ready availability to ensure a fair arbitration." The arbitration candidates could not be "in direct economic competition" with the claimant and may not "stand to gain . . . direct financial benefit from the outcome of the arbitration." The parties could submit written objections to any candidate to the chair of the Quality Care Committee who then would rule on any such objection. Each party could strike two names from the list of five and the chair of the Quality Care Committee then chooses the arbitrator. The appellate court found that this process included "safeguards against a biased adjudicator" and met the "minimal levels of integrity" required. The court added that there was no evidence that the insurer "unilaterally selects the arbitrator without any specified parameters" and denied the optometrist's mandamus motion. *Epstein v. Vision Service Plan*, 56 Cal. App. 5th 223 (1st Dist. 2020), rev. denied (Jan. 27, 2021). See also *Gilbert v. Indeed, Inc.*, 2021 WL 169111 (S.D.N.Y.) (contractual provision requiring party initiating litigation in contravention of the requirement to arbitrate to be liable for resulting fees and costs incurred found not to be substantively unconscionable in context of statutory discrimination claim where employer waived problematic provision and plaintiff was not chilled in asserting her legal rights).

Failure to Determine Procedural Unconscionability Requires Remand. California requires a finding of both substantive and procedural unconscionability for the contract defense to be applied. Here, the trial court ruled that the arbitration agreement was substantively unconscionable. The appellate court agreed. Among the unfairly one-sided provisions was a very short limitations period and a burdensome pre-arbitration grievance procedure that lacked mutuality. The appellate court concluded, however, that the lower court erred by not also assessing whether procedural unconscionability was present. The case was remanded to the trial court to "determine whether the Agreement is procedurally unconscionable." The trial court was directed, once having made its determination, to apply the "sliding scale analysis" applicable to unconscionability claims, that is, the more substantively oppressive the contract terms are, the less procedural unconscionability is required and vice versa. The appellate court also instructed the lower court to "reevaluate the question of severability." *Tzovolos v. Worldwide Flight Services*, 2020 WL 7867313 (Cal. App.).

Case Shorts:

- *Gustave v. SBE ENT Holdings*, 2020 WL 5819847 (S.D. Fla.) (no procedural unconscionability found where non-English speaking employees signed the arbitration agreement which was written in English without asking the translator present to translate or asked for a translator if one was not present as it "was their burden to investigate the terms of the contract").
- *Gilbert v. Indeed, Inc.*, 2021 WL 169111 (S.D.N.Y.) (arbitration agreement requiring arbitration of statutory discrimination claims not substantively unconscionable under Texas law where the Supreme Court has ruled arbitration of statutory claims did not prevent a party from vindicating his or her rights).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Non-Signatories Not Bound by Arbitration Agreement. In an action for defective construction of a home, a Texas trial court denied the construction company's motion to compel arbitration. The court held that plaintiffs, who were subsequent owners of the home, were not bound by the arbitration agreement in the original construction contract because they were not signatories to it. The construction company appealed, asserting that the trial court abused its discretion. The Texas appellate court affirmed the lower court's ruling, rejecting the construction company's arguments that the theories of equitable estoppel and/or implied assumption applied to bind non-signatory plaintiffs to the arbitration agreement. As to equitable estoppel, the court found that plaintiffs did not seek any direct benefits from the construction contract because their "pleading does not refer to the original purchase agreement or seek to enforce its terms, nor does it allege liability that arises solely from the original purchase agreement or that must be determined by reference to it." The court further found that implied assumption was inapplicable because it only applies when a contract has been assigned from one party to another and there was no evidence that had happened here. Accordingly, the court held that plaintiffs were not bound to arbitrate their claims and the trial court did not abuse its discretion. *Taylor Morrison of Texas, Inc. v. Kohlmeyer*, 2020 WL 7213480 (Tex. App.). Cf. *Shelton v. Comcast Corp.*, 2021 WL 214303 (E.D. Pa.) (non-signatory required under equitable estoppel principles to arbitrate claims where he knowingly exploited the agreement by using the television and internet services provided under subscriber agreement which contained arbitration provision); *Revis v. Schwartz*, 192 A.D.3d 127 (N.Y. App. Div. 2020) (NFL player's wholly-owned corporation, although non-signatory to lawyers' representation agreement, must arbitrate claims under direct benefits/estoppel theory where corporation was seeking claims under representation agreement which contained an arbitration provision).

Non-Signatory May Not Invoke Arbitration. Plaintiff joined an on-line marketplace, OfferUp, which in turn partnered with defendant to establish users' identities through use of biometric data. Plaintiff filed a putative class action under Illinois' Biometric Information Privacy Act and defendant sought to invoke the arbitration agreement between plaintiff and OfferUp. The court denied defendant's motion to compel. While recognizing that non-signatories may be bound or invoke arbitration terms in certain circumstances, none of those applied here. The court rejected defendant's third-party claim because the language of the arbitration agreement made clear that only disputes between the parties were subject to arbitration and, therefore, defendant was not an "intended beneficiary" under the agreement. The court also found no support for defendant's equitable estoppel argument as no evidence of defendant's detrimental reliance on the arbitration provision between plaintiff and OfferUp was shown. Finally, the court ruled that defendant was not an agent of OfferUp for these purposes. The court emphasized that "companies routinely partner with one another to provide services to customers without acting as one other's agents. Absent further evidence to demonstrate a principal-agent relationship between OfferUp and Defendant, we cannot conclude that such a relationship exists." For these reasons, the court denied defendant, a non-signatory to the underlying contract containing the arbitration provision, the opportunity to benefit from the contracting parties' arbitration term. *Sosa v. Onfido, Inc.*, 2021 WL 38141 (N.D. Ill.). See also *Setty v. Sugandhalaya*, 986 F.3d 1139 (9th Cir. 2021) (non-signatories may not be compelled to arbitrate based on the arbitration provision in partnership agreement where ownership of trademarks at issue not addressed in partnership agreement, but rather were a function of prior use of the marks by the partnership). Cf. *Mozzachio v. Schanzer*, 188 A.D.3d 59 (N.Y. App. Div. 2020) (non-party president may compel arbitration of sexual harassment claim against him based on arbitration agreement between plaintiff and the company that the president leads); *Cabrales v. Midland Credit Management*, 2020 WL 6145110 (N.D. Tex.) (debt collection dispute found to be covered by arbitration provision in credit card account paperwork as without "a credit card agreement, there would be no credit account, and therefore no dispute over debt collection regarding the account"); *Green v. Mission Health Communities*, 2020 WL 6702866 (M.D. Tenn.) (non-party may compel arbitration under Tennessee law where plaintiff alleged non-signatory was joint employer and jointly engaged in wrongful conduct alleged in the demand).

Hybrid Browsewrap Agreement Failed to Provide Inquiry Notice. An on-line purchaser clicked "complete purchase", and defendant publishing company argued that this was sufficient to bind the plaintiff to the website's terms and conditions and its arbitration provision. The district court rejected defendant's argument and denied its motion to compel arbitration. The court noted that the alleged acceptance of the site's terms and conditions, a box that was pre-checked, did not require the user to actually check the box to acknowledge the user's acceptance of those terms and conditions. Further, "the design and content of the checkout process distracts users from recognizing the existence of, and the

need to review, the Terms and Conditions, and the hyperlink was not conspicuous enough to put Plaintiff on inquiry notice." From this, the court found no evidence that the purchaser received actual notice of the terms and conditions. *Shultz v. TTAC Publishing*, 2020 WL 6937818 (N.D. Cal.). Cf. *McLane v. Goplus Corp.*, 2021 WL 97685 (Cal. App.) (on-line retailer's arbitration agreement enforced where it used "clear, conspicuous language" in a three-paragraph document "with unambiguous contractual terms"); *Hansen v. Ticketmaster Entertainment*, 2020 WL 7319358 (N.D. Cal.) (arbitration compelled where the sign-in page for modified clickwrap agreement was relatively uncluttered, sign-in box was prominently featured, and user was informed that continuing through site constituted acceptance of terms and conditions which included obligation to arbitrate).

Insufficient Proof That Plaintiff Received Arbitration Agreement. Plaintiff initiated a lawsuit against nine banking and debt collection institutions alleging violations of the Fair Credit Reporting Act. One of the defendants, First Premier Corp. ("FPC") moved to compel arbitration, asserting that the claims were governed by an arbitration clause contained in the underlying credit card agreement. Plaintiff opposed, arguing FPC failed to demonstrate that it sent her the agreement. The central issue before the court was whether the parties agreed to arbitrate the dispute. FPC submitted a declaration of one of its employees with "personal knowledge of the general business practices of [FPC] with respect to its credit card accounts." The declaration provided that FPC directed its vendor to mail the credit card and agreement to plaintiff. However, the court found this insufficient to show that the agreement was actually mailed. The court advised that FPC could have overcome this evidentiary lapse in several ways including, for example, by submitting a declaration of the vendor's ordinary business practices in carrying out FPC's instructions or a business record showing the agreement had been mailed. Because no such evidence was submitted, the court found that "a key link is missing from the logical chain that would permit the inference that plaintiff was mailed the credit card agreement." Accordingly, the court held that FPC failed to establish plaintiff received the agreement and assented to its terms. FPC's motion to compel arbitration was therefore denied. *Proctor v. First Premier Corp.*, 2021 WL 131447 (D.C. Cir.). See also *Gilbert v. I. C. System, Inc.*, 2021 WL 292852 (N.D. Ill.) (corporate declaration in support of claim that Sprint customer agreed to website's terms and conditions ruled inadequate to satisfy "the necessary fact-intensive inquiry to determine" assent where it was "devoid of any facts regarding how or when" plaintiff received the terms and conditions or how he was made aware of them).

Sufficient Proof of Electronic Offer of Arbitration Tendered. What proof is an employer required to proffer to establish that the employee received an e-mail implementing a dispute resolution program? In this case, Morgan Stanley established that: the e-mail was sent; no out-of-office reply e-mail issued; the employee sent emails within minutes of receipt of the relevant e-mail, and; the metadata associated with the e-mail marked it as read. The trial court on this record granted Morgan Stanley's motion to compel and the appellate court affirmed. The court noted that an employer need not negotiate individually

with each of its employees to establish a company-wide arbitration program but rather "the policy may be effectuated through a signature or other explicit waiver of rights." The court rejected plaintiff's argument that she did not recall receiving or reading the e-mail. The court noted that the arbitration obligation was not unilaterally imposed because plaintiff was offered the opportunity to opt-out and failed to do so. In sum, the court found the employer's presentation of "objective evidence that she received the e-mail" was sufficient proof to compel arbitration in this case. *Jasicki v. MorganStanley SmithBarney, LLC*, 2021 WL 162004 (N.J. App.). See also *Biermann v. Comcast Cable*, 2020 WL 6870824 (N.D. Ill.) (employee's silence following receipt by mail and e-mail of employer's new dispute resolution program requiring arbitration deemed acceptance of employer's offer); *Plazas Rocha v. Telemundo Network Group*, 2020 WL 6679190 (S.D. Fla.) (employee's acknowledgement of new hire documents and commencement of employment constitutes acceptance of obligation to arbitrate claims under Florida law).

Failure to Sign Subsequent Agreement Did Not Nullify Prior Arbitration Agreement. Plaintiff signed a confidentiality agreement with her employer Indeed which included an arbitration agreement. She also signed subsequent agreements on an annual basis until 2020 when she refused to sign the latest version. Plaintiff, who had been raped and repeatedly sexually harassed on the job, brought various civil claims against Indeed which in turn moved to compel arbitration. The court, in granting Indeed's motion, concluded that applicable Texas law did not permit a party to unilaterally repudiate an agreement. "In the event of a repudiation by Plaintiff, Indeed – as the non-breaching party – would have the option to rescind the Confidentiality Agreement or enforce it and hold Plaintiff to her obligation to arbitrate. The contract would not cease to exist." Moreover, the contractual language here made clear that each of the agreements that plaintiff signed remained in effect unless both parties agreed in writing to modify their agreement. For these reasons, plaintiff's claims were ruled subject to arbitration. *Gilbert v. Indeed, Inc.*, 2021 WL 169111 (S.D.N.Y.). Cf. *Gustave v. SBE ENT Holdings*, 2020 WL 5819847 (S.D. Fla.) (subsequent handbook which provided that employee may, but is not required to, arbitrate claims and also stated it was not a binding contract did not supersede earlier handbook which made arbitration mandatory).

Arbitration Agreement Signed by Minor Not Enforceable. Plaintiff started working at a restaurant when she was 16 years old at which time she signed the restaurant's arbitration agreement. She sued the restaurant for harassment and wage and hour violations when she was 18, and the restaurant moved to compel arbitration. The California trial court denied the motion and the appellate court affirmed. The court rejected the restaurant's argument that the plaintiff ratified the arbitration agreement by continuing to work after she turned 18. The court emphasized that the restaurant did not alert the plaintiff that her continued employment would constitute ratification of the arbitration agreement. Further, plaintiff's continued employment for four months after turning 18 did not waive her right under the California Family Code § 6710 to disaffirm the agreement. The court concluded that plaintiff

disaffirmed the agreement under California law by filing a lawsuit approximately four months after resigning her employment soon after turning 18. *Coughenour v. Del Taco*, 57 Cal. App. 5th 740 (4th Dist.).

No Mutual Assent Where Employer Used Coercion and Intimidation Tactics. A New Jersey superior court denied employer's motion to compel arbitration on the grounds that the circumstances surrounding plaintiff's execution of the arbitration agreement were "rushed and sudden" and did not support a finding of mutual assent. Central to the court's holding was evidence showing that when plaintiff was directed to sign the agreement, her employer "sat opposite her, handed her papers to sign, and pointed to where she should sign and initial . . . At no time did [employer] indicate plaintiff could take the papers home for review and return with the signed documents the next day. Plaintiff explained she was rushed during her signing of the documents . . . and felt compelled to sign the documents 'to keep her job and get paid.'" The appellate court affirmed, stating "based on our review of the record developed during the plenary hearing, the absence of the conclusive presumption of assent, defendant's failure to present any contradictory evidence, and the judge's credibility findings, we are satisfied the circumstances surrounding plaintiff's execution of the Agreement did not present a clear expression of an explicit and voluntary agreement to forego the court system and be bound by arbitration." *Imperato v. Medwell*, 2020 WL 6127127 (N.J. Super. Ct).

Constructive Fraud Bars Enforcement of Agreement. Plaintiff sued David Stanley Chevrolet ("DSC") for damages arising out of his purchase of a vehicle from the dealer. DSC moved to compel arbitration, relying on an arbitration clause in the purchase agreement. Plaintiff opposed, arguing the agreement to arbitrate was procured by fraud because the dealer's finance manager explained only some of the terms of the purchase agreement and other documents, such as price, financing, and the VIN number, but did not mention the arbitration clause contained therein. After an evidentiary hearing on the issue, the trial court found evidence supporting fraudulent inducement and denied the motion to compel. The appellate court vacated, finding the trial court erred in holding there was enough evidence to support fraudulent inducement. On further appeal, the Supreme Court of Oklahoma distinguished between actual and constructive fraud, clarifying that constructive fraud does not require an intent to deceive. Rather, "constructive fraud may be defined as any breach of a duty which, regardless of the actor's intent, gains an advantage by misleading another to his prejudice." Under the circumstances of the case, the court found that the representations of DSC's finance manager combined with the structure of the purchase agreement created a false impression that the purpose of Plaintiff's signature was only to verify the financial details of the sale. The court further found that plaintiff relied on these false impressions and was prejudiced thereby. The court held that the trial court order finding fraudulent inducement was fully supported by the evidence. The order of the appellate court was vacated, and the matter was remanded for further proceedings. *Sutton v. David Stanley Chevrolet*, 475 P.3d 847, as corrected (Okla. 2020). Cf. *More Roofing v.*

Scrivens, 2021 WL 413605 (E.D.N.Y.) (arbitration compelled where claims of fraud were not directed at the arbitration agreement itself or support the view that the agreement to arbitrate was fraudulently induced).

Case Shorts:

- *Altenhofen v. Southern Star Central Gas Pipeline*, 2020 WL 6877575 (W.D. Ky.) (non-party against whom overtime claim was filed can compel arbitration where the arbitration agreement between the employee and his direct employer was broad and covered all claims that relate to employee's employment).
- *Fein v. Berger*, 2020 WL 7315494 (N.Y. Sup. N.Y. Cty.) (arbitration provision providing that either party "may submit to final binding arbitration" before rabbi is permissive only to extent of authorizing either party to seek arbitration, but once invoked by either party "arbitration is mandatory" and therefore arbitration was compelled).
- *Mexicanos v. Executive MFE Aviation*, 2021 WL 49905 (Fla. App.) (trial court erred by deciding claims that were not arbitrable before ruling on threshold issue whether non-signatory parties were subject to arbitration, in which case whether claims are arbitrable would be for the arbitrator to decide).
- *Executive Strategies Corp v. Sabre Industries, Inc.*, 2020 WL 7213002 (W.D. La.) (arbitration agreement and forum selection clause not in conflict and can be reconciled where parties intended forum selection clause to apply to non-arbitrable claims that must be litigated in court).
- *Patterson v. American Income Life Insurance*, 2020 WL 6387555 (E.D. Ark.) (fact that agreement did not expressly provide that arbitration provisions survived expiration of agreement not dispositive because "contractual obligations other than the obligation to arbitrate a dispute cease, in the ordinary course, upon termination of the contract").
- *Wilcosky v. Amazon.com, Inc.*, 2021 WL 410705 (N.D. Ill.) (proof that consumer purchased products from Amazon website was sufficient to establish acceptance of conditions of use which is required before purchase can be effectuated).
- *Kalenga v. Irving Holdings*, 2020 WL 7496208 (N.D. Tex.) (employer manifested agreement to arbitrate despite not having signed the arbitration agreement where it drafted the agreement, required, and retained employees' acknowledgment, and moved to compel arbitration).
- *Fils v. Internet Referral Services*, 2020 WL 7770935 (S.D. Tex.) (arbitration agreement enforceable under Illinois law even where party may retroactively seek to enforce its right to unilaterally modify the agreement's terms).
- *Kalenga v. Irving Holdings*, 2020 WL 7496208 (N.D. Tex.) (post-suit arbitration agreement enforceable where no evidence of overt misleading or coercive acts present).

- *In re: Rotavirus Vaccines Antitrust Litigation*, 2020 WL 6828123 (E.D. Pa.) (medical practices which authorized physician buying groups to negotiate vaccine prices with pharmaceutical companies were not put on notice of arbitration requirement between buying groups and pharmaceutical companies and therefore were not bound to arbitrate class action allegations that vaccines were overpriced).
- *Robertson v. Intratek Computer, Inc.*, 976 F. 3d 575 (5th Cir. 2020) (arbitration agreement applicable to "any employee" binds former employee, as evidenced by agreement's reference to unemployment benefits which would not have been necessary had it applied only to current employees).
- *Barz Adventures v. Patrick*, 2020 WL 6342951 (E.D. Tex.) (arbitration agreement providing that disputes "shall" be subject to arbitration makes mandatory the arbitration of disputes seeking legal remedies; however, equitable remedies section of same agreement which provides that court injunctions are available along with remedies renders injunctive relief claims permissive under arbitration provisions, that is, parties "could pursue injunctive relief either in arbitration or litigation").
- *Stover v. Experian Holdings*, 978 F. 3d 1082 (9th Cir. 2020) (later amendment to arbitration agreement not enforceable as "for changes in terms to be binding pursuant to a change-of-terms provision in the original contract, both parties to the contract – not just a drafting party – must have notice of the change in contract terms").
- *Gustave v. SBE ENT Holdings*, 2020 WL 5819847 (S.D. Fla.) (employer's dispute resolution program which asked employee to "please" discuss concerns with supervisor before pursuing claims "is so non-committal that it cannot be analogized to the ironclad condition precedent language" in prior cases finding failure to satisfy condition precedent).
- *Orozco v. JPMorgan Chase Bank*, 2020 WL 6044332 (S.D. Tex.) (offer letters providing that employment was subject to accompanying arbitration agreement satisfied employer's burden of demonstrating notice of arbitration obligation).
- *Rhyan v. DW Direct, Inc.*, 2020 WL 6130743 (S.D. Tex.) (arbitration agreement that provides employer with unilateral right to modify it renders the agreement illusory and unenforceable).
- *Hensiek v. Board of Directors of Casino Queen Holding Co.*, 2021 WL 267655 (S.D. Ill.) (motion to compel denied as consideration was lacking for unilateral modification of stock ownership plan to include arbitration provision which benefited principally defendants who "took advantages for themselves while imposing corresponding disadvantages on the Plaintiffs by stripping from them certain rights they otherwise enjoyed under the Plan").

V. CHALLENGES TO ARBITRATOR OR FORUM

FAA Does Not Authorize Court to Remove Arbitrator before Arbitration. Plaintiffs challenged defendants' appointed arbitrator as being biased. After all, he was also defendants' hired expert. Plaintiffs moved to disqualify the arbitrator before the commencement of the arbitration. The court concluded that it did not have the authority to do so under the Federal Arbitration Act. Under prevailing law, according to the court, this determination was best left to the individual arbitrator until after the award was issued. The court noted that to allow such pre-arbitration challenges would cause undue delay and would be counter to the FAA's goal of quick resolution of disputes. The court added that while New York law does allow pre-arbitration challenges to the selection of arbitrators where there is a real possibility of injustice based on such grounds as dishonesty, evident partiality, or corruption, "New York courts recognize that such power should not be utilized unless there is 'a real possibility that injustice will result.' Removal is not warranted simply because an arbitrator has a 'fully known relationship' with one of the parties." The reason for this is that "New York courts have not required appointed arbitrators to be neutral." Rather, New York law recognizes that the selection of an arbitrator is a valuable contractual right and provides assurance that that party's perspective will be heard. For these reasons, the court denied plaintiffs' application to remove and disqualify defendants' designated arbitrator. *Clean Pro Carpet and Upholstery Care v. Upper Pontalba*, 2021 WL 638117 (E.D. La.).

Challenge to JAMS Arbitrator on Partiality Grounds Rejected. JAMS filed two amicus briefs in opposition to an earlier Ninth Circuit ruling vacating an award based on a finding that the arbitrator's failure to disclose his ownership interest in JAMS was non-trivial and could create a reasonable impression of bias. Upon remand to the district court, a party moved to remove the case from JAMS administration, arguing that the filing of the amicus briefs was proof that JAMS could not be impartial. The court rejected this argument. The court reasoned that it "would be highly speculative to argue that this position would affect an individual JAMS arbitrator's ability to neutrally consider" the parties' dispute. The court concluded that there was no basis to "take the drastic step of disqualifying every single JAMS arbitrator – even those with no ownership interest in the company." The court added that sufficient safeguards were present to maintain an impartial forum, noting that since JAMS encourages parties to select arbitrators before JAMS gets involved, the parties "are free to try to select an arbitrator with no interest in JAMS." *Monster Energy Co. v. City Beverages*, 2021 WL 650275 (C.D. Cal.).

Court Designates Substitute Arbitrator. The employer's arbitration provision simply stated that disputes are to be administered by the American Arbitration Association. Plaintiff filed an FLSA claim which was compelled into arbitration. The arbitrator, appointed under the AAA Rules, ordered the employer to pay the initial fee of $1,900. The employer refused, citing an indemnification provision that the employee signed, which the employer

argued applied here because the employee had signed a separation agreement and release which covered this claim in the employer's view. The AAA closed the case for nonpayment of the fee. The employer moved for the appointment of an arbitrator by the court. The court found that the references to the AAA and the arbitration agreement were not central to the parties' agreement "because it does not pervade the Agreement, but rather suggests an ancillary logistical concern." The court relied on the severability clause in the agreement in concluding that the reference to the AAA could be severed from the agreement due to the AAA's unavailability to adjudicate this case. The court concluded "because the choice of arbitral forum is not integral to the parties' Agreement and, even if it were enforceable, the invalid portion of the provision is severable from the rest of the Agreement, the Court concludes that the appointment of a substitute arbitrator pursuant to § 5 of the FAA is appropriate." *De Pombo v. Irinox North America, Inc.*, 2020 WL 6290153 (S.D. Fla.). Cf. *Allen v. Horter Investment Management*, 2020 WL 5814498 (S.D. Ohio.) (court refuses to appoint arbitrator were both parties are willing to arbitrate but cannot agree whether to arbitrate two cases separately or together and the AAA, which had refused to administer cases due to defendant's failure to comply with its rules, left the door open in the event defendant rectified its failures).

Case Shorts:

- *Fagan v. Warren Averett Companies*, 2020 WL 6252771 (Ala.) (employee can proceed in court with claims against employer where employer failed to pay fees as ordered by the AAA under its Commercial Rules).
- *Gertner v. Manorhaven Partners*, 2020 WL 6363695 (N.Y. Sup. Ct. N.Y. Cty.) (employer ordered to pay outstanding AAA's fees, concluding that defendant "cannot stymie the employment agreement and its arbitration provision by refusing to pay the fees required by the AAA").
- *Goldberg v. Bruderman Brothers*, 2020 WL 6161619 (N.Y. Sup. Ct. N.Y. Cty.) (forum selection clause selecting JAMS as arbitral forum supersedes regulation designating FINRA as arbitration forum).

VI. CLASS, COLLECTIVE, AND GROUP FILINGS

CPR's Mass Claims Protocol Ruled Not Biased. Over 4000 delivery drivers filed consent forms seeking to join a FLSA collective action pending before a California district court. Doordash moved to compel arbitration. A certain number of those who signed consent forms agreed to proceed under CPR's recently issued Mass Claims Protocol (the "Protocol"). Under the Protocol, any time 30 or more nearly identical arbitration demands are filed in close proximity with each other certain procedures are to be allowed. Included in those procedures is the random selection of ten cases to serve as "test cases". The results of those ten cases will then be given to a mediator who will try to resolve the remaining cases. If the mediation fails, parties may opt-out of the arbitration process and proceed with their claims

in court. Plaintiffs here argued that Doordash's counsel, Gibson Dunn, played a role in the development of the Protocol and for this reason claims under the Protocol will not be heard by a fair and impartial forum. The court rejected Doordash's argument. The court noted that in fact CPR worked with experts in the field in developing the Protocol and Gibson Dunn did not control the process. The court added that the Protocol "is offered to the market – i.e., it is not a one-off protocol tailored to Doordash but is openly available to other companies." The court stated that at least "as a facial matter, the Court is hard pressed to see any such catering or favoritism" to Gibson Dunn's client; rather, the court opined, "the terms of the Mass-Claims Protocol appear fair." The court emphasized that the test cases were selected randomly, the claimants have a greater role in selecting the arbitrators, and the employer pays for the mediation. Finally, and most importantly according to the court, "after the mediation process, a claimant can choose to opt out of the arbitration process and go back to court" an option generally not available otherwise to claimants in the mass claims setting. The court concluded therefore the "Protocol is not so biased that it negates the agreement to arbitrate." *McGrath v. Doordash, Inc.,* 2020 WL 6526129, reconsideration denied, 2020 WL 7227197 (N.D. Cal.).

Employees Subject to Arbitration Not Similarly-Situated for Purposes of FLSA. Plaintiffs sought to certify an FLSA collective action of 12,000 employees. Approximately 9,800 of those employees signed arbitration agreements; the named plaintiff did not. The court concluded that the employees who signed arbitration agreements were not similarly situated to the named plaintiff for purposes of certifying the FLSA collective action. The court agreed with the employer that the ancillary litigation "attendant upon the need to address the validity and enforceability of up to 9,800 signed arbitration agreements or arbitration acknowledgement forms would overwhelm the court, render it impossible to address the merits of the claims of those individuals who have not signed arbitration agreements and who may proceed in court, and would 'fatally undermine both fairness and judicial efficiency.'" Moreover, the court reasoned that the employees who signed the arbitration agreements "would have a relatively low likelihood of succeeding in invalidating the agreement." For those reasons, the court concluded that employees who signed arbitration agreements are not similarly situated to those employees who are not subject to arbitration and are therefore excluded from the collective." *Hammond v. Floor and Decor Outlets of America*, 2020 WL 6459641 (M.D. Tenn.).

Case Shorts:

- *Ortiz v. Trinidad Drilling, LLC*, 2020 WL 7055903 (W.D. Tex.) (notice of collective action under FLSA need not be sent to those employees who are subject to an arbitration agreement).

VII. HEARING-RELATED ISSUES

Emergency Arbitrator's Order Subject to Confirmation by Court. The emergency arbitrator here ordered injunctive relief, and the district court confirmed the order. In doing so, the court rejected the claim that the award was not final and subject to confirmation. The court reasoned that confirmation of the interim order was necessary to make final relief under a distribution agreement meaningful. In particular, the emergency arbitrator ordered a Pepsi vendor to abide by the terms of the parties' distribution agreement and cease efforts to sell to customers for whom Pepsi had exclusive distribution rights. The court rejected the vendor's argument that the emergency order recognized it was not final by acknowledging it remained in effect until a superseding order was issued by the panel to be selected by the parties. Rather, the court interpreted this provision as not precluding "confirmation of the Emergency Arbitrator's Order, which is designed to preserve the status quo pending adjudication of the parties' dispute by the arbitration panel." Rather, the court interpreted the emergency order as preserving the vendor's "right to seek relief from the panel without rendering the injunctive relief granted therein meaningless." For these reasons, the court confirmed the emergency arbitrator's order granting injunctive relief. *Vital Pharmaceuticals v. PepsiCo*, 2020 WL 7625226 (S.D. Fla.).

Arbitrator's Preliminary Award Ruled "Final". The parties to a collective bargaining agreement submitted to the arbitrator several jurisdictional and arbitrability issues in a class action grievance affecting more than 100,000 employees. Among the rulings made by the arbitrator was that a "mandatory" mediation of the dispute had been concluded, that the dispute was arbitrable, and that eight grievances with related pending state cases were excluded. Certain former employees sought to intervene in a motion to confirm the award, arguing among other things that the award was not final and therefore could not be confirmed. The court rejected this contention and confirmed the award. The court made clear that "the general test for finality depends on the arbitration agreement and whether the parties intended to 'resolve finally the issue submitted' to the arbitrator." Here, the court explained that the "party sought a decision by the Arbitrator on important issues on the scope of the arbitration, namely whether the arbitration included wage and hour claims for former union members, and whether the Arbitrator had jurisdiction to arbitrate those claims. Given the importance of those questions to the scope of the arbitration, the party sought a decision on those issues at the outset of the Arbitration." The court concluded that the collective bargaining agreement granted to the arbitrator the authority to rule on these issues and "it was the parties' intent for this Award to be final regarding the two questions that were decided." In the court's view, the award was "sufficiently final" to support its jurisdiction to confirm the award. *1199 SEIU United Healthcare Workers v. PSC Community Services*, 2021 WL 632188 (S.D.N.Y.).

Case Shorts:

- *Sullivan v. Feldman*, 2020 WL 7129879 (S.D. Tex.) (whether interim hearing conducted via Zoom from Louisiana which resulted in interim award was proper under forum selection clause requiring hearing to be conducted in Texas is for arbitrator to decide).
- *FSI Construction v. Martin*, 2021 WL 260218 (S.D. Tex.) (party challenging award bears burden of producing a complete record of the proceeding when seeking to vacate the award and record lacking hearing transcript here was not sufficient to support vacatur motion).
- *LTF Construction v. Cento Solutions*, 2020 WL 7211236 (S.D.N.Y.) (manifest disregard claim alleging due process violations rejected where alleged injuries were self-inflicted, e.g., belated adjournment request, failure to provide witness and exhibit lists, and failure to participate in final preliminary hearing or appear at the hearing itself).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Second Arbitration Enjoined as Collateral Attack on First. After entry of judgment confirming an arbitration award in favor of Gulf against Eni, Eni pursued a second arbitration. The second arbitration alleged different claims against Gulf but sought damages to redress the harm it suffered by the adverse award in the first arbitration. Gulf moved in Delaware's Court of Chancery for declaratory and injunctive relief to prevent the second arbitration. The Court of Chancery partially granted the motion and both parties appealed. The Delaware Supreme Court noted that the court doors are closed to a dispute once court review of an arbitration award under the FAA is finished. Some parties, the court explained, try to open a new door by filing a follow-on proceeding. "In the follow-on proceeding, the claims are changed but the goal is the same – trying to undo a loss in the prior arbitration award. Settled federal and state precedent recognizes these follow-on proceedings as improper end runs around the FAA's exclusive review process. In the words of those cases, they are improper collateral attacks on the earlier final award." The court concluded that the Court of Chancery erred by focusing on the nature of the claims in the second arbitration. Instead, it should have focused on "whether Eni sought through the Second Arbitration to, in effect, 'appeal' the Final Award outside the FAA's review process." Holding that this is precisely what Eni was trying to do, the case was remanded to the Chancery Court with instructions to modify its order to enjoin Eni from pursuing all claims in the second arbitration. *Gulf LNG Energy, LLC v. ENI USA Gas Marketing LLC*, 242 A.3d 575 (De. 2020).

Award Constitutes Judicial Record for Public Disclosure Purposes. Penn National filed an arbitration award under seal with a Pennsylvania district court as part of its motion to confirm. Everest Reinsurance, a non-party to the award, sought to unseal it pursuant to the

common-law right of access. The district court ordered the award unsealed and Penn National appealed. The Third Circuit reviewed the common-law right of access, stating that it applies to "judicial proceedings and records," permitting members of the public access to them. "To determine if the common-law right of access applies to a document, a court must first determine if the document is a 'judicial record' . . . A party opposing access to the judicial record can overcome the presumption by articulating a 'clearly defined and serious injury' that would result from the disclosure of the document. Third Circuit precedent provides that "the *filing* of a document gives rise to a presumptive right of public access, thus making the document a judicial record." Accordingly, the award, filed by Penn National as part of its motion to confirm, became a judicial record when it "[made] its way into the clerk's file." Penn National sought to overcome the presumption of public access by arguing that other reinsurers might choose to forego paying Penn National and contest their obligation to pay if they learned about the contents of the arbitration award. The Third Circuit was not convinced and held that the district court "did not abuse its discretion in asserting that no 'clearly defined' injury existed . . . because it could not 'determine how many possible relationships could be impacted, the amount of money that could be at stake, the types of actions other parties may pursue, or the likelihood that any such actions would be successful." The judgment of the district court was therefore affirmed. *Pennsylvania National Mutual Casualty Insurance Group v. New England Reinsurance Corp.*, 2020 WL 7663878 (3d Cir.).

Wrongful Discharge Award for At-Will Employee Confirmed. A Citigroup employee alleged that he was wrongfully discharged and was awarded almost four million dollars. Citigroup convinced the district court that the fact that the employee was employed on an at-will basis required vacatur of the award. The Eleventh Circuit reversed. The appellate court emphasized that its role in reviewing an arbitration award was extremely limited and that it must defer to the arbitrators no matter how incorrect it believes the award to be. The court explained that an "arbitration agreement is better thought of as a sort of choice-of-forum clause, and a motion to confirm an arbitration award is very nearly like asking a court to recognize and enforce the judgment of a different court." Here, the court found significant that countering the employee's at-will status was a provision in Citigroup's Arbitration Policy under it. The court postulated that the "arbitrators may have thought it implausible that the anti-retaliation provision was intended only as aspirational language". The court concluded, however, that the "legal merits of the dispute were the arbitrators' concern, not the district court's or ours". On this basis, the court reversed the district court and confirmed the award. *Gherardi v. Citigroup Global Markets*, 975 F. 3d 1232 (11th Cir. 2020).

Arbitrator Exceeded Authority Under California Law. California strongly disfavors contractual restraints on competition. A former employer sought to recover a substantial bonus payment to a former employee alleging that he violated his contractual confidentiality obligations by disclosing its clients and bonus formula in an arbitration

submission. The trial court confirmed the award, but the appellate court reversed. The court emphasized that the confidentiality provision was "strikingly broad" which the court found if read literally would preclude a former employee from using all information "usable in" the securities industry. The court concluded "the confidentiality provisions in the Employment Agreement on their face patently violate [California law that limits the enforcement of restrictive covenant]. Collectively, these overly restrictive provisions operate as a de facto non-compete provision; they plainly bar [plaintiff] in perpetuity from doing any work in the securities field, much less in his chosen profession of statistical arbitrage." The court rejected the employer's argument that voiding the confidentiality provision would strip it of its ability to protect its trade secrets, noting that its ruling "does not prevent [the employer] from enforcing a properly drawn confidentiality agreement which preserves an employee's right to compete after leaving [the employer's] employ." *Brown v. TGS Mgmt. Co., LLC*, 57 Cal. App. 5th 303 (2020), as modified on denial of reh'g (Nov. 12, 2020), review denied (Feb. 24, 2021).

Case Shorts:

- *Ferrand S.A.S. v. Mystique Brands LLC*, 2021 WL 119572 (S.D.N.Y.) (arbitrator's ruling that party which successfully defended against claim was the prevailing party under the agreement's prevailing party provision met "barely colorable justification" standard and was therefore enforceable).
- *Milberg v. Drawrah Ltd.*, 2021 WL 438896 (2d Cir.) (motion to vacate under FAA ruled untimely due to lack of diligence where notice to opposing counsel was served after the three-month filing period and after opposing counsel stated that it was not authorized to accept service).
- *Fava v. Morgan Stanley Smith Barney*, 2020 WL 6047834 (N.Y. Sup. Ct. N.Y. Cty.) (motion to vacate denied where party objected to FINRA's jurisdiction but fully participated in the arbitration and failed to seek a stay from the court).
- *FSI Construction v. Martin*, 2021 WL 260218 (S.D. Tex.) (absence of a hearing transcript "does not preclude enforcement [of an award], but precludes vacatur").
- *Hale v. Morgan Stanley Smith Barney*, 982 F.3d 996 (6th Cir. 2020) (plaintiff's monetary demand in arbitration, rather than amount awarded by arbitrator ($0), serves as basis for subject matter jurisdiction for purposes of motion to vacate).
- *FSI Construction v. Martin*, 2021 WL 260218 (S.D. Tex.) (claim that arbitrator exceeded her authority under Texas law did not constitute basis to vacate under the FAA).

IX. ADR – GENERAL

Heightened Standard Applies for Production of Private Mediation Documents. What must a non-party show to obtain discovery of materials from a private and confidential mediation? A New York district judge applied the same "heightened standard of need" to a private mediation as is applied by the Second Circuit to production of materials from a court-ordered mediation. In doing so, the court emphasized the importance of confidentiality to the mediation process. The court expressed the concern that "providing weaker protections to communications during a confidential private mediation than to communications during a court-sponsored mediation would discourage parties from agreeing to engage in private mediation." The court noted that private mediation may in many cases be preferable to court-ordered mediation because private mediators are paid and are generally highly experienced. "Incentivizing private mediations (or, to be more precise, not *disincentivizing* them) benefits not only the parties in such cases, but also the court system generally, both because it alleviates the burdens on court-sponsored mediation programs (which are often thinly staffed by unpaid volunteers) and because, when successful, it lightens the court's docket." The court acknowledged that parties in a court proceeding could turn to private mediation but pointed out that providing a lesser assurance of confidentiality to private mediation "would discourage what the parties did here, namely turning to mediation prior to, and as a potential substitute, for commencing litigation. That is, to secure a stronger assurance of confidentiality, parties who might otherwise have been able and willing to settle a dispute without burdening the courts might feel they have no choice but to file a lawsuit." Turning to the case at hand, the court refused to order production of the mediation materials. According to the court, "the relevant inquiry is whether the party seeking discovery can otherwise obtain the *information* in withheld documents, and here there is no question that Plaintiffs can (or already have)." *Accent Delight Int'l v. Sotheby's*, 2020 WL 7230728 (S.D.N.Y.).

Case Shorts:

- *Steamer v. Rinde*, 2021 WL 186493 (N.Y. Sup. N.Y. Cty.) (court requires parties to share cost of mediation which is condition precedent to arbitration even though agreement requires party invoking arbitration to bear its full cost, recognizing "the mutual benefit to both sides inherent in mediation as a means of negotiation toward the goal of consensual resolution and settlement of their dispute").
- *Sengebush v. House Values Real Estate School*, 2021 WL 343435 (N.J. App.) (trial court order compelling arbitration of statutory civil rights claim and dismissal of case vacated and remanded with order compelling mediation and arbitration under the parties' agreement as well as a stay of the court proceeding rather than dismissal).

X. COLLECTIVE BARGAINING SETTING

Case Shorts:

- *Union Pacific Railroad v. American Railway and Airway Supervisors' Association*, 2020 WL 7391894 (5th Cir.) (transportation safety regulation regarding drug testing did not establish public policy limiting arbitrator's authority to decide drug test's validity under personnel policy and therefore vacatur of labor award on public policy grounds reversed).
- *Communication Workers of America v. AT&T Mobility*, 2021 WL 409764 (N.D. Ga.) (court could decide whether employer violated collective bargaining agreement by not arbitrating issue of union representation as it could rule on breach of contract issue without deciding representation issue that belonged before NLRB).
- *1199 SEIU United Healthcare Workers v. PSC Community Services*, 2021 WL 632188 (S.D.N.Y.) (union, as exclusive bargaining agent, "had authority to enter into CBAs and subsequent agreements, on behalf of its bargaining unit members" and therefore former bargaining unit members did not have to consent to arbitration being conducted by the union).

XI. NEWS AND DEVELOPMENTS

ICDR Revises Arbitration Rules. The International Centre for Dispute Resolution substantially updated and revised its existing Arbitration Rules. Among the most significant modifications are:

- Early disposition of claims is authorized when the tribunal determines that the application has a reasonable opportunity of succeeding while disposing of or narrowing one or more issues in the case, and is likely to be more efficient or economical then having the issue resolved at the hearing (Article 23);
- Video, audio, or other electronic means may be used for preliminary and final hearings (Articles 22 and 26);
- Witness statements "should" rather than merely "may" be used in lieu of direct testimony (Article 26); and
- The Administrator may appoint a "consolidation arbitrator" on its own initiative and need not await a request from a party when the arbitration involves "related" parties and not merely the "same" parties.

The revised rules took effect on March 1, 2021.

The ICDR Updates Its Mediation Procedures. The International Centre for Dispute Resolution modified its exiting Mediation Rules in recognition of the significant role that mediation can play in the resolution of international disputes. The revised ICDR Mediation

Rules include the recognition of the appropriateness of the use of video for mediations. In addition, the modified rules provide a comprehensive outline regarding how the mediation is to be conducted. Included in this outline is (a) the possibility of conducting a preliminary conference with the parties for purposes of organizing the mediation, (b) recognizing that part or all of the mediation may be conducted via video, (c) allowing the exchange of documents relevant to the relief being requested before the mediation, and (d) permitting the exchange of memoranda on issues underlying the parties' negotiations and the issues in the dispute.

The new ICDR Mediation Rules took effect on March 1, 2021.

DOJ Outlines Use of Arbitration in Merger Context. The Antitrust Division of the Department of Justice issued a guidance outlining when and how arbitration may be used in the merger context. According to the Department of Justice, "arbitration is an important litigation tool that the Antitrust Division has at its disposal. In appropriate circumstances it can help to enhance investigation and negotiation efforts, conserve resources, and achieve better civil antitrust enforcement results." The guidance makes clear that arbitration will not be mandated, and arbitration will only be used on a case-by-case basis. The DOJ added that the use of arbitration in the recent acquisition of Aleris by aluminum supplier Novelis "saved resources for both taxpayers and the merging parties and ensured that competition was preserved."

XII. TABLE OF CASES