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Feliu Case Summaries:

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Contents

I. JURISDICTIONAL ISSUES: GENERAL

Sovereign Immunity Does Not Apply to $50 Billion Award Versus Russia. Former shareholders of Yukos Oil obtained arbitration awards in excess of $50 billion against the Russian Federation based on its dismantling of Yukos. The awards were issued in 2014 and litigation in multiple fora has consumed the parties ever since. The issue before the district court here was whether foreign sovereign immunity precludes the court's exercise of subject-matter jurisdiction, a necessary predicate to the court's ability to rule on the enforceability of the awards under the New York Convention. The court concluded that sovereign immunity did not apply. The court relied on the exemption in the Foreign Sovereign Immunity Act for arbitration awards which ensures the enforceability of awards governed by certain treaties. "This exception has authorized the participation of U.S. federal courts in upholding the international arbitration system that has flourished since the post-World War II era to facilitate cross-border investments and business dealings." The court noted that Russia was a signatory to the applicable treaty and both parties agreed to arbitrate the dispute. Further, the parties delegated jurisdictional determinations to the tribunal and therefore the tribunal's jurisdictional rulings are binding on the court, including its ruling that the dispute was arbitrable and the subject of the agreement between the parties. The court also ruled that Russia's fraud claims apply to whether the award may be enforced and not to whether the court has subject-matter jurisdiction. Finally, the court concluded that the awards "arose out of a commercial relationship between the parties based on the Russian Federation's own admitted and undisputed facts as to the history of the parties' relationship and applicable case law" and, therefore, the New York Convention governs granting to the court subject-matter jurisdiction to rule on the enforcement of the awards in favor of the Yukos shareholders. *Hulley Enterprises v. The Russian Federation*, 2023 WL 8005099 (D.D.C.).

Arbitration Agreement Did Not Supplant Court's Subject-Matter Jurisdiction. Plaintiff moved for and obtained summary judgment against defendant Upshot establishing that it owed payments to plaintiff. When Upshot did not make these payments, the court held Upshot in contempt and imposed sanctions. Upshot then moved to compel arbitration and to vacate the court's prior orders by arguing that the court lacked subject-matter jurisdiction. The Delaware Court of Chancery ruled that the arbitration provision did not deny the court of its jurisdiction. The court began its analysis by pointing out that a court derives its subject-matter jurisdiction from constitutional or statutory provisions. "By agreeing to litigate a dispute in a particular forum, parties can commit among themselves not to ask a court to exercise the subject-matter jurisdiction it possesses. Such an agreement does not deprive a court of its authority to hear a particular type of case." When a court grants a motion to compel arbitration it is not finding that it lacks subject-matter jurisdiction, the court reasoned, but rather is enforcing the parties' legally enforceable forum selection clause. "Principles of contract law, not a lack of subject matter jurisdiction, generate that outcome." In this case, the court made clear that it had subject-matter

jurisdiction over the dispute and the parties by agreeing to an arbitration provision "cannot eliminate that jurisdiction by contract." The court added that "Upshot has not pointed to any case in which a court permitted a party to invoke an arbitration provision after losing on the merits and being held in contempt. That would be the ultimate do-over." The court then denied Upshot's motion to compel on the grounds that it waived its right to arbitrate. *Gandhi-Kapoor v. Hone Capital, LLC*, 2023 WL 8480970 (Del. Ct. Chanc.), order certifying interlocutory appeal, 2023 WL 8769432 (December 18, 2023).

Case Shorts

- *Bungie, Inc. v. Aimjunkies.com*, 2023 WL 6806996 (W.D. Wash.) (arbitrator's finding that party violated copyright statute entitled to issue preclusive effect in subsequent litigation on video game company's related claims).
- *Mekari v. Access Restoration US, Inc.*, 2023 WL 6809813 (E.D. La.) (injunction to stop pending arbitration denied where arbitrator could award the monetary damages being sought and therefore the alleged injury was not irreparable).
- *Conti 11. Container Schiffarts-GMBH & Co. v. MSC Mediterranean Shipping Co.*, 91 F.4th 789 (5th Cir. 2024) (contacts relating to the underlying dispute, and not those relating solely to the arbitration, must be considered when determining if a court has personal jurisdiction under the New York Convention to confirm an arbitration award).
- *Certain Underwriters at Lloyds of London v. Mpire Properties, LLC*, 2023 WL 6318034 (S.D.N.Y.) (Louisiana insurance code provision supersedes the FAA and New York Convention under the McCarran-Ferguson Act and, therefore, arbitration of property owner dispute may not be compelled).
- *Town of Vinton v. Certain Underwriters at Lloyd's London*, 2023 WL 8655270 (W.D. La.) (Louisiana law precluding arbitration of insurance disputes applies and under McCarran-Ferguson Act is not preempted by the FAA where only domestic insurers are defendants).
- *12260 Group, LLC v. Independent Specialty Insurance Co.*, 2023 WL 8452230 (M.D. Fla.) (international arbitration governed by New York Convention not subject to McCarran-Ferguson Act which applies only to arbitration agreements within the United States).
- *Manheim v Independent Specialty,* 2023 WL 8370369 (E.D. La.) (under existing Fifth Circuit law, which is admittedly minority view, New York Convention requirement of a written arbitration agreement is satisfied if executed contract contains arbitration clause even if separate arbitration agreement is not signed).
- *Goldman Sachs & Co., LLC v. Leissner*, 2023 WL 7049775 (S.D.N.Y.) (federal statutory interest rate applies to an award once it has been reduced to a judgment even if arbitration agreement applies prevailing interest rate under state law).

- *Brown v. GoJet Airlines, LLC*, 677 S.W.3d 514 (Mo. 2023) (pilot's dispute with employer subject to arbitration under Missouri's Uniform Arbitration Act even though plaintiff qualifies for transportation workers' exemption under the FAA).
- *Fraga v. Premium Retail Services, Inc.*, 2023 WL 8435180 (D. Mass.) (merchandisers who receive, sort, and display products at the point of purchase are not sufficiently related to interstate commerce to satisfy the requirements of the FAA transportation workers' exemption).
- *Allco Finance Ltd. v. Trina Solar (U.S.), Inc.*, 2023 WL 8664865 (S.D. Fla.), appeal dismissed, 2024 WL 122503 (11th Cir.) (court can compel arbitration even where the parties agree to arbitrate dispute outside the judicial district).
- *Interactive Brokers v. Delaporte*, 2023 WL 6795419 (S.D.N.Y.) (preliminary injunction issued against non-signatory investors who sought to arbitrate claim before FINRA against broker who allegedly defrauded investors based on arbitration agreement between broker and manager of funds where relationship to dispute was not sufficiently intertwined).
- *Resource Group International Ltd. v. Chishti*, 91 F.4th 107 (2d Cir. 2024) (New York law displaces the FAA's prohibition against interlocutory appeals from orders refusing to enjoin an arbitration and therefore appellate review of such proceeding permitted).
- *Flores v. National Football League*, 2024 WL 50238 (S.D.N.Y.) (court declines to certify appeal of order granting motion to compel certain claims at plaintiffs' request despite fact that defendant had appealed to circuit court those claims that were not sent to arbitration).
- *Mattson Technology v. Applied Materials, Inc.*, 96 Cal. App.5th 1149 (2023), as modified on denial of reh'g (Nov. 20, 2023), review denied (Feb. 14, 2024) (court proceeding stayed under California law where pending arbitration against former employee and separate court action against new employer alleging misappropriation of trade secrets rely on the same allegations against both parties).
- *New Orleans Employers International Longshoremen's Association v. United Stevedoring of America, Inc.*, 2023 WL 7220551 (E.D. La.) (motion to compel ERISA withdrawal liability lawsuit denied where employers failed to timely seek arbitration as they were not "divested of their right" to arbitrate by language in pension plan that was "far from crystalline").
- *Suarez v. Superior Court of San Diego County*, 2024 WL 256450 (Cal. App.) (statute extending time to file as accommodation to holidays and where electronic service is employed do not serve to extend an employer's time to timely pay arbitration fees under existing California law).
- *12260 Group, LLC v. Independent Specialty Insurance Co.*, 2023 WL 8452230 (M.D. Fla.) (defenses against arbitration under domestic law, such as unconscionability, not available under the New York Convention).

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

Right to Arbitration Waived. A party can waive its right to arbitrate where it knows of its right but acts inconsistent with it. Here, Breadeaux's Pisa elected to litigate a dispute with its franchisee in federal court. After litigating its preliminary injunction application, taking part in mediation, and participating in discovery proceedings, Breadeaux filed a demand for arbitration and moved to stay all federal court proceedings pending completion of the arbitration. The district court denied Breadeaux's motion, and the Eighth Circuit affirmed. Acknowledging that the Supreme Court recently "stripp[ed] the prejudice requirement" from the waiver inquiry, the Eighth Circuit noted: "[t]o decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party." The court then found that Breadeaux's actions were determinative. "Breadeaux knew of its right to arbitrate. Yet Breadeaux acted inconsistently with its right by seeking a permanent injunction against [defendant] which would require a determination of arbitrable issues." Breadeaux's actions in failing to seek arbitration after the district court declined to enter a preliminary injunction, mediating the dispute, and participating in discovery proceedings also supported the district court's finding that Breadeaux acted inconsistent with its right to arbitrate. As such, the district court's denial of Breadeaux's motion was affirmed. *Breadeaux's Pisa, LLC v. Beckman Bros. Ltd.*, 83 F.4th 1113 (8th Cir. 2023). Cf. *EmpRes at Riverton, LLC v. Osborne*, 538 P.3d 670 (Wyo. 2023) (party, which asserted presence of arbitration agreement as affirmative defense in its answer, did not waive its right to arbitrate by moving to compel 14 months later as mere delay did not constitute manifest waiver of right to arbitrate and no extensive litigation activity occurred during that period); *Stonex Commodity Solutions v. Garcia*, 2023 WL 7299128 (S.D. Tex.) (waiver of arbitration claim rejected where motion to compel submitted four months after complaint was filed and defendant's participation in litigation was defensive in nature).

Challenge to Delegation Provision Must be Specific. The Ninth Circuit addressed the question of what a party must do to properly challenge the enforceability of a delegation provision. The court concluded that a party challenging a delegation provision must "make specific arguments attacking the provision" but may employ the same arguments it is offering to challenge the arbitration agreement generally "so long as the party specifies why each reason renders the specific provision unenforceable." In this case, an investor in crypto signed onto Coinbase's online portal and accepted its user agreement which included an arbitration provision. The investor specifically challenged the delegation provision on unconscionability grounds. In addressing the issue, the court reasoned that it could look beyond the specific language of the delegation provision itself to provide a context in determining its enforceability. The court rejected the investor's procedural unconscionability argument, instead finding "the process is neither hidden nor beyond the

reasonable expectation of the user." As to substantive unconscionability, the court acknowledged a lack of mutuality as only users would be challenging the arbitration provision but added that substantive unconscionability required more than a one-sided provision. The court rejected the investor's argument that the requisite pre-arbitration steps gave Coinbase a "sneak peek" at an investor's claim, finding that "these pre-arbitration procedures [not] to be overly harsh or unfairly one-sided." For these reasons, the court rejected the investor's challenge to Coinbase's delegation provision on unconscionability grounds. *Bielski v. Coinbase, Inc.*, 87 F.4th 1003 (9th Cir. 2023).

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- *Brayman v. Keypoint Government Solutions*, 83 F.4th 823 (10th Cir. 2023) (district court's denial of motion to compel reversed where clear delegation provision was present and "emphatic" carveout from delegation to arbitrator for class waiver question only reinforces that "no other exception was intended").
- *Ferreira v. Uber Technologies, Inc.*, 2023 WL 7284161 (N.D. Cal.) (delegation of arbitrability issues applicable to non-signatories requires clear and unmistakable evidence of delegation which was lacking here where agreement was bilateral in nature and between signatories only).
- *Young v. ByteDance, Inc.*, 2023 WL 7096937 (N.D. Cal.) (non-party seeking to compel arbitration may not invoke delegation provision in arbitration agreement to which it did not agree so as to have arbitrator decide question of arbitrability).
- *Lewis v. Samsung Electronics America*, 2023 WL 7623670 (S.D.N.Y.) (arbitrability disputes delegated to arbitrator where arbitration agreement incorporated the AAA's Consumer Arbitration Rules and encompassed broadly all disputes between the parties without any exclusions).
- *711 Tchoupitoulas Condominium v. Independent Specialty,* 2023 WL 8716580 (E.D. La.) (participation in court's Case Management Order which attempted, following filing of various hurricane-related claims, to offer "streamlined settlement conference and mediation protocol" did not constitute invocation of the litigation process sufficient to constitute waiver of arbitration).
- *Tupelo Children's Mansion v. Elegant Reflections*, 2023 WL 8259254 (N.D. Miss.) (failure to assert right to arbitration as an affirmative defense and the filing of a boilerplate answer and requests for jury trial did not constitute waiver of right to arbitrate).
- *Brevard v. Credit Suisse*, 2024 WL 36991 (S.D.N.Y.) (employer's failure to invoke right to arbitration before EEOC did not constitute waiver as EEOC is not bound by private arbitration agreements).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Arbitration Agreement Ruled Unconscionable. A California residential facility's arbitration agreement was dealt a fatal blow when a California appellate court affirmed a lower court order denying the facility's motion to compel arbitration on the ground that the arbitration provision was unconscionable. The trial court found that the circumstances surrounding the execution of the agreement presented "a high degree of procedural unconscionability," based on both oppression and surprise. The appellate court agreed, noting that the evidence supported the finding that the facility subjected the plaintiff to a financial "pressure tactic" that was oppressive. The appellate court also addressed the parties' contentions regarding the portion of the arbitration agreement providing, in bold text, "that residents could withdraw from the clause by giving written notice within 30 days of signing the agreement, and cautioned that by signing below, you warrant that this paragraph has been explained to you, that you understand its significance, that you voluntarily agree to be bound by it, and that you understand that agreeing to arbitration is not a condition of admission to the [facility]." The court reviewed and upheld the lower court's determination that no one at the facility ever explained the arbitration provision to the plaintiff and concluded that "[plaintiff] did not have an authentic informed choice to reject the arbitration clause given its confusing presentation, the failure of anyone at the facility to explain the clause or the opt-out procedure to her, and the temporal and financial pressure she experienced in her vulnerable state." *Haydon v Elegance*, 97 Cal. App.5th 1280 (2023), review filed (January 26, 2024).

Severance of Unconscionability Terms Barred Where They Permeate Agreement. Plaintiff was required to sign electronically a number of documents when she became employed by the American Automobile Association, including an arbitration agreement as a condition of employment. The trial court denied the motion to compel, finding the arbitration agreement to be unconscionable and declined to sever the unconscionable provisions. The California appellate court affirmed. The appeals court noted that the arbitration "paragraphs are dense, spanning two single-spaced, letter sized pages filled with statutory references and legal jargon." The court concluded that the limited access to the agreement made available to plaintiff and problematic formatting "was presented with the aim to thwart, rather than promote the non-drafting party's understanding" of the agreement and established a high degree of procedural unconscionability. The court further found the arbitration agreement to be substantively unconscionable. For example, the agreement provided that any party that filed a claim covered by the arbitration agreement with a government agency waived their right to any remedy or relief for such claim. The court also ruled that the confidentiality provision attached to the arbitration agreement was overbroad as lacking any legitimate commercial purpose. The court concluded that "the confidentiality clause in the arbitration agreement benefits only the

Association with respect to harassment, retaliation, and discrimination claims, such as the claims here, and is thus substantively unconscionable." Finally, the court held that the ban on representative actions to be "unconscionable because it requires an employee to waive a right that is not waivable." With these considerations in mind, the court affirmed the trial court's refusal to sever the offensive provisions as the agreement was permeated with unconscionable terms and the court would have had to rewrite the agreement to make it enforceable. *Hasty v. American Automobile Association of Northern California*, 98 Cal. App.5th 1041 (Cal. App. 2023).

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- *Payne v. Yerba Mate Co.*, 2023 WL 8718118 (N.D. Ill.) (unconscionability claim rejected, despite court being "troubled" by employee with glaucoma who was not technologically proficient being pressured to sign arbitration agreement, where agreement was sent to employee nine times before he signed it).
- *Curtis v. JP Morgan Chase Bank*, 2024 WL 283474 (S.D.N.Y.) (unconscionability claim rejected based on a waiver of punitive damages and injunctive relief, shortened statute of limitations, and unilateral right to modify the agreement provisions which were found to be ancillary and could be stricken by the arbitrator if found to be unenforceable).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

"Reasonably Prudent Internet User" Standard Clarified. The consumer here brought a class action against defendant Klarna whose "buy now, pay later" policy resulted in unreimbursed overdraft fees being charged. Klarna moved to compel based on the arbitration provision embedded in its website interface. In particular, Klarna contended that plaintiff agreed to its terms of service at various points during the online transaction, including when she used Klarna's checkout "widget" to finalize her purchase. The district court denied the motion to compel but the Second Circuit reversed. First, the court found that the content was "visible at once" without the need to review beyond what was immediately visible. In its view, a "reasonable internet user, therefore, could not avoid noticing the hyperlink to Klarna's terms." The appellate court also concluded that under the totality of the circumstances test a reasonable internet user would understand that by clicking the "confirm and continue" button he or she was agreeing to the payment terms. While acknowledging that Klarna had provided only some but not all of the relevant payment terms, plaintiff was on inquiry notice as to those terms placing the "burden . . . on her to find out to what terms she was accepting." The court concluded that plaintiff "unambiguously manifested her assent to Klarna's terms", and the court held that "as a matter of law [plaintiff] agreed to arbitrate her claims against Klarna." *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023). See also *Tamburo v. Hyundai Motor America Corp.*, 2024 WL

22230 (N.D. Ill.) (car purchaser agreed to arbitrate claim involving connected services by clicking accept button agreeing to linked terms of service and doing so twice more when re-subscribing to the services); *Coe v. The Coca Cola Company*, 2023 WL 7524396 (W.D.N.Y.) (arbitration compelled where online customers used "uncluttered" interface that warned "users that they are agreeing to the hyperlinked Terms of Use & by clicking the box and proceeding with the account creation"); *Babaeva v. J Crew Group*, 2023 WL 7346079 (N.D. Cal.) (online purchaser bound to arbitrate claim against retailer where purchaser was required to proceed through checkout page which conspicuously displayed Terms of Use containing arbitration provision).

No Mutual Assent Where Customer Not Notified About Arbitration Term. Noting that "it is a basic tenet of contract law that, in order to be binding, a contract requires a meeting of the minds and a manifestation of mutual assent," the Second Circuit affirmed a district court order denying Popular Bank's motion to compel arbitration. The customer did not receive actual notice of the arbitration terms, but the court noted that the customer could "nevertheless [be] bound by such terms if he is on *inquiry* notice of them and assents to them through conduct that a reasonable person would understand to constitute assent." Here, however, the court found that there were several modified versions of the agreement over a series of years containing contradictory language which rendered the agreement ambiguous as to whether the various versions were amendments to or replacements for the original. Because of this, the court concluded, "in light of the totality of the circumstances," the customer never received notice about the contract terms in a "clear and conspicuous way" and a "reasonable customer would not be sufficiently aware of which of these opt-out provisions governs." As such, the court concluded the arbitration agreement was invalid for lack of mutual assent. *Lipsett v. Popular Bank*, 2024 WL 111247 (2d Cir). See also *Land v. IU Credit Union*, 218 N.E. 3d 1282 (Ind.), aff'd on reh'g, 2024 WL 378251 (Ind.) (e-mail notice transmitting credit union's account statement with inconspicuous subject line, and which made no reference to modification of terms in body of e-mail but instead indicated that a new e-statement could be retrieved, did not constitute proper notice of modified terms including arbitration requirement).

Non-Signatory Cannot Compel Arbitration. Ford Motor Company moved to compel arbitration of a proposed class action based on the arbitration agreements contained in Plaintiffs' sale contracts, lease agreements, and/or "connected services" agreements. Ford was not a signatory to these agreements but argued that it could compel arbitration on the theories of equitable estoppel, agency, and third-party beneficiary. The California district court disagreed, finding that Plaintiffs' claims were not sufficiently connected to the sale and lease agreements for equitable estoppel or agency to apply and rejected Ford's third-party beneficiary theory because "the [pertinent agreements] plainly state that only four parties are permitted to invoke the arbitration provision, and Ford is not one of them." Turning to

the "connected services" agreements, the court opined: "Surely, Ford knows how to draft a mandatory and binding arbitration clause, and this is not it." The court observed that that the agreement contained a "hodgepodge of statements" making it "utterly unable to discern the intention of the parties" and therefore held that it failed to evidence the clear and unmistakable intent necessary to establish an agreement to arbitrate. Ford's motion to compel arbitration was denied. *Scriber et al. v. Ford Motor Co.*, 2023 WL 7348461 (S.D. Cal.). Cf. *Nicholas Services v. Bombardier, Inc.,* 2023 WL 8888641 (N.D. Miss.) (buyer of used aircraft equitably estopped from resisting arbitration as non-signatory where buyer obtained repairs under manufacturer's warranty that was agreed to by original purchaser); *Curtis v. JP Morgan Chase Bank*, 2024 WL 283474 (S.D.N.Y.) (non-signatory Zelle may compel arbitration as intended third-party beneficiary and on equitable estoppel grounds as plaintiffs are suing both the bank and Zelle for alleged improper money transfers and the issues between the two defendants were sufficiently intertwined); *Ferreira v. Uber Technologies, Inc.*, 2023 WL 7284161 (N.D. Cal.) (Uber could compel arbitration as third-party beneficiary under agreement between its drivers and its subsidiaries which provided technology platform required for access to download the requisite drivers' app); *Young v. ByteDance, Inc.*, 2023 WL 7096937 (N.D. Cal.) (non-party TikTok may invoke equitable estoppel doctrine to compel arbitration where allegations of "substantially interdependent and concerted misconduct" were made against it and plaintiff's employer).

Arbitration Compelled Between Two Non-Signatories. The long-standing rule in Nevada has been that a party to a contract may compel a non-signatory to arbitrate its claims after demonstrating both the right to enforce the contract and that compelling the non-signatory to arbitration is warranted under at least one of five theories: incorporation by reference, assumption, agency, veil-piercing/alter ego, or estoppel. In deciding an issue of first impression as it concerned two non-signatories, the Nevada Supreme Court recently "[took] the opportunity to clarify that a non-signatory can be compelled to arbitrate by another non-signatory" after making the same showing. Because the lower court "did not consider or make any findings relevant to whether [the parties] nonetheless could be bound by the arbitration agreements under general theories such as agency and equitable estoppel," the matter was remanded to the district court for reconsideration of the motion to compel consistent with the Supreme Court's opinion. *Ruag Ammotec GMBH v. Archon Firearms, Inc.*, 538 P.3d 428 (Nev. 2023).

Silence Regarding Modified Terms Did Not Constitute Consent. The Indiana Supreme Court ruled that a customer's failure to respond to notice of modified terms relating to her credit union account to require arbitration of disputes did not constitute consent to the modification. The Court found that the customer was properly put on notice of the change which was referenced in a two-page addendum to her account statement sent by postal mail and further found that the customer was given the opportunity to opt out of the

arbitration obligation, but never did. The Court, relying on the Restatement of Contracts standard, found no "definite and substantial" reliance on the modified terms by the customer. The Court rejected the credit union's contention that the customer's continued use of the account constituted acceptance of the modified terms as no notice was provided that "suggested that silence and continued use of the accounts would result in acceptance of any future modification to those original contracts." The Court pointed out that customers could opt out of arbitration and still use their accounts, which demonstrated that continued use of the account did not necessarily constitute acceptance of the modification. The Court further emphasized that when the customer signed onto the account she had to affirmatively click "accept" which undercut any "course of dealing" argument by the credit union. The Court concluded that the customer's "subsequent silence and inaction did not amount to acceptance" of the modified terms and arbitration obligation. *Land v. IU Credit Union*, 218 N.E. 3d 1282 (Ind.), aff'd on reh'g, 2024 WL 378251 (Ind.).

Case Shorts

- *Pagel v. Weikum*, 997 N.W.2d 872 (N. Dak. 2023) (arbitration provision in law firm partnership agreement, which provided that "any disputes regarding the terms of this agreement" would be subject to arbitration, is broad and encompasses partner's breach of contract and conversion claims following firm's dissolution).
- *Merrow v. Horizon Bank*, 2023 WL 7003231 (E.D. Ky.) (breach of fiduciary claim under ERISA subject to arbitration as arbitration agreement is in ESOP plan document itself and not in employment agreement).
- *Oganesyan v. Tiffany and Co.*, 2023 WL 7928098 (S.D.N.Y.) (plaintiff's claim that she did not understand implications of arbitration agreement rejected as "it was her responsibility to ensure she understood the document she signed" and therefore motion to compel granted).
- *Costello v. Olson*, 2023 WL 8502753 (Fla. App.) (dispute between baseball player's estate and team physician did not fall within scope of arbitration clause providing that disputes between baseball clubs are subject to arbitration).
- *RUAG Ammotec GMBH v. Archon Firearms, Inc.*, 538 P. 3d 428 (Nev.) (question of existence of arbitration agreement is present when a non-signatory moves to compel arbitration which must be decided by a court in the first instance).
- *Resource Group International Ltd. v. Chishti*, 91 F.4th 107 (2d Cir. 2024) (later executed agreement which specifically precludes arbitration supersedes earlier agreement with otherwise enforceable arbitration provision).
- *Brevard v. Credit Suisse*, 2024 WL 36991 (S.D.N.Y.) (employee must arbitrate claim under 2014 agreement with valid arbitration agreement even if she signed a later agreement under duress).

- *Forge Underwriting v. Amtrust Financial Services*, 2023 WL 6890844 (S.D.N.Y.) (arbitration proceeding enjoined where insurer's agreement without arbitration provision was shown not to have incorporated by reference related agreement with arbitration term).
- *Yeh v. Tesla, Inc.*, 2023 WL 6795414 (N.D. Cal.) (father and infant obligated to arbitrate dispute with car manufacturer based on arbitration agreement signed while child was in utero where father represented that car was purchased in part to benefit unborn child and the claims of the father and son were clearly and closely intertwined).
- *Hicks v. Hartman Income REIT,* 2023 WL 8437057 (N.D. Tex.) (arbitration policy enforced despite fact that new employee did not sign any document as policy was companywide and "arbitration agreement did not have signs of requiring a signature to be binding").
- *Brevard v. Credit Suisse*, 2024 WL 36991 (S.D.N.Y.) (arbitration agreement signed after employee began employment supported by consideration based on continued or future employment even though she already began to work for employer).
- *Woman's Care Specialists, PC v. Potter*, 2023 WL 3558508 (Ala.) (post-termination tort claims are subject to arbitration under the agreement providing for arbitration of "any and all disputes related in any manner whatsoever" to plaintiff's employment).
- *Woman's Care Specialists, PC v. Potter*, 2023 WL 3558508 (Ala.) (presumption is that arbitration provision did not expire following termination of employee's employment).
- *Tamburo v. Hyundai Motor American Corp.*, 2024 WL 22230 (N.D. Ill.) (loss of desired car-related services by car purchaser who did not accept terms of service which included arbitration provision did not constitute duress as customer "had free will to accept or refuse the terms").
- *Payne v. Yerba Mate Co.*, 2023 WL 8718118 (N.D. Ill.) (offer ruled enforceable despite fact that employee with glaucoma was required to sign agreement on a phone screen without being told its contents where the agreement had been forwarded to him nine times before).
- *Williams v. Smyrna Residential, LLC*, 2024 WL 655014 (Tenn.) (beneficiaries of decedent asserting wrongful death claim are subject to arbitration agreement to which decedent was bound as wrongful death action is derivative and was "transferred" to his beneficiaries).
- *Hitachi Construction Machinery Co. v. Weld Holdco, LLC*, 2023 WL 8452389 (S.D.N.Y.) (non-signatory compelled to arbitrate fraud claim based on agreement with arbitration provision at heart of dispute but can litigate contract claim based solely on separate agreements).

V. CHALLENGES TO ARBITRATOR OR FORUM

"Dispute" Under EFAA Defined. The Ending Forced Arbitration Act, which took effect on March 3, 2022, bars the arbitration of sexual harassment and sexual assault disputes. At issue in this case is what constitutes a "dispute" for purposes of the statute. Plaintiff here alleged various acts of sexual harassment from 2019 but he did not complain until after EFAA took effect. Defendant argued that a "dispute" arises when the alleged offensive acts occurred, which in this case was before enactment of the statute. The California appellate court disagreed. The court reasoned that a "dispute" is a fact-specific inquiry and extends beyond the alleged sexual conduct. "A dispute arises when one party asserts a right, claim, or demand, and the other side expresses disagreement or takes an adversarial posture." In reaching this conclusion, the court distinguished between a claim and a dispute. "Unlike a claim . . . a dispute does not arise simply because the plaintiff suffers an injury; it additionally requires a disagreement or controversy." Since a dispute did not exist before the effective date of the statute even though the harassing activity had already occurred, the court rejected the employer's effort to arbitrate plaintiff's sexual harassment claim. *Kader v. Southern California Medical Center*, 2024 WL 322052 (Cal. App.). See also *Mitura v. Finco Services, Inc.*, 2024 WL 232323 (S.D.N.Y.) (sexual harassment claim which is pled sufficiently to survive a motion to dismiss is not subject to arbitration under the Ending Forced Arbitration Act).

Collateral Estoppel Applied to Bar Arbitration. In an earlier-filed class action alleging privacy violations, TCC Wireless sought to enforce the arbitration clause contained in its employment agreement to force its employees to arbitrate their claims. TCC lost the motion and the trial court denied TCC's motion for reconsideration. The court's orders were appealable, but TCC chose not to appeal, and the matter was eventually settled. Sometime thereafter, a different employee filed a proposed class action alleging the same privacy violations. TCC sought to compel arbitration based on the same employment agreement but was barred from doing so by an Illinois appellate court under the doctrine of collateral estoppel. The court explained "the doctrine's purpose is to prevent a party from losing an issue on the merits, but then relitigating it before a different judge to procure the desired result" and that it "exists to prevent litigants from doing exactly what TCC attempts." The court found that the issue of the enforceability of TCC's arbitration clause "was fully decided, and the opportunity to appeal exhausted, and it was only after this process that TCC decided to settle. When the settlement became final via court order, the earlier order denying arbitration merged with that final order. To allow TCC to obtain an opposite result after its previous opportunity to fully litigate the issue would run directly counter to why the doctrine of collateral estoppel exists." The court therefore concluded that "each element of collateral estoppel is present, and TCC cannot enforce the arbitration clause in the employment agreement regarding [plaintiff]." *Ipina v. TCC Wireless*, 2023 WL 7412294 (Ill.

App.). Cf. *New York Black Car Operators' Injury Compensation Fund v. State Farm Mutual Automobile Insurance Co.*, 2024 WL 99508 (N.Y. Sup. Ct.) (res judicata did not apply to jury verdict relating to motor vehicle accident that was not yet entered as a judgment and therefore court could confirm an award which reached a different result).

Case Shorts

- *Jiangxi Zhengao Recycled Textile Industry Co. v. Amazon.com Services*, 2023 WL 8700956 (S.D.N.Y.) (AAA Rules require arbitrators to keep confidential all matters related to arbitration or an award and therefore arbitrator's failure to disclose award in favor of respondent in a separate matter was not evidence of bias as a matter of law).
- *Baker Hughes Saudi Arabia Co. v. Dynamic Industries, Inc.*, 2023 WL 7299129 (E.D. La.) (motion to compel denied where arbitration forum, the Dubai International Financial Center London Court of International Arbitration, was abolished by the Dubai government despite it being replaced by the Dubai International Arbitration Center as the Dubai government did not have the authority to unilaterally change the arbitration forum agreed to by the parties).
- *Great American Insurance Company v. Crystal Shores Owners Association*, 2023 WL 8858165 (Ala.) (insurance appraisal lacks indicia of classic arbitration as agreement did not require appraisers to use specific standard for valuing loss, require them to consider evidence or arguments from the parties, or resolve the entire dispute and therefore proceeding did not constitute an arbitration under the FAA).

VI. CLASS, COLLECTIVE, MASS FILINGS, AND REPRESENTATIVE ACTIONS

Arbitration Provision May Not Bar Public Injunctive Relief. Comcast's subscriber agreement includes a waiver of all class, collective, and representative claims. Ramsey, a subscriber, sued Comcast alleging unfair competition and deceptive business practices under California law and sought public injunctive relief. Comcast moved to compel arbitration, arguing that under its subscriber agreement Ramsey could only seek individual relief in arbitration. The trial court ruled that, as the subscriber agreement purports to waive Ramsey's right to seek public injunctive relief, it was unenforceable under California law. Comcast appealed and the appellate court affirmed. The court, relying on the California Supreme Court's decision in *McGill v. Citibank*, concluded that California will not enforce arbitration provisions barring public injunctive relief. "An injunction that seeks to prohibit a business from engaging in unfair or deceptive practices and marketing, requires it to provide enhanced pricing transparency, and requires it to comply with our consumer protection laws, does have the primary purpose and effect of protecting the public, and thus falls within *McGill's* definition of public injunctive relief." The court pointed out that Ramsey's relief is "forward-looking" as he is already aware of the injury he suffered, and the

relief sought is prospective and seeks the cessation of the alleged unlawful practices. For these reasons, the appellate court upheld the denial of Comcast's motion to compel. *Ramsey v. Comcast Cable Communications, LLC*, 2023 WL 9468196 (Cal. App.). See also *Piran v. Yamaha Motor Corp.*, 2024 WL 484845 (Cal. App.) (individual claims under California's Private Attorneys General Act are subject to arbitration but claims seeking non-individual, public relief must be litigated); *Wing v. Chico Healthcare and Wellness Centre*, 2023 WL 8710138 (Cal. App.) (non-individual PAGA claim is not subject to class action waiver but is stayed pending resolution of the individual PAGA claim in arbitration).

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- *De Marinis v. Heritage Bank of Commerce*, 98 Cal. App.5th 776 (2023) (non-severability clause tied to class action waiver constituted a "poison pill" rendering entire arbitration agreement unenforceable as purporting to require arbitration of non-individual PAGA claims – a provision which is unenforceable and cannot be severed).
- *Costa v. Apple, Inc.*, 2023 WL 8101980 (N.D. Cal.) (notice of conditional certification of a collective action not delayed where defendant has not demonstrated that a significant portion of the potential members of the collective are subject to mandatory arbitration provisions).
- *Kim v. Allison*, 87 F.4th 994 (9th Cir. 2023) (class representative who was subject to arbitration agreement found to have conflict of interest with certified class and therefore was not an adequate representative on behalf of the class).
- *In re: Google Assistant Privacy Litigation*, 2024 WL 251407 (N.D. Cal.) (Google waived right to arbitrate class action by waiting four years and filing five dispositive motions in pending litigation).

VII. HEARING-RELATED ISSUES

Panel's Application of AAA Rule Not Unfair. Minority shareholders sought to enforce their contractual right to force the sale of the company over the objection of the majority shareholders and a highly contentious arbitration followed. The arbitration was conducted in accordance with the Commercial Rules of the American Arbitration Association. The panel granted the minority shareholders' request for specific performance and ordered the sale of the company in a partial final award issued under Rule 47 of the Commercial Rules. The majority shareholders challenged the partial final award, arguing that New York law and not Rule 47 should apply. The district court rejected the argument, and the Second Circuit affirmed. The court emphasized that the parties were on notice that the AAA rules applied to this proceeding. The court acknowledged that the parties and the panel did at times focus on New York law but concluded that it was "not unfair to expect the parties to be prepared to address" Rule 47 which had been suggested by the panel as governing. The

court noted that even after the panel averted to Rule 47 during oral argument, the majority shareholders still sought application of New York law relating to specific performance and continued to do so on appeal. The court observed that respondents "were not prejudiced by the alleged 'last-minute switch' because their litigation posture remained unchanged." The court added that in any event "the panel analyzed the specific performance issues under New York law in the alternative and arrived at the same conclusion." For these reasons, the Second Circuit affirmed the district court's refusal to vacate the panel's rulings. *Telecom Business Solution, LLC v. Terra Towers Corp.*, 2024 WL 446016 (2d Cir.).

Discovery Related to FAA Transportation Exemption Ordered. Uber drivers brought a class action and Uber moved to compel arbitration. Uber asserted that the FAA Transportation Exemption applied to them and sought discovery in support of their position. The district court ruled that based solely on the face of the complaint the Transportation Exemption did not apply. The Second Circuit reversed, holding that the pleading did not "provide a sufficient factual record on which to evaluate the applicability" of the Transportation Exemption. The court ordered that limited discovery be permitted and offered the following nonexclusive list of topics for which discovery may be warranted: "Uber's policies regarding interstate trips; the potential penalties and costs of declining interstate trips; Uber's revenue from interstate trips; the average number of interstate trips Uber drivers take over various time periods (such as a week, a month, or a year); the median number of interstate trips for Uber drivers over various time periods; what percentage of Uber drivers take interstate trips over various time periods; how often Uber drivers decline interstate trips; and any other relevant information." For these reasons, the court remanded the case back to the district court to allow for a prescribed discovery prescribed. *Aleksanian v. Uber Technologies, Inc.*, 2023 WL 7537627 (2d Cir.).

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- *Telecom Business Solution, LLC v Terra Towers Corp.*, 2024 WL 446016 (2d Cir.) (arbitration panel's decision not to allow discovery related to affirmative defenses not fundamentally unfair as panel determined that discovery was not necessary as factual allegations "even if substantiated, would not establish these affirmative defenses as a matter of law").
- *Bequest Funds, LLC v. Magnolia Financial Group*, 2023 WL 6849442 (N.D. Tex.) (evidence need not be authenticated to be admissible at the motion to compel stage of proceeding).
- *Ahmed v. Oak Management Corp.*, 348 Conn. 152 (2023) (Rule 58 of the AAA's Commercial Rules, which defines permissible arbitral sanctions, did not preclude application of fugitive disentitlement principles which, although properly viewed as a sanction, is not prohibited by Rule 58).

- *New York City Transit Authority v. Charter Oak Fire Insurance Co.*, 2023 WL 8869642 (N.Y. Sup. Ct.) (award confirmed where arbitrator relied on evidence beyond police report of car accident including position of vehicles and damages as observed by the police officer which were not hearsay evidence).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Award Vacated Based on Arbitrator's Linguistic Bias. The arbitrator in this case ruled against Phuong Pham on credibility grounds in part because she used an interpreter when testifying. As the arbitrator noted, while the underlying failed real estate deal at issue was rather complicated, her decision was "made easier by an evaluation of the credibility of the witnesses." The arbitrator acknowledged that witnesses for whom English is a second language may prefer testifying in their native language, but "Pham's use of an interpreter appeared to the Arbitrator to be a ploy to appear less sophisticated than she really is. She has been in the country for decades, has engaged in sophisticated business transactions and has herself functioned as an interpreter." The trial court denied the motion to vacate the award, but the California appellate court reversed. The court emphasized that the arbitrator's "sparse four-page decision . . . rose and fell on witness credibility." The court concluded that the arbitrator's credibility-based award relied on "misconceptions about English proficiency and language acquisition." The court acknowledged that there is no bright line test for arbitrator bias. The court found evidence in this record that Pham had used her daughter to translate during negotiations due to the daughter's English proficiency. Beyond that, the court saw no reasonable connection between years living in the United States with sufficient fluency to participate in an arbitration. The court, in vacating the award, emphasized that Pham's "decades of living in United States, savvy business dealings, and unspecified past role as an interpreter do not permit a reasonable, non-speculative inference that her decision to use an interpreter in this high-stakes commercial arbitration proceedings was a deceptive ploy. In concluding otherwise without any elucidation of supporting facts, the award raises an impression of possible bias." *FCM Investments v. Grove Pham, LLC*, 96 Cal. App.5th 545 (2023), review denied (January 17, 2024).

Arbitration Panel's Modification of its Award Vacated. An arbitration panel issued a partial final award in favor of claimant RSM of over $10 million. The parties jointly applied to modify the award, RSM to increase it by a nominal amount and respondent to reduce it by over $4 million dollars. The panel agreed with respondent that it miscalculated the damages and reduced RSM's damages by over $4 million. Upon review, the court concluded that the panel "committed a textbook case of reversing course on a substantive legal issue it previously decided." The court found that the panel "unmistakenly determined" that RSM was entitled to its three components of damages awarded in the partial final award. Therefore, what the Tribunal chalked up to a 'miscalculation' was not a

miscalculation at all, but rather a re-calculation". Because the "original award had no 'evident material miscalculation of figures,' and the Tribunal plainly re-determined a substantive issue of law", the court vacated the panel's modification of the partial final award and restored the full damages originally awarded to RSM. *RSM Production Corp. v. Gaz du Cameroun*, 2023 WL 7305061 (S.D. Tex.).

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- *Telecom Business Solution, LLC v Terra Towers Corp.*, 2024 WL 446016 (2d Cir.) (arbitration panel's two interim awards, which expressly contemplated further proceedings, are not final and therefore may not be reviewed on an interlocutory basis).
- *Jiangxi Zhengao Recycled Textile Industry Co. v. Amazon.com Services*, 2023 W L8700956 (S.D.N.Y.) (arbitrator's failure to disclose ruling in favor of respondent in separate case fails as matter of law as evidence that arbitrator harbored impermissible bias against plaintiff).
- *Flores v. National Football League*, 2024 WL 50238 (S.D.N.Y.) (FAA provides protection against biased arbitrator once award is issued but "not by preventing arbitration from the get-go").
- *Crossborder Solutions v. Macias, Gini & O'Connell, LLP*, 2023 WL 7297242 (S.D.N.Y.) (motion to confirm award is denied on mootness grounds as damages provided for in award were fully satisfied).
- *Garrity v. Credit Suisse Securities (USA), LLC*, 2023 WL 7924726 (S.D.N.Y.) (arbitration panel's rejection of argument that claims were time-barred was not beyond panel's authority or in manifest disregard of law where barely colorable basis for ruling is present).
- *Unifirst Corp. v. Industrial Fabrication & Repair*, 2024 WL 43442 (Tenn. App.) (confirmation of award reversed where court failed to consider whether losing party agreed to arbitrate dispute as agreement formation issues are for court and not arbitrator to decide).
- *Llagas v. Sealift Holdings,* 2023 WL 8613607 (5th Cir.) (arbitrator's deciding merits of claim despite ruling that affirmative defense precluded that claim upheld as often courts make findings of an affirmative defense but then also "assume arguendo" that such holding is not correct and then address merits of claim).
- *Torres v. Department of Homeland Security*, 88 F.4th 1379 (Fed. Cir. 2023) (arbitration award under Merit System Protection Board vacated as award lacked statutory requirement of substantial evidence where discipline imposed was "inconsistent with similarly situated federal employees").

- *Civic Center Site Development v. Certain Underwriters at Lloyd's*, 2023 WL 8878951 (E.D. La.) (reservation of right to seek interest on principal amount awarded by arbitrator did not preclude confirmation of award).
- *Ahmed v. Oak Management Corp.*, 348 Conn. 152 (2023) (arbitrator did not exceed his authority by applying the fugitive disentitlement doctrine as the award drew its essence in applying the equitable remedy from the underlying agreement).

IX. ADR – GENERAL

AAA Administrative Ruling Declining Arbitration Found to be Binding. Hernandez sought a loan from MicroBilt which declined Hernandez's application based on its reliance on records for another Hernandez on the government's watch list. Hernandez sued under the Fair Credit Reporting Act and MicroBilt moved to compel under its arbitration agreement governed by the American Arbitration Association's Construction Rules. The AAA administrator declined to administer the matter because the arbitration agreement violated the AAA's Construction Due Process Protocol by limiting the damages available to Hernandez. MicroBilt sought review of the AAA's administrative decision by an arbitrator, but the AAA refused to submit the matter to an arbitrator. Hernandez returned to court and the district court reinstated Hernandez's action. MicroBilt appealed, arguing the arbitrability issue was for an arbitrator and not the AAA administrator to rule on. The Third Circuit affirmed. The court reasoned that "the administrator's decision to dismiss Hernandez's claims did not implicate the 'existence, scope, or validity' of the arbitration provision, because Hernandez and MicroBilt agree on all three of these gateway issues." The court emphasized that the AAA Rules, referenced in the arbitration agreement, empowered the AAA to administer the arbitration, including declining to administer it if the agreement failed to satisfy its Due Process Protocol. The court concluded that Hernandez was acting in accordance with the arbitration agreement as "Hernandez and MicroBilt agreed to arbitrate in accordance with the AAA's rules, and those rules brought Hernandez back to court." *Hernandez v. MicroBilt Corp.*, 88 F.4th 215 (3d Cir. 2023). See also *Bedgood v. Wyndham Vacation Resorts, Inc.*, 88 F.4th 1355 (11th Cir. 2023) (compliance with the AAA's due process protocols is an administrative determination within the prerogative of the AAA administrator to decline administration of arbitration and provides basis for court's exercise of discretion in concluding that defaulting party would have to litigate disputes).

Arbitration Mandate is Material Term for Immigration Certification. Plaintiff here is a foreign agricultural worker employed under an H-2A visa. The employer mandated arbitration of any dispute that plaintiff may have with it but did not disclose in its certification to the Department of Labor that arbitration of employment disputes would be required. The employer moved to compel arbitration when plaintiff brought employment claims against it. The trial court denied the motion, and the California appellate court affirmed. The court pointed out that the employer was required to disclose to the

Department of Labor "material terms and conditions of employment." Both courts concluded that the arbitration term was material to the agricultural worker's employment. The appellate court pointed out that plaintiff was required to forfeit his right to a jury trial and was barred from participating in any class proceeding, both of which the court concluded were material terms of employment. The court held that the arbitration agreement was "unlawful and unenforceable" due to the failure to disclose its existence to the Department of Labor. *Cisneros v. Alco Harvest, Inc.*, 97 Cal. App.5th 456 (2023), review filed (December 29, 2023).

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- *Valores Mundiales v. Bolivarian Republic of Venezuela*, 87 F.4th 510 (D.C. Cir. 2023) (award issued by International Center for Settlement of Investment Disputes entitled to same full faith and credit it would receive if it were a final judgment of a state court).

X. COLLECTIVE BARGAINING SETTING

Arbitrator Afforded Broad Discretion in Imposing Discipline on Tenured Teacher. A New Jersey statute requires disputes that may result in the "dismissal or reduction in salary" of a tenured teacher be submitted to arbitration. The school district here sought the dismissal of an assistant principal, and the matter was submitted to arbitration. The arbitrator concluded that discipline was warranted short of termination and demoted the tenured assistant principal to a tenured teacher position. The trial court confirmed the award, but the Appellate Division vacated the award, finding that the arbitrator's possible remedies were limited to a reduction in salary or termination. The New Jersey Supreme Court overruled the Appellate Division, concluding that the standard set in the statute applies to what cases could be submitted to arbitration, not what remedies were available to be imposed once a case was before the arbitrator. In doing so, the Court "recognized the broad discretion of hearing officers and arbitrators to fashion an appropriate remedy when imposing a penalty for tenure charges." *Sanjuan v. School District of West New York*, 2024 WL 537907 (N.J.).

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- *Broecker v. New York City Department of Education*, 2023 WL 7485465 (2d Cir.) (teacher's union's decision to submit vaccine mandate dispute to arbitration did not violate the New York City Civil Service Law or the union members' due process rights).
- *Fowler v. Department of Justice,* 2024 WL 569449 (Mont.) (union employee subject to collective bargaining agreement must exhaust union grievance procedures, including

arbitration, before pursuing claims under Montana's Wrongful Discharge from Employment Act).

- *Miles v. Brusco Tug & Barge*, 2023 WL 8166781 (9th Cir.) (collective bargaining agreement did not mention or expressly provide for the arbitration of statutory and wage and hour claims and therefore lacks requisite clear and unmistakable waiver of the judicial forum).

XI. NEWS AND DEVELOPMENTS

Upcoming Supreme Court Rulings: The Supreme Court has on it docket for this Term three cases of importance to arbitrators. In *Smith v. Spizzirri*, Case No. 22-1218, the Court will decide whether Section 3 of the FAA requires district courts to stay lawsuits pending resolution of the arbitration or have the discretion to dismiss the matter when all the claims are subject to arbitration; in *Bissonnette v. LePage Bakeries Park St., LLC*, Case No. 23-51, the Court agreed to review a Second Circuit ruling that held that the FAA transportation workers exemption did not apply to workers who distributed baked goods, finding that the drivers were not in the transportation industry and therefore did not qualify for the exemption, and; in *Coinbase, Inc., v Bielski*, Case No. 23-3, whether a court or arbitrator should decide whether an arbitration agreement, which has a delegation clause, is narrowed by a later agreement that is silent as to arbitration and the delegation of claims to an arbitrator.

AAA Modifies Mass Arbitration Rules. The American Arbitration Association adopted its Supplemental Rules for Multiple Case Filings in 2021 which set standards for the handling of 25 or more related arbitrations filed with it. Those Rules were recently modified by its Mass Arbitration Supplementary Rules which took effect on January 15, 2024. The modifications include: updating the categories of disputes within the jurisdiction of the "process arbitrator" who rules across the related cases on such issues as whether the contractual requirements and conditions precedent have been satisfied; amending and staggering the fees an employer is obligated to pay; providing for the automatic appointment of a global mediator without requiring the stay of the arbitrations while permitting either party to opt out of mediation, and; establishing a standard rate of $300/hour for arbitrations.

California Law Sanctioning Employers Pre-Empted by FAA. A federal district court has permanently enjoined the state of California from enforcing A.B. 51, a law that prohibited "forced arbitration" as a condition of employment. A few years prior, the same district court issued an order preliminarily enjoining the enforcement of the law and, on appeal, the Ninth Circuit affirmed. In doing so, the court, joining the First and Fourth Circuits, explained that the FAA preempts state laws that affect the enforceability of arbitration agreements and laws that discriminate against the formation of arbitration agreements. The court reasoned that although A.B. 51 does not expressly bar arbitration agreements, it disfavors the formation of arbitration agreements and stands as an obstacle to the FAA's purpose by

deterring employers from entering into arbitration agreements by imposing civil and criminal sanctions on those who do so. The parties subsequently stipulated that the Ninth Circuit decision "effectively resolve[d] the legal issues" and agreed to an injunction. The permanent injunction was issued by the district court on January 1, 2024.

FINRA Proposes Amendments to Clarify Party Representation. FINRA has proposed amendments to its arbitration and mediation rules that are intended to clarify the representation of parties in its Dispute Resolution Services Forum. In particular, the proposed amendments would: (a) prohibit compensated non-attorneys from representing parties in the DRS forum; (b) codify current practice that a student enrolled in a law school and practicing under the supervision of an attorney may represent investors in the DRS forum; and (c) clarify additional circumstances in which any person, including attorneys, would be prohibited from representing a party in the DRS forum. The proposed amendments also provide that "a challenge to the qualifications of a representative made outside of the proceeding would not stay or otherwise delay the proceeding without a court order."

Proposed Ban on Mandatory Arbitration for Human Trafficking Claims. A recent bipartisan bill introduced in the Senate seeks to ban mandatory arbitration provisions in employment agreements for human trafficking claims. In a news release, Sens. Blumenthal and Hawley, the bill's sponsors, said the "Ending Forced Arbitration in Human Trafficking Act," would prevent traffickers from shielding themselves from public accountability through mandatory arbitration clauses which "force victims to relinquish their legal remedies available under the Trafficking Victims Protection Act."

No Automatic Stay of Proceedings When Arbitration Denied in California. In October 2023, California Gov. Gavin Newsom signed S.B. 365 into law, putting an end to an automatic stay of proceedings when a party appeals an order dismissing or denying a motion to compel arbitration. Sen. Wiener, one of the bill's sponsors, said the new law, which amends California's Code of Civil Procedure, provides workers with "a level playing field with corporations in our justice system . . . by ending a loophole that allowed corporations to tie up even frivolous disputes in endless process."

Arbitrator Indicted After Issuing $14.9B Award against Malaysia. Gonzalo Stampa, a Spanish arbitrator who issued a $14.9 billion arbitration award against Malaysia in a territorial dispute it had with the last sultan of Sulu, has been indicted by the Spanish Public Prosecutor and a Madrid investigative court for contempt of court and will also face charges for "unqualified professional practice". The charges stem from Stampa's conduct in continuing to preside over the dispute as sole arbitrator, even after the Spanish courts annulled his appointment in 2021 over a service of process issue.

XII. TABLE OF CASES

Cases