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Feliu Case Summaries:

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I. JURISDICTIONAL ISSUES: GENERAL

FAA Transportation Exemption Inapplicable to Ride Share Drivers. A Lyft driver filed a putative class action claiming that Lyft misclassifies drivers as independent contractors rather than employees. On appeal from the denial of Lyft's motion to compel arbitration, plaintiffs argued that because some of the drivers occasionally transport passengers across state lines, they are exempt from arbitration under Section 1 of the FAA. Noting this was a case of first impression for the First Circuit, the court looked to the Supreme Court's instruction that the "§ 1 exclusion provision must be afforded a narrow construction . . . and that we must construe the general language of the residual phrase to embrace only objects similar in nature to those objects enumerated by the preceding specific words." The court observed that the two identified classes of workers in Section 1 – seamen and railroad employees – are primarily devoted to the movement of goods and people beyond state boundaries. The court then concluded that "Lyft drivers are not among a class of transportation workers engaged in interstate commerce within the meaning of section 1 as narrowly construed. They are among a class of workers engaged primarily in local intrastate transportation, some of whom infrequently find themselves crossing state lines and are thus fundamentally unlike seamen and railroad employees when it comes to their engagement in interstate commerce." Accordingly, the First Circuit held that the FAA's transportation exemption does not apply to the Lyft drivers and reversed the lower court order denying Lyft's motion to compel. *Cunningham v. Lyft*, 17 F.4th 244 (1st Cir. 2021). See also *Rogers v. Lyft*, 2022 WL 474166 (9th Cir.) (same); *Singh v. Uber Technologies*, 2021 WL 5494439 (D.N.J.) (Uber drivers do not fall within exemption for transportation workers under the FAA as their "interstate trips, albeit numerically many, do not constitute a central part of what Uber does when placed in the context of its drivers' overall work activities"). Cf. *Carmona v. Domino's Pizza*, 21 F.4th 627 (9th Cir. 2021) (drivers who deliver goods from supply centers to Domino's Pizza franchisees are covered by the FAA's transportation exemption because the drivers operate in a single, unbroken stream of interstate commerce).

Determination of "Parties" Under FAA Section 4. A federal court can enforce an arbitration agreement under Section 4 of the FAA only if it would be able to hear the underlying "controversy between the parties." The Supreme Court has instructed that federal courts must "look through" a Section 4 petition "to the parties' underlying substantive controversy" to define that controversy. *Vaden v. Discover Bank*, 556 U.S. 49 (2009). The question here was whether *Vaden* applies to a federal court's determination of the "parties" to a § 4 controversy. According to the Fifth Circuit, the plain text of § 4 resolves the issue: "§ 4 uses 'parties' to mean only the parties to the § 4 suit: those who refuse to abide to arbitrate and those whom they aggrieve by doing so. Non-parties to that suit do not matter." The Fifth Circuit therefore found that the district court erred when it "looked through" the Section 4 petition to the underlying complaint and dismissed the petition for

lack of diversity. The Fifth Circuit explained that while the underlying complaint includes parties who do not satisfy the requirements for federal diversity jurisdiction, the Section 4 petition involves only ADT, a citizen of Florida and Delaware, and its customers who are domiciled in Texas. As such, the court concluded, complete diversity exists over ADT's Section 4 petition. The district court decision was vacated, and the matter was remanded for further proceedings. *ADT v. Richmond*, 18 F.4th 149 (5th Cir. 2021).

Award Confirmed but Final Judgment Not Entered Where Related Claims Pending. The court ordered to arbitration one counterclaim and stayed the plaintiff's claims and defendant's other counterclaims pending the issuance of the arbitration award. The arbitration panel found for defendant on the counterclaim and awarded damages with interest. Defendant moved to confirm the award and for entry of judgment. The court confirmed the award but declined to enter a final partial judgment. The court noted that the underlying contract here permitted plaintiff to withhold funds if defendant was found to have violated its terms. Plaintiff's claims arose out of the same facts and sought an offset for any monies owed defendant. The court noted that the record was insufficient before it to "reach a determination regarding the collateral estoppel effect of the Final Award." For these reasons, the court confirmed the award but declined to enter partial final judgment at this time. The court also decided to lift the stay it had imposed on the claims not subject to arbitration as the "conclusion of the arbitration eliminates the basis for the stay, and the remaining claims in this matter are now ready to proceed." *The Pike Company v. Tri-Krete Ltd.*, 2021 WL 5194688 (W.D.N.Y.). See also *Arabian Motors Group v. Ford Motor Co.*, 19 F.4th 938 (6th Cir. 2021) (stay of court proceeding granted under the FAA upon request of a party where, as here, court is satisfied that claims are subject to arbitration therefore allowing other provisions of FAA, such as enforcement of subpoenas and motions to vacate, to be promptly and efficiently addressed).

Arbitration Agreement Did Not Preclude Human Rights Agency Proceedings. Eric Jewett, who signed an arbitration agreement when he was hired, filed a harassment claim against Charter Communications with the New York State Division of Human Rights ("DHR"). The agency found probable cause and Jewett's claim was scheduled for a hearing before a DHR administrative law judge. Charter moved to enjoin the administrative proceeding, arguing that Jewett could only pursue his claim in arbitration. The court refused to enjoin the administrative proceeding. The court reviewed the duties and mandates of the DHR. The court noted that whether the complaint is filed by an individual or the DHR itself, "in pursuing that complaint through the investigation, conciliation, and public hearing stages, the [DHR] is acting in its prosecutorial capacity and working in the interest of the state." The court rejected Charter's contention that the agency is merely presenting Jewett's claims on his behalf. The court pointed to the agency's regulations which "explicitly state that there is no 'attorney-client relationship' between the [DHR] attorney and the complainant . . . and

while the statute provides that a complainant's attorney may present the case in the support of the complaint, the attorney may only do so with the [DHR's] consent." The court concluded that Charter had failed to demonstrate that it was likely to succeed on the merits, as required for the issuance of an injunction, emphasizing that "the Arbitration Agreement between Charter and Jewett, is unlikely to be a basis on which to effectively bar the [DHR], which is not a party to the Agreement, from acting in accordance with its statutory authority to prosecute the complaint Jewett filed through to a final determination by the Commissioner." *Charter Communications v. Jewett*, 2021 WL 5332121 (N.D.N.Y.).

Arbitration Barred Where Executory Agreement Rejected in Bankruptcy. The Bankruptcy Court here refused to compel arbitration where the debtor had rejected the executory agreement at issue containing the arbitration clause. The court recognized that federal policy supports the view that arbitration provisions should be enforced but found the facts present here required denial of the motion to compel. The court held that the rejection by the debtor of the executory contract likewise required the rejection of the arbitration agreement which should be "considered a separate executory agreement that was rejected." The court concluded that "as a matter of fact that requiring arbitration in this case would impose undue and unwarranted burdens and expenses on the parties to the detriment of the [debtor's] creditors." *In re: Highland Capital Management*, 2021 WL 5769320 (Bankr. N.D. Tex.).

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- *Sanchez v. Marathon Oil Co.*, 2021 WL 4995483 (5th Cir.) (district court's order compelling arbitration but failing to either dismiss or stay court proceeding not final order and therefore appellate court lacks jurisdiction to hear appeal).
- *The Pike Company v. Tri-Krete Ltd.*, 2021 WL 5194688 (W.D.N.Y.) (order confirming award not by itself an enforceable judgment; to be enforceable, the order must be entered onto the court's docket as a judgment).
- *In re Jet Homeloans Ventures, LLC*, 2021 WL 5908901 (N.D. Tex.) (FAA did not establish federal jurisdiction for purposes of adjudicating dispute over enforceability of arbitration subpoena and case therefore remanded to state court).
- *Ventoso v. Shihara*, 2022 WL 19706 (S.D.N.Y.) (*pro se* action dismissed for failure to prosecute where motion to compel had been previously granted and plaintiff failed to pursue arbitration and "altogether ceased responding to defense counsel's attempts to communicate").
- *Bird v. Oregon Commission for the Blind*, 22 F.4th 809 (9th Cir. 2022) (government agency's agreement to arbitrate all disputes "does not unequivocally waive sovereign immunity from liability for monetary damages").
- *Antonucci v. Curvature Newco*, 2022 WL 453465 (N.J. App.) (amendment to New Jersey Law Against Discrimination which prohibits limitations on substantive or

procedural rights is preempted by the FAA to the extent that it purports to bar pre-dispute arbitration agreements).

- *Cottrell v. AT&T*, 2021 WL 4963246 (9th Cir.) (request for injunction requiring AT&T to provide accounting for alleged improper charges does not constitute public injunctive relief because the "requested relief . . . would not primarily accrue to the general public [but] rather, the beneficiaries of the injunction would be current and future AT&T customers").
- *Rummel Klepper & Kahl v. Delaware River & Bay Auth.*, 2022 WL 29831 (Del. Ch.) (issues relating to time limits, statutes of limitations, and other conditions precedent to an obligation to arbitrate constitute matters of procedural arbitrability to be decided by the arbitrator).
- *ROHM Semiconductor USA v. MaxPower Semiconductor*, 17 F.4th 1377 (Fed. Cir. 2021) (arbitrability question for arbitrators where parties' agreement required arbitration to be conducted in accordance with California Code of Civil Procedure and that Code provides that arbitrator may rule on own jurisdiction).
- *CPR Management v. Devon Park Bioventures*, 19 F.4th 236 (3d Cir. 2021) (interpleader may not be sought on a petition to confirm award because FAA proceedings are by motion whereas interpleader under Rule 22 of the Federal Rules of Civil Procedure proceeds by complaint).
- *Tatneft v. Ukraine*, 2021 WL 5353024 (D.D.C.) (discovery in aid of execution of judgment on foreign arbitration award authorized based on defendant's failure to comply with discovery requests and repeated delaying tactics).
- *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, 23 F.4th 1036 (D.C. Cir. 2022) (award against Venezuela not enforced where Attorney General was not served as required under Venezuelan law and Hague Convention requires that service be made "by a method prescribed by [sovereign state's] internal law").
- *Lyons v. PNC Bank*, 2022 WL 453060 (4th Cir.) (clear and unambiguous language in the Truth-in-Lending Act which prohibits pre-dispute arbitration agreements involving residential mortgage loans barred arbitration of borrower's claims alleging violations of the Act).
- *Fed. Republic of Nigeria v. VR Advisory Services*, 25 F.4th 99 (2d Cir. 2022) (Nigeria's request under Section 1782 granted as it does not seek to circumvent legal assistance treaty between Nigeria and the United States and discovery sought relating to criminal proceedings in the UK qualifies as a proceeding in a foreign tribunal).

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

Contract Formation Issues May Not be Delegated. The arbitration agreement here delegated to the arbitrator disputes relating "to the formation, enforceability, applicability, or interpretation" of the agreement. Plaintiff, a former employee, sued his employer which successfully moved to compel arbitration. In granting the motion, the district court ruled that the question of contract formation and arbitrability was for the arbitrator to decide. Plaintiff argued that the arbitration agreement was with the employer's parent company and not with his employer and therefore no agreement to arbitrate existed with his employer. The Ninth Circuit reversed, holding that issues of contract formation may not be delegated to an arbitrator. The court pointed to similar rulings by the Fifth and Tenth Circuits. The Ninth Circuit noted that since plaintiff "challenged the very existence of an agreement to arbitrate, the district court was required to address [the plaintiff's] challenge and determine whether an agreement existed. . . [I]f no agreement to arbitrate was formed, then there is no basis upon which to compel arbitration." The court then concluded that no agreement to arbitrate had been formed as the agreement, as drafted, was solely between the parent company and plaintiff and a mere parent-subsidiary relationship was insufficient to compel plaintiff's claim against the employer. *Ahlstrom v. DHI Mortgage Co.*, 21 F.4th 631 (9th Cir. 2021).

Infancy Defense for Arbitrator to Decide. The Sixth Circuit made clear that questions regarding the formation of a contract are for the court to decide even if arbitrability issues are delegated to the arbitrator. In this case, four plaintiffs, who are minors, argued that the website's terms of service containing the arbitration agreement could not be applied to them under Michigan's infancy doctrine. The question for the court was whether the infancy doctrine raised contract formation arbitrability issues. The Sixth Circuit explained that under Michigan law a minor's contract is not necessarily void, but voidable. As there was an enforceable arbitration agreement with a delegation cause present, the court made clear that plaintiffs' claims must challenge the delegation provision directly for the issue to be resolved by the court. Here, plaintiffs lodged their infancy defense against the enforceability of the entire agreement, and not merely the delegation clause, and therefore enforceability was for the arbitrator to decide. *In re: Stockx Customer Data Security Breach Litigation*, 2021 5710939 (6th Cir.).

Court To Decide Arbitrability When Effect of Arbitration Clause Is Disputed. A dispute between an art publisher ("McKenzie") and the Estate of Robert Indiana, the famous artist widely known for his "LOVE" artwork, wound its way through the court system, a New York arbitration, and a mediation in Maine before landing in front of the First Circuit. Before the Court of Appeals was the gateway issue, namely, who was to decide whether the parties agreed to arbitrate this dispute – an arbitrator or the court. The case involved numerous claims and cross-claims but the preliminary issues before the court essentially boiled down

to: the effect of the "2008 Agreement," which set forth the collaboration rights between McKenzie and Indiana and included a mandatory arbitration clause; the effect of the "2019 Term Sheet," which the parties agreed to in an effort to settle their claims and which purported to replace the 2008 Agreement but was never converted into a full and final agreement and, finally; whether a court or an arbitrator must resolve these issues in determining whether the parties are bound to arbitrate. The district court had ruled that the gateway issue of arbitrability should be determined by an arbitrator. The First Circuit disagreed, noting the presumption that a court should decide the question of arbitrability was particularly important here where the effect of the 2019 Term Sheet, and whether it displaced the 2008 Agreement and its arbitration clause, must be determined in resolving whether the parties agreed to arbitrate. "This is why, contrary to the Estate's insistence otherwise, the 2008 Agreement does not provide the requisite 'clear and unmistakable evidence' of an agreement to have a gateway question like this fielded by arbitrators – McKenzie's supportable arguments as to the 2019 Term Sheet directly challenge the 2008 Agreement and its arbitration clause as 'clear and unmistakable' evidence of an agreement to arbitrate." The district court's decision was reversed, and the matter was remanded for further determination. *McKenzie v. Brannan*, 19 F.4th 8 (1st Cir. 2021).

Staffing Company Employees Required to Arbitrate Under Equitable Estoppel Principles. Employees brought a collective action under FLSA to recover unpaid overtime from an energy company they worked for through a third-party staffing company. An Oklahoma district court denied the energy company's motion to compel arbitration. On appeal, the Tenth Circuit, applying Oklahoma contract law, held that the "concerted misconduct" theory of equitable estoppel applied, subjecting the employees to the arbitration clause in the employment agreements they signed with the staffing company. Noting that the "Oklahoma Supreme Court has yet to address concerted misconduct estoppel", the court analyzed the reasoning of two Oklahoma appellate decisions to guide its reasoning. The court noted that the theory applies when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract. The alleged misconduct in this action was the energy company's failure to pay overtime. However, it was the staffing company that paid the employees and sent them records of their pay. As such, the court found that the allegations against the energy company were "substantially interdependent" with the performance of the staffing company's duties under the employment agreement and held that the employees were required to arbitrate their claims under the doctrine of equitable estoppel. *Reeves v. Enterprise*, 17 F.4th 1008 (10th Cir. 2021). See also *Feuer v. Stoler of Westbury*, 2021 WL 4820605 (E.D.N.Y.) (arbitration agreement with employer includes non-signatory parent company, related entities, and corporate officers where claims against those entities and individuals are intertwined with claims against employer). But see *City of Almaty v. Sater*, 2021 WL 4940304 (S.D.N.Y.) (principal, who actively hid his ownership of

entity which entered into an agreement containing an arbitration provision cannot compel arbitration on estoppel grounds as he did not have a sufficiently close relationship with the plaintiffs to invoke arbitration under the contract's terms); *Newman v. Plains All American Pipeline*, 23 F.4th 393 (5th Cir. 2022) (non-signatory client cannot invoke arbitration clause in employer's agreement with employees assigned to work for client under Texas's close relationship theory where there was no corporate affiliation between the client and employer who were found to be merely independent participants in a business transaction).

Non-Signatory May Compel Arbitration Under Equitable Estoppel Principles. Straub leased a Ford vehicle from a dealer in North Carolina. Ford was not a signatory to the lease agreement. Straub brought a nationwide class action alleging that the leased vehicle had a faulty flex plate in its engine. Ford moved to compel arbitration under the lease agreement. The district court granted Ford's motion on equitable estoppel grounds. The court explained that the Fourth Circuit applies equitable estoppel when the signatory to an agreement with an arbitration provision relies on the terms of the agreement in asserting its claims against the non-signatory. In that situation, the signatory's claims arose under the written agreement and therefore arbitration is appropriate. The court reasoned that the "claims Straub asserts against Ford make reference to, and depend upon, his having entered into the Lease. Ford's duty to comply with its warranty arose only when Straub leased a vehicle." As such, Straub was equitably estopped from resisting Ford's motion to compel. *Straub v. Ford Motor Company*, 2021 WL 5085830 (E.D. Mich.). See also *Binh v. King & Spalding, LLP*, 2022 WL 130879 (S.D. Tex.) (non-signatory law firm may compel arbitration based on provision in litigation funding agreement where, as here, non-signatory who is explicitly tasked with performing duties under the agreement containing an arbitration provision, or issues non-signatory is seeking to resolve, are intertwined with that agreement); *City of Kenner v. Certain Underwriters at Lloyd's*, 2022 WL 307295 (E.D. La.) (equitable estoppel applied to compel arbitration of claim brought against a group of insurers, including two insurers whose agreements would otherwise be preempted by federal law, where allegations of interdependent and concerted misconduct by both the signatories to the valid and enforceable arbitration clause present). But see *Ngo v. BMW of North America*, 23 F.4th 942 (9th Cir. 2022) (BMW may not invoke arbitration provision in car purchaser's agreement with car dealership to compel arbitration of breach of warranty litigation as "nothing in the contract here evinces any intention that the arbitration clause should apply to BMW"); *De Gracia v. Royal Caribbean Cruises*, 2022 WL 91945 (S.D. Fla.) (motion to compel denied as Bahamian law did not recognize equitable estoppel as a basis for non-signatory to compel arbitration based on arbitration provision in vendor's agreement with its employee).

Waiver Rejected Where Delay Due to Plaintiff's Misrepresentation. Plaintiff brought a class action based on an alleged defect in a Google Pixel XL smart phone he claimed he purchased. The Pixel XL was never subject to an arbitration agreement and Google proceeded to defend itself in court, including filing a motion to dismiss. During discovery, it became clear that plaintiff bought a Google Pixel 3aXL smart phone which was in fact subject to an arbitration agreement. Google moved to compel arbitration. The court rejected plaintiff's contention that Google had waived arbitration and granted Google's motion to compel. The court concluded that plaintiff could not "satisfy the heavy burden of demonstrating that Defendant had knowledge of an existing right to compel arbitration given Plaintiff's continuous representations" that he purchased a phone not governed by an arbitration agreement. For these reasons, the court concluded that Google "has not waived its right to compel individual arbitrations." *McCoy v. Google,* 2021 WL 6882419 (N.D. Cal.).

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- *Constellium Rolled Prod. Ravenswood v. United Steel, Paper and Forestry*, 18 F.4th 736 (4th Cir. 2021) (issue of preclusive effect of prior court judgment is an affirmative defense and a procedural question for arbitrator and not the court to decide).
- *Noah's Ark Processors v. UniFirst Corp.*, 310 Neb. 896 (2022) (company that acquired contracting party's assets and continued operations is equitably estopped from disclaiming arbitration in underlying agreement, particularly where it sought to terminate the same agreement for cause).
- *Citigroup v. Sayeg Seade*, 2022 WL 179203 (S.D.N.Y.) (relevant arbitration provision which is broad and expresses an intent to arbitrate all aspects of disputes is precisely the categorical, unconditional, and unlimited language evidencing a clear intent to delegate arbitrability issues to arbitrator).
- *Welcome v. Huffmaster Staffing*, 2022 WL 363743 (N.J. App.) (right to arbitrate waived where employer waited 10 months into litigation to invoke right after making various pre-trial motions and conducting plaintiff's deposition).
- *Straub v. Ford Motor Company*, 2021 WL 5085830 (E.D. Mich.) (court must address arbitrability issue where there is no stand-alone delegation clause and the party resisting arbitration has challenged delegation to the arbitrator or arbitrability issues).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Arbitration Agreement Void for Unconscionability. A California superior court denied employer's motion to compel arbitration of employee's claims on the basis that the applicable arbitration agreement was both procedurally and substantively unconscionable. On appeal, the California Court of Appeal noted "the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due

to unequal bargaining power, the latter on overly harsh or one-sided results." On review of the arbitration agreement, the court observed it was "permeated by unconscionability" and stated that "such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." Here, the court ruled the arbitration provision unconscionable based on its shortening of the statute of limitations for all claims to one year, and for placing limits on discovery and allowing arbitrator to order more discovery only upon a showing of "substantial need". While noting that the general rule does favor arbitration, the court concluded that "when the agreement is rife with unconscionability, as here, the overriding policy requires that the arbitration be rejected." The lower court's order denying the motion to compel was affirmed. *De Leon v. Pinnacle Prop. Mgmt.*, 72 Cal. App.5th 476 (2021).

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- *Corsaro v. Columbia Hospital*, 2021 WL 6135342 (N.D. Tex.) (employee's claim that agreement was procedurally unconscionable because employer allegedly took advantage of his lack of mental capacity rejected as "finding this agreement procedurally unconscionable would collapse the distinction between procedural unconscionability, which concerns the procedure of contracting, and mental incapacity, which concerns a person's ability to understand the agreement and its consequences").
- *DeLeon v. Pinnacle*, 72 Cal. App.5th 476 (2021) (severance of unconscionable provision rejected where unconscionable terms permeate the arbitration agreement).
- *Shenzen Shileziyou Technologies v. Amazon.com, Inc.*, Case No. 3:21-CV-07083 (N.D. Cal. December 9, 2021) (claim that arbitration clause is unconscionable and unenforceable under California law because it bars public injunctions must be resolved by arbitrator because challenge was to the arbitration agreement as a whole rather than specifically to delegation provision).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Shrinkwrap Notice of Arbitration Sufficient. The packaging for the Samsung Galaxy S20 phone drew that purchaser's attention to the terms and conditions associated with the purchase of the phone. "More important, and leaving no room for ambiguity, the box label made express reference to an arbitration agreement, provided the location where full terms could be accessed and advised the consumer that certain, identified actions would constitute assent to those terms, all under a capitalized and bold heading reading 'IMPORTANT INFORMATION.'" The court characterized this as a "valid shrinkwrap agreement" and compelled arbitration of a nationwide class action against Samsung based

on an alleged known defect in the product. This was particularly so where the label disclosed where the consumer could "review the full terms of the agreement and obtain information about how to opt out." The court also found that the pamphlet containing the terms and conditions was included in the box with the phone and constituted an independent basis for finding that the plaintiffs had reasonable notice of the arbitration agreement. *Vasadi v. Samsung Elect. America*, 2021 WL 5578736 (D.N.J.). See also *Parrella v. Sirius XM Holdings*, 2022 WL 151939 (N.J. App.) (consumer's assent to arbitration found where he received welcome kit with agreement, was told by phone where to find customer agreement, and had been a customer for 15 years and received copies of agreement previously); *Ackies v. Scopely, Inc.*, 2022 WL 214541 (D.N.J.) (sufficient notice of obligation to arbitrate found where notice was clearly visible in middle of video game launch screen and therefore user agreed to terms of service, which were hyperlinked, by continuing to play game); *In re: Juul Labs, Inc., Antitrust Litigation*, 2022 WL 137627 (N.D. Cal.) (placement of box referencing terms and conditions of website with accompanying hyperlink above log-in box – even absent click box – was sufficient to put a reasonably prudent user on inquiry notice of the Arbitration Policy contained in the Terms and Conditions).

Sign-In Wrap Notice Insufficient. California's Automatic Renewal Law ("ARL") makes it unlawful for a business to enroll a customer in an automatic renewal or continuous service agreement without providing "clear and conspicuous" notice of the subscription. A class action was brought against JustAnswer based on the automatic enrollment of plaintiff after submitting a one time "trial" question to the service. JustAnswer sought to compel arbitration based on its "sign-in wrap" notice of its terms of service which included an arbitration provision. Quoting from a prior decision, the California Court of Appeals explained that a sing-in wrap agreement is one "in which a user signs up to use an internet product or service, and the sign-up screen states that acceptance of a separate agreement is required before the user can access the service. While a link to the separate agreement is provided, users are not required to indicate that they have read the agreement's terms before signing up." The court emphasized that "the full context of any transaction is critical to determining whether any particular notice is sufficient to put a consumer on inquiry notice of contractual terms contained on a separate, hyperlinked page." The court concluded that JustAnswer's sign-in wrap agreement was not enforceable. The court relied on the ARL's requirement of "clear and conspicuous" notice and the fact that plaintiff was automatically enrolled in a monthly service unwittingly based on a single "trial" transaction. The court pointed out that the relevant language on the screen was not in larger type or in contrasting font or color and was not set off from the surrounding text by symbols or other marks and was outside the user's primary area of focus. To allow JustAnswer to enforce its mandatory arbitration provision that is "less conspicuous than the statutory notice requirements governing Plaintiffs' underlying claims – would permit JustAnswer to end-run around legislation designed to protect consumers in these specific transactions." For these

reasons, defendant's motion to compel was denied. *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, reh'g denied (Jan. 18, 2022), review filed (Feb. 8, 2022). Cf. *Ackies v. Scopely, Inc.*, 2022 WL 214541 (D.N.J.) (sufficient notice of obligation to arbitrate found where notice was clearly visible in middle of video game launch screen and therefore user agreed to terms of service, which were hyperlinked, by continuing to play game).

Arbitration Denied Based on Uber's Ride Share App. Plaintiff sued Uber, claiming she suffered injuries during a car ride she ordered through the Uber ride-share app. Uber moved to compel arbitration. Uber insisted that when plaintiff used the ride-share app she was prompted to read its terms and conditions, including the arbitration agreement, "via an in-app pop up screen and that plaintiff checked the box indicating that she agreed to the terms." The central question on the motion was "whether plaintiff actually intended to waive certain rights and to handle disputes via arbitration." In the context of "electronic bargaining" such as this, it is essential for there to be "reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers." The court examined the reasoning of an analogous Massachusetts case, *Kaunders v. Uber Tech, Inc.*, 486 Mass. 557 (2021), where the court held that the process in Uber's ride-share app to obtain consumers' assent to its terms failed to provide sufficient notice of the existence of contract terms to the consumer and therefore failed to form an enforceable arbitration agreement. Similarly here, the court found that "this process (clicking on the hyperlink and having to read a long terms of use) does not constitute conspicuous notice of the terms of use to justify compelling arbitration of this dispute." Concluding that "the practical realities of using this ride-share app do not support Uber's argument that there was a clear and unequivocal intention by plaintiff to be bound by the arbitration provision in the terms of use," the court denied Uber's motion to compel. *Zambrano v. Acevedo,* 2021 WL 5154181 (N.Y. Sup. Ct.). See also *Sarchi v. Uber Technologies*, 2022 WL 244113 (Me.) (clicking "DONE" after entering payment information on website did not constitute acceptance of obligation to arbitrate because "to a reasonably prudent user, clicking 'DONE' would not indicate assent to a contract or, in fact, anything beyond having completed the registration process").

Process For Establishing Existence of Arbitration Agreement Clarified. The First Circuit, in a matter of first impression for the circuit, agreed with its sister circuits that the summary judgment standard should be applied when evaluating motions to compel arbitration under the FAA. As such, "the court must construe the record in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." Parsing the language of Section Four of the FAA, the court reasoned that a summary proceeding must be conducted to expeditiously determine whether an agreement to arbitrate exists. The First Circuit faulted the district court in this case for impermissibly placing the burden on the party opposing arbitration. Rather, "the substantive law on the enforceability of arbitration

agreements puts the burden on the party moving to compel arbitration to show that is entitled to that outcome." As the district court failed to apply the appropriate summary judgment standard to the motion to compel, the court reversed and remanded the matter for further proceedings. *Air-Con, Inc. v. Daikin Applied Lat. Am.*, 21 F.4th 168 (1st Cir. 2021).

Plaintiff Did Not Establish Economic Distress to Invalidate Arbitration Agreement. Defendant employer moved to compel arbitration of a dispute with an employee who signed the arbitration agreement after traveling from Mexico to California and after starting his job harvesting lettuce. The Northern District of California refused to enforce the agreement on the ground that it was signed under economic duress. The Ninth Circuit reversed and remanded, finding the employee did not establish economic distress under California law. Economic distress occurs, under prevailing California law, when a wrongful act that is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to agree to an unfavorable contract." The panel majority observed the doctrine does not prohibit "simple hard bargaining" but rather is designed to preclude the exploitation of "business exigencies" to obtain undue advantage. The employee alleged that the employer's request for him to sign the arbitration agreement after he had traveled from Mexico, began working, and was dependent on the employer for housing was the "wrongful act" supporting his economic duress claim. The majority disagreed, stating there was no showing that the employer "made any false claim, bad-faith threat, or refusal to repay its debt" or that the "[employer] had a coercive purpose or acted in bad faith in asking him to sign the arbitration agreements after his arrival in the United States." The majority concluded "while the circumstances surrounding the signing of the agreements were not ideal, they didn't make 'a mockery of the freedom of contract or undermine the proper functioning of our economic system.'" As such, the district court's decision was reversed, and the matter remanded. *Martinez-Gonzalez v. Elkhorn Packing,* 25 F.4th 613 (9th Cir. 2022).

Parents Effectively Appointed Children to be Agents for Purchase of PC Games. Video game consumers filed an action against a video game manufacturer for anticompetitive practices. The video game manufacturer moved to compel arbitration, arguing the terms and conditions of its Steam Subscriber Agreement ("SSA"), which must be agreed to when purchasing games, contains an arbitration provision. The plaintiffs opposed, asserting that two of the plaintiffs were not signatories to the SSA. The argument was premised on the fact that these plaintiffs' children were the direct purchasers and even though they used their respective parents' credit card information, the games were not purchased directly by the parents and therefore they did not agree to the SSA. The district court disagreed. Noting that the complaint provided that these parents "purchased PC Desktop Games through the Steam Store" for their children, the court stated, "the question is whether they are bound by the SSA under an *agency theory*." Holding that they were, the court found that the parents "effectively appointed their children as their agents when they purchased

games on their parents' behalf using the parents' credit card information and their own Steam accounts. Without this appointment, the parents would not have standing for the claims asserted here." The motion to compel arbitration was granted. *Wolfire Games v. Valve*, 2021 WL 4952220 (W.D. Wash.). See also *Corsaro v. Columbia Hospital*, 2021 WL 6135342 (N.D. Tex.) (presumption of a contractual capacity to enter into arbitration agreement prevails where plaintiff "has submitted no medical records, no medical testimony, and no evidence from third parties regarding his mental condition").

Subsequent General Release Superseded Arbitration Agreement. Kantz, an AT&T employee, agreed to an arbitration agreement in 2012 which indicated it "survived" the termination of her employment. Kantz was terminated in 2019 and signed a general release as part of a severance package which provided that it constituted the "entire agreement" between the parties and that any "other promises or representations, written or oral, are replaced by the provisions of this document and are no longer effective unless they are contained in this document." Kantz later sued AT&T with regard to her termination and AT&T then moved to compel arbitration under the 2012 arbitration agreement. The district court denied the motion and the Third Circuit affirmed. The Third Circuit acknowledged that the two agreements did not concern precisely the same subject matter but concluded that "a complete subject-matter overlap is not a requirement for supersession under Pennsylvania law." The court reasoned that the merger clause in the general release superseded the 2012 arbitration agreement with respect to Kantz's termination but noted that the arbitration agreement remained "in place for other potential disputes between Kantz and AT&T." *Kantz v. AT&T, Inc.*, 2022 WL 413946 (3d Cir.).

Modification Clause Does Not Render Arbitration Agreement Illusory. Six subscribers to defendants' cable television service filed a putative class action alleging violations of various consumer protection laws. Defendants moved to compel arbitration with regard to five of the plaintiffs who had assented to the arbitration agreement contained in their Terms of Service (plaintiff number six was the only one who opted out of the arbitration agreement). Plaintiffs opposed the motion, arguing that the agreement was illusory because the modification provision granted defendants "unlimited unilateral authority to change any of its terms without notice to subscribers . . . as well as the ability to make changes to the General Terms . . . that have retroactive effect." The court disagreed, noting that "the phrase 'illusory promise' [means] words in promissory form that promise nothing." The court observed that the agreement here "first mandates that [defendants] give customers notice of intended changes to the terms, and it then gives customers the option of agreeing to the changes" by continuing to accept the services. As such, "these respective promises by the parties together are sufficient to constitute valid consideration." Defendants' motion to compel arbitration was granted. *Byrne v. Charter Communications, Inc.*, 2022 WL 138020 (D. Conn).

Arbitration Provision Runs with the Land. The Supreme Court of Florida, answering a certified question submitted by a Florida appellate court, found that an arbitration provision contained in a residential warranty deed requiring arbitration of any dispute arising from an alleged construction defect was a real covenant running with the land rather than a personal covenant. Therefore, subsequent purchasers had constructive notice of the covenant and were required to arbitrate their claims. *Hayslip v. U.S. Home Corp.*, 2022 WL 247073 (Fla.).

Case Shorts

- *McCain v. Tier 1 Completions Solution*, 2021 WL 5632774 (S.D. Tex.) (arbitration agreement executed by DocuSign enforced as only plaintiff, using his personal DocuSign account, could have accessed documents and no credible basis for challenging existence of enforceable arbitration agreement offered).
- *Bokhari v. FSD Pharma et al.*, 2021 WL 5711829 (E.D. Pa.) (dispute regarding issuance of stock to CEO in recognition of his performance "arises out of or relates to the Employment Agreement and falls within the scope of the Employment Agreement's arbitration provision").
- *Krueger v. Angelos*, 2022 WL 453980 (4th Cir.) (courts will not presume arbitrability of employer-union disputes even where arbitration agreement exists where, as here, the applicable trust agreement provides "positive assurance" that the dispute was not arbitrable).
- *City of Almaty v. Sater*, 2021 WL 4940304 (S.D.N.Y.) (principal who actively hid his ownership of entity which entered into agreement containing an arbitration provision cannot compel arbitration as an intended third-party beneficiary where claims against him relate to actions before the entity was formed).
- *Leroy v. Amedisys Holding*, 2022 WL 394568 (W.D.N.Y.) (employer's uncontroverted evidence that employee received e-mail transmitting arbitration agreement and employee's failure to recollect receiving e-mail and claim that he was not "actually engaged in providing services" to employer at the exact time the e-mail was sent fails to "create a material issue of fact requiring a trial on whether plaintiff agreed to the arbitration agreement").
- *Antonucci v. Curvature Newco*, 2022 WL 453465 (N.J. App.) (continued employment of employee who acknowledged reviewing employee handbook to which arbitration agreement was attached is deemed to have assented to arbitration even though he did not sign the arbitration agreement itself).
- *Gamboa v. Northeast Community Clinic*, 72 Cal. App. 5th 158 (2021) (declaration of HR director not sufficient to establish existence of arbitration agreement where employee disputes seeing or signing the agreement and HR director did not explain how she knows what employee saw and signed).

- *Gezu v. Charter Communications*, 17 F.4th 547 (5th Cir. 2021) (declarations confirming both receipt and opening of e-mail announcing dispute resolution program created presumption of enforceable offer that was not rebutted).
- *Chambers v. Crown Asset Management*, 71 Cal. App.5th 583 (Cal. App. 2021) (affidavit offered in support of evidence of mailing of arbitration agreement insufficient as affiant lacked personal knowledge of mailing and did not show that the underlying business records upon which she relied were admissible evidence).
- *Garcia-Alvarez v. Fogo De Chao Churrascaria*, 2021 WL 5804289 (E.D. Tex.) (issuance by employer of mandatory arbitration program after filing of FLSA collective action enforced where no evidence of coercion or of misleading of employees presented).
- *Duncan v. Int' Markets Live*, 20F.4th 400 (8th Cir. 2021) (district court required to first resolve factual disputes as to whether valid arbitration agreement exists, including holding a trial on the question, before ruling on a motion to compel may be rendered).
- *Reeves v. Enterprise Products Partners*, 17 F.4th 1008 (10th Cir. 2021) (arbitration provision in employees' agreement with staffing company required arbitration of claims against staffing company's client on equitable estoppel grounds where employees alleged "substantially interdependent and concerted misconduct by defendant and staffing company").
- *California Union Square v. Sachs & Co.*, 71 Cal. App. 5th 136 (2021) (ancillary proceeding, including motions to confirm or vacate, do not constitute proceedings to enforce lease for which attorneys' fees are awardable under the parties' agreement).
- *BREA 3-2 LLC v. Hagshama Fla. 8 Sarasota, LLC*, 327 So. 3d 926 (Fla. App. 2021), review denied, 2022 WL 71014 (Fla. 2022) (arbitration agreement providing that claims "under this agreement" are narrow and must be strictly construed did not encompass statutory claims as it did not have a "direct relationship" with the agreement).
- *Amerigas USA v. Standard Capital SA*, 2021 WL 5052658 (N.D. Tex.) (arbitration agreement became enforceable when signed and failure to deliver copy of fully executed agreement did not defeat enforceability).
- *Gordon v. Atria Management Co.*, 70 Cal. App.5th 1020 (2021) (durable power of attorney which authorized son to "demand, arbitrate, and pursue litigation" on mother's behalf empowered son to enter into arbitration agreement with mother's residential care facility and required arbitration of son's abuse and negligence lawsuit).
- *Hackett-Napier v. Alliance Health Operations*, 73 Misc. 3d 1228 (A) (N.Y. Sup. Ct. Kings Cty.) (nursing home failed to demonstrate existence of arbitration agreement where it relied on attorney's affirmation not based on personal knowledge and an unauthenticated agreement with the decedent's signature line left blank).

- *Drummond v. Bonaventure of Lacey*, 500 P.3d 198 (Wash. App. 2021) (Washington state statute that protects civil and legal rights of long-term care residents did not guarantee right to a jury trial and therefore motion to compel based on arbitration provision in admission agreement signed by resident's representatives granted).
- *Gezu v. Charter Communications*, 17 F.4th 547 (5th Cir. 2021) (continued employment for year after receipt of dispute resolution program ending in arbitration constitutes acceptance of offer particularly where employee failed to opt out of program as he was permitted to do).
- *Jiangsu Beier Decoration Materials Co. v. Angle World, LLC*, 2021 WL 5003337 (E.D. Pa.) (unsigned memorandum of understanding with arbitration provision fails to satisfy New York Convention requirement for a signed arbitration agreement).
- *Eminence Healthcare v. Centuri Health Ventures*, 2022 WL 321011 (Cal. App.) (carveout from arbitration agreement for equitable claims applied and court appropriately delayed arbitration of remaining non-equitable claims until court ruled on claims seeking equitable relief).

V. CHALLENGES TO ARBITRATOR OR FORUM

FINRA Arbitration Process Manipulated. Securities investors filed a FINRA arbitration against Wells Fargo alleging securities law violations, and a breach of fiduciary duty. Wells Fargo's lead counsel had a bad experience with one of the arbitrators listed and believed that arbitrator harbored a personal bias against him. Counsel requested that FINRA remove that arbitrator from the list of potential arbitrators. The investors insisted that FINRA comply with its own rules and objected to the request. Wells Fargo's law firm then disclosed that it had an agreement with FINRA that none of the arbitrators on an earlier panel to which counsel objected would be listed on any cases in which that counsel participated. FINRA struck the challenged arbitrator from the list of potential arbitrators. The panel was selected and ruled in favor of Wells Fargo. The investors' motion to vacate the award was granted. The Georgia trial court concluded that the arbitrator selection process violated the FAA based on a finding that "Wells Fargo and its counsel manipulated the FINRA arbitrator selection process in violation of the FINRA Code of Arbitration Procedure, denying the Investors' their contractual right to a neutral, computer-generated list of potential arbitrators." The court added that "permitting one lawyer to secretly red line the neutral list makes the list anything but neutral, and calls into question the entire fairness of the arbitral forum." The court added that FINRA's rules require it to disclose to the parties before removing an arbitrator on FINRA's own initiative and that this did not occur based on FINRA's secret deal with counsel. *Leggett v. Wells Fargo Clearing Services*, 2019CV328949 (Super. Ct. Ga. January 25, 2022). *Note: FINRA's Audit Committee retained*

independent counsel to determine whether its Dispute Resolution Services office complied with its rules, policies, and procedures for arbitrator selection in this case.

Case Shorts

- *Principal Securities v. Agarwal*, 23 F.4th 1080 (8th Cir. 2022) (business partners do not qualify as "customers" under FINRA Rules and could not pursue FINRA arbitration against registered representative).
- *Leggett v. Wells Fargo Clearing Services*, 2019CV328949 (Super. Ct. Ga. January 25, 2022) (FINRA removal of arbitrator because arbitrator's law firm represented a client in a lawsuit against respondent violated the FAA where the arbitrator disclosed his firm's activities prior to the selection and the "newly filed case did not create any newly disclosed interest or bias against" respondent).
- *Rummel Klepper & Kahl v. Delaware River and Bay Authority*, 2022 WL 29831 (Del. Ch.) ("fact that the chosen arbitrator may be an employee of one of the parties is not sufficient to show unconscionability" under Delaware law).

VI. CLASS, COLLECTIVE, AND GROUP FILINGS

Post-Litigation Arbitration Agreement to Class Members Enforceable. Plaintiff brought an FLSA collective action and state wage and hour class action but before he moved to certify the class or collective, the employer issued a mutual arbitration agreement to its employees. The employer took the position that based on continued employment the agreement bound all employees to arbitrate all claims, including claims encompassed by the pending class and collective action. Plaintiff challenged the enforceability of the arbitration agreement with respect to the putative class and collective members. The court rejected plaintiff's motion, finding no "specific evidence of coercion or efforts to undermine the potential collective action" by the employer. The court recognized that an "ongoing business relationship" between a defendant and potential class members "invites the potential for coercion . . . this alone is insufficient to warrant relief." The court noted that the arbitration agreement went out to all employees and not just to potential class and collective members. "This broad dissemination of the Agreement suggests that Defendants did not disseminate it in response to the lawsuit or target potential plaintiffs." The court acknowledged that some aspects of the agreement "cause the Court concern", but overall plaintiff "has not yet met his burden to show Defendants engaged in misleading communications with the putative class." Moreover, the court ruled that remedial measures would be premature since plaintiff was not bound by the arbitration agreement, therefore "the Agreement plaintiff urges the Court to invalidate are between defendants and third parties not presently before the Court." For these reasons, the court declined to impose any

remedial measures at this time. *Garcia-Alvarez v. Fogo De Chao Churrascaria*, 2021 WL 5804289 (E.D. Tex.).

Case Shorts

- *Holmes v. Baptist Health South Florida*, 2022 WL 180638 (S.D. Fla.) (arbitration agreement that bars plan-wide monetary relief and representative actions did not deny plaintiffs' ability to effectively vindicate rights since "a waiver of the right to bring a class action in arbitration is permissible and [therefore] the concomitant waiver of remedies associated with class actions is also permissible").

VII. HEARING-RELATED ISSUES

Arbitrators' Rulings Warrant Vacatur. Investors filed a FINRA arbitration against Wells Fargo. The panel ruled in favor of Wells Fargo, and the investors successfully moved to vacate on various grounds. The court cited the panel's refusal to agree to a short adjournment "necessitated not by the Investors' failure to prepare but rather due to Wells Fargo's late production of documents outside the time periods set forth by the FINRA Code of Arbitration Procedure." The court also ruled that the panel refused to hear relevant, noncumulative evidence. In particular, the investors sought rebuttal testimony from their new stockbroker with whom one of the arbitrators disclosed he had a close personal relationship. "The Arbitrators' decision to deny the Investors' their right to present this relevant testimony was undoubtedly influenced by the possibility that the appearance of the witness would require one of the three Arbitrators to recuse himself." The court also noted that Wells Fargo was permitted to present testimony from an expert who was never identified as a potential witness. The court also concluded that the award was obtained by fraud as a key witness for Wells Fargo used a break caused by a medical emergency "to materially change his testimony and offer perjured testimony in direct contravention of the earlier testimony. In addition, counsel for Wells Fargo inserted himself as a fact witness and purported to testified to the Panel himself to support the changed story. The relevance of this testimony cannot be understated" the court observed. Finally, the court found that the panel erred by awarding costs and attorneys' fees against the investors beyond what FINRA or the agreement between the parties allowed as "Wells Fargo did not provide the Arbitrators with any statute, agreement, or court rule supporting their claim for attorneys' fees." The court concluded that each of these violations provided "separate, independent grounds to vacate the Award in its entirety." *Leggett v. Wells Fargo Clearing Services*, 2019CV328949 (Super. Ct. Ga. January 25, 2022).

Case Shorts

- *Trustees of the New York City District Council of Carpenters v. Three Guys Floor Covering Workroom, Inc.,* 21 Civ. 910 (KPF)(S.D.N.Y. October 18, 2021) (arbitration

award of prejudgment interest from date of award until issuance of judgment affirmed under Labor Management Relations Act where collective bargaining agreement stated award was final and binding and judicial district's practice was to exercise its discretion in favor of awarding pre-judgment interest).

- *Kirk v. Ratner*, 2022 WL 405422 (Cal. App.), as modified on denial of reh'g (Feb. 23, 2022) (arbitrator's preliminary injunction which did not resolve any part of the underlying controversy is not an "award" under California's arbitration law which would have made it subject to judicial review).
- *CPR Management v. Devon Park Bioventures*, 19 F.4th 236 (3d Cir. 2021) (arbitrator's refusal to stay proceeding not misconduct where the arbitrator "gave the parties months to prepare for the arbitration and had an interest in moving the case to its conclusion").

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Professional Relationship with Counsel Insufficient to Warrant Vacatur. Respondent nominated Smit to serve on a three-person panel. Smit disclosed before the arbitration that he knew lead counsel for claimant, Shore, from arbitration conferences. During the arbitration Smit and Shore were appointed to a panel to arbitrate an ICC matter. Their appointments were publicly listed on multiple websites, but neither Smit nor Shore made a disclosure in the arbitration in which Shore was counsel. Claimant prevailed, and respondent moved to vacate, challenging Smit's impartiality. "Respondent argues that's Smit's incomplete disclosures, and Shore and Petitioner's silence, on their previous professional relationship constituted fraud because the disclosures did not give Respondent reason to do any further research into the professional contacts of the chosen arbitrators." The district court denied the motion. The court rejected defendant's claim of fraud based on the incomplete disclosure because with the exercise of due diligence it could have discovered the appointment of Smit and Shore to the ICC matter. The court also rejected defendant's claim that by working closely together Smit and Shore "had the opportunity for *ex parte* communications, collegial interactions, and collaborative decision-making." The court ruled that misconduct may be shown where there is an undisclosed pecuniary relationship or familial relationship between arbitrators and a party, but merely serving together in a second arbitration matter does not constitute a material relationship warranting vacatur. The court also emphasized that respondent failed to show any denial of fundamental fairness in the arbitration proceedings themselves sufficient to warrant vacatur. For these reasons, the motion to vacate was denied by the court. *Andes Petroleum Ecuador Ltd. v. Occidental Exploration and Production Co.*, 2021 WL 5303860 (S.D.N.Y.).

Challenges to Arbitrators' Impartiality Rejected Under New York Convention. Three arbitration panels were constituted to address disputes between the governmental agency that operates the Panama Canal and a consortium of contractors. The three panels all shared one arbitrator, Gaitskill, and two had the same panel of arbitrators. Extensive hearings were held, and awards issued. The consortium moved to vacate arguing that the three arbitrators on the same panels in two related arbitrations each failed to make appropriate disclosures. These failures, the consortium argued, violated public policy and warranted vacatur under the Convention. The court began its analysis by noting that no actual conflict was alleged, and therefore the consortium must show "facts permitting a reasonable person to believe that there existed a potential – not actual – bias in favor of a party that was 'direct, definite and capable of demonstration rather than remote, uncertain, and speculative.'" The court concluded that the consortium failed to carry its burden. In doing so, the court rejected the claim of evident partiality based on the fact that one of the arbitrators, Gunter, was nominated by Gaitskill and selected in an unrelated arbitration. Rather, the court suggested that this was "likely a testament to Mr. Gunter's experience and expertise." The court added that "[a]rbitrators are appointed every day, and oftentimes the same arbitrators, particularly in matters concerning subjects that are highly specialized, will sit together." The court concluded that the "mere fact that arbitrators may sit together on other panels and may have an opportunity to discuss matters, outside the presence of another member of another arbitration panel, does not constitute a 'direct, definite and capable of demonstration' allegation of partiality." The court also rejected the argument that bias can be inferred from the fact that the same counsel appeared in unrelated arbitrations. The court reasoned that the fact the counsel in the present arbitration "played some role in appointing Dr. Gaitskill to an unrelated arbitration panel during . . . the arbitration is of itself unremarkable and would not lead a reasonable person to conclude that there was a potential non-speculative bias." Finally, the court failed to find bias based on the fact that an attorney representing one of the parties was serving as arbitrator with one of the arbitrators in these cases in an unrelated matter. The court pointed out that as co-arbitrators they "did not share a duty to a client" and the court failed to see any potential bias as having "the opportunity to discuss a case is not the same as having a possible bias in favor of a party." For these reasons, the court confirmed the awards and rejected the motion to vacate. *Grupo Unidos por el Canal v. Autoridad del Canal de Panama*, 2021 WL 5834296 (S.D. Fla.).

Vacatur Not Warranted Based on Arbitrator's Destruction of Recording of Hearing and Notes. The labor arbitrator here received permission from the parties to record the hearing for his own use. After issuing his award the arbitrator destroyed the audio tape and his notes in accordance with his "consistent practice of destroying his notes and audio recordings." The losing party moved to vacate the award, arguing that the arbitrator was guilty of misconduct. The court denied the motion and confirmed the award. The court

found the arbitrator's explanation about his consistent practice of destroying his notes and audio recordings "plausible on its face and Plaintiff has not cited any evidence of a nefarious purpose on the Arbitrator's part." The fact that the arbitrator referred to his notes in the award did not transform "them into a formal record or required that they be produced to the parties." The court acknowledged that it was unusual for an arbitrator to refer to his notes in the award as his "official hearing notes" but the court added that that did not "change the analysis - namely, that the destruction of an arbitrator's notes that were not required to be maintained does not somehow constitute misconduct." In rejecting the motion to vacate, the court pointed out that plaintiff "was allowed full access to all the evidence relied upon by the Arbitrator -- it was present at every stage of the proceedings and could have hired a stenographer to create an official transcript if it believed one was necessary." *Goulds Pumps v. United Steelworkers*, 2022 WL 318436 (W.D.N.Y.).

Due Process Challenge Under New York Convention Rejected. A Haitian contractor brought an arbitration against Respondent which was a Haitian governmental entity. Respondent sought an adjournment based on the impact of the pandemic on Haiti and the political turmoil surrounding the assassination of Haiti's president. The panel did adjourn the hearing after defendant's director and principal witness contracted COVID. The panel later declined to adjourn the matter for an additional 60 days following the assassination of the president but did cancel the first two days of the hearing when defendant did not attend. The panel proceeded with the hearing and issued a partial final award in plaintiff's favor. The court denied defendant's challenge to the award on due process grounds. "While the COVID-19 surge in Haiti and the political turmoil surrounding the assassination of Haiti's president are certainly significant and relevant factors to consider, based on the available record, the Court concludes that in the context of confirming an arbitration award under the New York Convention, [defendant] did have an opportunity to present its case at the arbitration hearing conducted in New York, but it declined to do so." *Preble-Rich Haiti v. Republic of Haiti*, 2022 WL 229701 (S.D.N.Y.).

Finality of Award Rests on Intent of Arbitration Panel. The limitations period for moving to vacate an award depends on the finality of the award being challenged. The arbitration panel here issued an award in a time-sensitive matter on December 30, 2019, and followed up with an opinion on January 21, 2020. Actions to vacate awards under the Labor Management Relations Act must be brought within 30 days of issuance of the award. The employer here filed its motion to vacate on February 14, 2020, and the union moved to dismiss on timeliness grounds. The issue for the court was whether the December 30, 2019, award was final in which case the employer's action was untimely. The Third Circuit noted that in reviewing the employer's application "we must first determine whether the finality of an arbitration award is a question of fact or of law before considering whether dismissal is warranted." The court concluded that in reaching this conclusion "the finality of an

arbitration award is to be determined as a matter of law from the award itself and the written arbitration record." The court emphasized the importance of focusing on the arbitration panel's intent and found that since "the December 2019 Award unambiguously indicates that it is a final determination of all the issues the parties authorized them to decide" the employer's action to vacate under the LMRA is untimely. In doing so, the court rejected the argument that the January 21st award established finality. In doing so, the court found no support for the obligation of an arbitrator to "explain his award so that it shall be deemed final." *PG Publishing v. Newspaper Guild of Pittsburgh*, 19 F.4th 308 (3d Cir. 2021).

Manifest Disregard Claim Rejected. Berkowitz prevailed on his age discrimination claim, but his former employer prevailed on its counterclaims resulting in a much-reduced damages award for Berkowitz. He moved to vacate or modify the award on manifest disregard grounds. In rejecting Berkowitz's motion and in confirming the award, the court emphasized that Berkowitz carried a heavy burden of demonstrating that the arbitrator both knew and ignored a governing legal principle. For example, the court agreed with Berkowitz that prevailing parties under the ADEA are entitled to attorneys' fees. The court emphasized that Berkowitz only argued before the arbitrator that he was "entitled" to fees but found that statement "was not sufficiently specific to establish that the Arbitrator knew the governing principle and failed to apply it in manifest disregard of the law." As a result, the court held that because "Berkowitz had failed to show that he properly communicated to the Arbitrator that an award of attorneys' fees and costs is mandatory to a prevailing ADEA claimant, . . . he has failed to demonstrate that the Arbitrator acted in manifest disregard of the law with regard to attorneys' fees and costs." Similarly, the court rejected Berkowitz's claim that he was entitled to liquidated damages which is only awarded upon a finding of willfulness which the court pointed out he never argued at the hearing. The court similarly rejected Berkowitz's claim for emotional distress damages, because "Berkowitz never communicated to the arbitrator the legal basis for his claimed emotional distress damages." Finally, the court denied Berkowitz's argument that the arbitrator exceeded his authority, finding that his "real objection" is that the arbitrator "committed a legal error in denying the damages sought . . . and because he does not argue that the Arbitrator considered issues outside of the parties' agreement to arbitrate . . . Berkowitz's claim that the Arbitrator exceeded his powers is without merit." *Berkowitz v. Gould Paper Corp.*, 2022 WL 118232 (S.D.N.Y.). See also *Adventure Motorsports Reinsurance v. Interstate National Dealer Services*, 867 S.E.2d 115 (Ga. 2021) (vacatur of award on manifest disregard grounds overturned even if arbitrator's understanding of applicable law was "imperfect" as such "a failure by the arbitrator does not amount to concrete evidence of a deliberate decision not to apply the applicable law in making the arbitration award"); *Golden Crust Franchising v. Actus Restaurant Group*, 2021 WL 4974808 (S.D.N.Y.) (where authority on question of law is split, award will not be vacated on manifest disregard grounds because the arbitrator picked one line of authority over the other).

Award Confirmed Where Party Willingly Failed to Appear. Okada participated fully in the arbitration brought by his former law firm seeking to collect its fees for most of the proceeding. Okada announced, however, 72 hours before the evidentiary hearing that he would not be appearing. When the panel made clear that it would be proceeding nonetheless Okada stated that he was boycotting the proceeding because he rejected the validity of the law firm's engagement agreement and later because of undisclosed and unconfirmed medical issues. He further informed the panel that he was not authorizing his attorneys to participate. The hearing proceeded and an award against Okada was issued. The district court confirmed the award and the Seventh Circuit affirmed under the FAA and the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards. In doing so, the court rejected Okada's claim that the award was fundamentally unfair. The court noted that Okada made clear that he was not going to participate in the hearing. In rejecting Okada's claim that his health prevented his participation, the court pointed out that Okada "offered no explanation, let alone something like a doctor's note, to support his claimed health problem. He did not even hint that it was an emergency. Nor did he offer to appear by video or phone, and he never asked for a continuance." The court added that Okada's counsel asked for the opportunity to "convince" him to attend the hearing and the court reasoned that Okada would not need "convincing" if his health was the issue. The court concluded that "the Panel was both reasonable and fair when it decided to move ahead without him. It is hard to imagine what else it could have done given Okada's flat refusal to participate." *Bartlit Beck vs. Okada*, 25 F.4th 519 (7th Cir. 2022).

Tribal Lending Agreement Violates Public Policy. Plaintiffs were Virginia residents and borrowers of high interest, short-term loans whose interest rates ranged from 544% to 920%. The loans were received from online lenders affiliated with a federally-recognized Native American tribe. Plaintiffs filed this putative class action against tribal officials and two non-members affiliated with the tribal lenders claiming, among other things, that the loans were usurious. The lending agreements contained a choice-of-law clause requiring exclusive application of Tribal law and provided for arbitration of all disputes. The Eastern District of Virginia denied the Tribal Lender's motion to compel arbitration on a number of grounds, including that the lending agreements' choice of tribal law was unenforceable as a violation of Virginia's public policy. The Fourth Circuit agreed, stating "the choice-of-law clauses of this arbitration provision, which mandate exclusive application of tribal law during any arbitration, operate as prospective waivers." Turning first to the plaintiffs' challenge to the delegation clause, which delegated arbitrability to an arbitrator, the court found it "would require the arbitrator to determine whether the arbitration provision impermissibly waives federal substantive rights without recourse to federal substantive law. As a result, the delegation clause is unenforceable as a violation of public policy." For the same reasons, the entire arbitration clause was found unenforceable. "Read as a whole, the arbitration provision communicates an intent to require arbitration of all disputes, including those

arising under federal law, while depriving borrowers of any remedy under federal law. That forbidden purpose to squelch federal claims in contravention of public policy goes to the core of the agreement to arbitrate. We accordingly cannot sever the invalid clauses and, as a result, the entire arbitration provision is unenforceable." The lower court's denial of the motion to compel was affirmed. *Hengle v Treppa*, 19 F.4th 324 (4th Cir. 2021).

Case Shorts

- *Munizzi v. UBS Financial Services*, 2021 Ill. App. (1st) 201237 (Ill. App.) (challenge to FINRA award on public policy grounds rejected as public policy basis for challenging award limited under Illinois law to challenges of awards in the collective bargaining setting).
- *Refresco Beverages US v. International Brotherhood of Teamsters*, 2021 WL 5908988 (N.D. Tex.) (labor arbitrator did not violate public policy by setting aside discipline for violating harassment policy as arbitrator's ruling was based on employer's failure to abide by disciplinary procedures, not because he approved of grievant's alleged harassment).
- *Constellium Rolled Products Ravenswood v. United Steel, Paper and Forestry*, 18 F.4th 736 (4th Cir. 2021) (plea that court exercise plenary review when assessing manifest disregard claim rejected as to do so "would subject an arbitrator's award to more searching judicial scrutiny than authorized by the FAA or our precedent, without any legal authority.").
- *Subway International, B.V. v. Subway Russia Franchising Co.,* 2021 WL 5830651 (S.D.N.Y.) (vacatur warranted where final award denied a claim that partial final award, which was incorporated by reference, made clear had not been presented or addressed).
- *Jiangsu Beier Decoration Materials Co. v. Angle World, LLC*, 2021 WL 5003337 (E.D. Pa.) (court declines to confirm arbitration award issued by a CIETAC arbitration tribunal under the U.N. Convention on the International Sale of Goods where court ruled contract between parties did not satisfy the New York Convention's requirement for a signed arbitration agreement).
- *Women's Healthcare of Beverly, Ltd. v. Ambrose*, 2021 (Ill. App.) (1st) 201312-U (Ill. App.) (motion to vacate denied as "arbitrator's lack of reference to defendants' arguments does not mean the arbitrator failed to consider them" and "settled law holds that arbitrators need not provide explanations or rationale on how they reached their conclusions").
- *Grupo Unidos por el Canal v. Autoridad del Canal de Panama*, 2021 WL 5834296 (S.D. Fla.) (court confirmed award even though monies due under awards were paid as mootness is not a recognized defense under the New York Convention).

- *Gray v. Fidelity Investment*, 2021 WL 5826368 (N.D.N.Y.) (*pro se's* motion to vacate denied without prejudice, in deference to her *pro se* status, so as to give her "one final opportunity to provide evidence to support her varied claims of misconduct by the arbitration board").
- *Golden Crust Franchising v. Actus Restaurant Group*, 2021 WL 4974808 (S.D.N.Y.) (court declines to remand award to arbitrator, although it had the power to do so, merely because petitioner disagrees with award rather than based on any ambiguity in award).
- *China Railway No. 10 Engineering Group v. Triorient*, 2022 WL 134880 (S.D.N.Y.) (party seeking to confirm arbitration award entitled to award of fees and costs related to confirmation proceeding where defendant refused to abide by arbitrator's decision without justification).
- *Goulds Pumps v. United Steelworkers*, 2022 WL 318436 (W.D.N.Y.) (party who successfully opposed motion to vacate not entitled to attorneys' fees where motion to vacate was not filed in bad faith and question whether fundamental fairness applies in LMRA context unsettled).
- *PG Publishing v. Newspaper Guild of Pittsburgh*, 19 F.4th 308 (3d Cir. 2021) (motions to confirm or vacate arbitration award under FAA are to be submitted as motions, not pleadings).
- *Goodwin v. Comerica Bank, N.A.*, 72 Cal. App. 5th 858 (2021), as modified on denial of reh'g (Jan. 5, 2022), review filed (Jan. 24, 2022) (failure to seek disqualification of arbitrator under California civil code within 15 days of learning of omission or misrepresentation constitutes waiver of ability to move to disqualify arbitrator).
- *Signal 88 v. Lyconic*, 310 Neb. 824 (2022) (award found to be unambiguous and therefore lower court's modification and remand of matter to arbitrator rather than confirmation of award was unwarranted).

IX. ADR – GENERAL

Litigation Stayed Pending Arbitration of Related Disputes. Union leaders criticized management for, among other things, failing to follow COVID protocols. Management simultaneously conducted an investigation that resulted in five of six union leaders being terminated. Grievances were filed on behalf of the union leaders and a litigation asserting First Amendment violations was initiated as well. One grievance resulted in an arbitration award upholding the discharge based on a finding of gross misconduct by one of the union officials for transmitting a sex video. Management moved to stay the litigation pending resolution of the outstanding arbitrations. The court granted management's request, concluding that the issue of whether involvement with the sex tape constituted cause for termination was subject to the parties' grievance process and arbitration. "Having

determined that the parties agree to arbitrate the threshold issue of whether Plaintiffs were discharged for cause, the only remaining question is whether a federal statute or policy renders this issue non-arbitrable. No such prohibition exists." *Amalgamated Transit Union Local 1546 v. Capital Area Transit System*, 2021 WL 5578040 (M.D. La.). See also *Childers v. Rent-a-Center East*, 2021 WL 5386211 (E.D. La.) (court proceedings stayed in favor of related arbitration on efficiency and judicial economy grounds where: the disputes in court and in arbitration arose out of the same event with extensive factual overlap; any damages awarded in arbitration would be relevant to court litigants, and; arbitration would benefit litigants); *Byrne v. Charter Communications, Inc.*, 2022 WL 138020 (D. Conn) (where five out of six named plaintiffs in a putative class action were bound to arbitrate, a stay of the remaining plaintiff's action was proper because the determinations made in the arbitration may have preclusive effect on the court action); *Vasadi v. Samsung Electronics America*, 2021 WL 5578736 (D.N.J.) (court will not stay litigation brought by plaintiffs who opted out of arbitration in favor of related arbitrations where any efficiency gained would be "minimal" and plaintiffs would not be biased by the outcome of the related arbitrations).

Case Shorts

- *Shubin v. Slate Digital*, 2022 WL 168152 (S.D.N.Y.) (injunction in aid of arbitration denied were plaintiff failed to demonstrate arbitration would be rendered ineffectual where, should he prevail, award will be "classically monetary" and restricted shares at issue "will be returned to him, or he will be entitled to a damages award reflecting the value of those shares").

X. COLLECTIVE BARGAINING SETTING

Grounds to Order Joint Arbitration of Labor Dispute Lacking. The Third Circuit, in a matter of first impression, concluded that a party may seek joint arbitration under the Labor Management Relations Act to settle union jurisdiction disputes with two related employers to avoid risk of inconsistent determinations. Here, a contractor subject to a collective bargaining agreement created a second entity to employ members from a second union. A dispute arose as to which union's members could be retained on a new project. The employer initiated a court action to compel the two unions to participate in a joint arbitration. The district court rejected the employer's efforts and the Third Circuit affirmed. While recognizing that a court had the authority to order a joint arbitration, the court stated that there must be a contractual nexus between and among the parties and subject matter and the risk of inconsistent rulings must be genuine. The court concluded, however, that evidence was lacking whether the two entities here were single or joint employers. In particular, the Third Circuit found no evidence of a functional integration between the two entities, joint ownership, or sufficient control of the terms and conditions of employment between the two entities. "Put another way, instead of a triangular relationship between

one employer and two unions which could support joint arbitration, this case involves two parallel lines, each of which connects a different union with a different employer, and those two lines never intersect." For these reasons, the Third Circuit concluded that the unions could not be required to participate in a bipartite arbitration with the two employers. *P&A Construction v. International Union of Operating Engineers*, 19 F.4th 217 (3d Cir. 2021).

Case Shorts

- *Refresco Beverages US v. International Brotherhood of Teamsters*, 2021 WL 5908988 (N.D. Tex.) (labor arbitrator did not exceed authority by reinstating grievant accused of harassment based on employer's due process violations and failure to follow time limits under the collective bargaining agreement for imposing discipline).
- *Johnson Controls Security Solutions v. International Brotherhood of Electrical Workers*, 24 F.4th 87 (1st Cir. 2022) (union's grievance relating to employer's unilateral reduction of its matching contribution to 401(k) plan is arbitrable and does not fall within exemption for arbitration of disputes which "directly or indirectly involves the interpretation of the plans covering pensions" as exemption could be plausibly read "as not applicable to this dispute concerning compliance with the CBA's requirements as to the 401(k) plan").
- *Northeast Illinois Regional Commuter Rail Corp. v. International Association of Sheet Metal, Air, Rail, and Transportation Workers*, 2022 WL 60523 (N.D. Ill.) (union's challenge to vaccine mandate constituted "minor dispute" under the Railway Labor Act and must be resolved in arbitration).
- *Okonite Co. v. International Brotherhood of Electrical Workers*, 2021 WL 5492898 (D. R.I.) (labor dispute arbitrable, even though no employee yet impacted by the employer's policy change, as collective bargaining agreement defines grievance subject to arbitration to include interpretation of the collective bargaining agreement).

XI. NEWS AND DEVELOPMENTS

Forced Arbitration of Sexual Assault and Harassment Claims Barred. Congress enacted and President Biden signed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021." The statute will amend the Federal Arbitration Act and will limit an employer's ability to mandate pre-dispute arbitration of an employee's sexual harassment or sexual assault claim. The definition of sexual harassment and sexual assault includes "similar" or "applicable" laws, and the Act encompasses protection beyond federal law. The statute also prohibits pre-dispute class or collective claim waivers of such claims. The Act takes immediate effect but does not appear to apply retroactively. Any question

regarding the applicability of the statute or relating to arbitrability is to be determined by a court and not an arbitrator.

Supreme Court to Issue Five Arbitration-Related Rulings. The Supreme Court has taken up five cases this Term with rulings expected by June 2022. The issues posed to the Supreme Court and the citation of the decision that was appealed are provided below:

- *Morgan v. Sundance, Inc.,* 992 F.3d 711 (8th Cir. 2021), cert. granted, 142 S. Ct. 482 (2021): Whether an employee is required to show "prejudice" to prove that a company waived its right to require her to arbitrate her claims, especially when she would not have been required to make such a showing for waiver regarding another contract.

- *Luxshare ZF Automotive US*, 15 F.4th 780 (6th Cir. 2021), consolidated with *Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP*, 5 F.4th 216 (2d Cir.), cert. granted sub nom. *AlixPartners, LLP v. The Fund for Prot. of Investors' Rts. in Foreign States,* 142 S. Ct. 638 (2021): Whether Section 1782, which allows litigants to invoke the power of U.S. courts to render assistance in gathering evidence for use in "a foreign or international tribunal", applies to private commercial arbitral tribunals or ad hoc ISDS tribunals.

- *Southwest Airlines v. Saxon*, 993 F.3d 492 (7th Cir. 2021), cert. granted, 142 S.Ct. 638 (2021): Whether an airline employee who works as a ramp supervisor is a "transportation worker" under the Federal Arbitration Act and related Supreme Court jurisprudence and therefore is not required to arbitrate her wage dispute with the airline.

- *Viking River Cruises v. Moriana*, 2020 WL 5584508 (Cal. App. 2d Dist.), cert. granted, 142 S. Ct. 734 (2021): Whether the Federal Arbitration Act does or does not require enforcement of a bilateral arbitration agreement providing that an employee cannot raise claims on behalf of others under the California Private Attorneys General Act (PAGA).

- *Badgerow v. Walters*, 975 F.3d 469 (5th Cir. 2021), cert. granted, 141 S. Ct. 2620 (2021): Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the Federal Arbitration Act when the only basis for jurisdiction is that the underlying dispute involved a federal question (i.e., by means of "look-through" jurisdiction).

California Law Requires Arbitration Providers to Set Deadlines for Payment of Fees by Corporations. A new California law seeks to put an end to corporate delay of arbitration claims filed by their workers and consumers. The law requires the arbitration provider to specify the final due date of the initiation fees as soon as the worker or consumer completes their filing requirements. The arbitrator must also obtain consent from all parties before extending any due dates for other fees and costs involved in the continuation of the arbitration.

New York Sanctions Virtual Non-Jury Trials. New York's Chief Administrative Judge issued a directive known as Rule 36 which gives litigants the ability to consent to remote non-jury trials. The rule creates minimum standards for remote proceedings, including: confirming a party's ability to communicate confidentially with counsel; ensuring that all documents and exhibits received by the court are made available to remote litigants; interpretive services are provided to non-English speakers; a requirement for verbatim transcriptions of the hearings, and; guaranteed access to the public of the proceedings.

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