FELIU NEUTRAL SERVICES LLC

Alfred G. Feliu
afeliu@feliuadr.com
212-763-6801

Feliu Case Summaries:
November 2022

Contents

I. JURISDICTIONAL ISSUES: GENERAL

U.S. Discovery Limited to Foreign Tribunals, Not Private Arbitration. Parties in foreign tribunals may seek discovery in U.S. courts under 28 U.S.C. § 1782. Courts have disagreed in recent years as to whether non-U.S. private arbitrations constituted foreign tribunals for purposes of Section 1782. A unanimous Supreme Court ruled that "tribunals" for purposes of Section 1782 are adjudicative bodies that exercise governmental authority. The Court found important inconsistencies between the FAA and Section 1782. Most notably, the Court pointed out that "discovery is off the table under the FAA but broadly available under Section 1782." One of the two consolidated cases here subject to the ruling involved a foreign corporation and a Lithuanian bank. The Court, focusing on the substance of the agreement, acknowledged that this dispute was subject to arbitration based on an international treaty, but emphasized that the arbitration panel was ad hoc and not pre-existing. "Nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority. For instance, the treaty does not itself create the panel; instead, it simply references the set of rules that govern the panel's formation and procedure if an investor chooses that forum." The Court added that, like in a private arbitration, the authority of the arbitration panel in this case derived from the parties' consent to arbitrate. "Russia and Lithuania each agreed in the treaty to submit to ad hoc arbitration if an investor chose it." The Court reasoned that "a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it." The Court concluded that "neither the private commercial arbitral panel in the first case nor the ad hoc arbitration panel in the second case qualifies" as a foreign or international tribunal for purposes of Section 1782. *ZF Automotive US v. AlixPartners, LLP*, 142 S. Ct. 2078 (2022).

FAA Transportation Worker Exemption Applies to Airline Ramp Supervisor. The Supreme Court ruled that the FAA transportation worker exemption applies to "any class of workers directly involved in transporting goods across state lines or international borders." In so doing, the unanimous Court rejected the employee's argument that workers in the industry itself, whether or not they are actively engaged in moving goods in interstate commerce, are exempt. The employee here, as part of her job as an airline ramp supervisor, physically loaded and unloaded baggage and freight onto planes. The Court was persuaded that "cargo loaders exhibit the central function of a transportation worker" and are "intimately involved in the commerce (e.g., transportation) of that cargo." The Court rejected as too narrow the airline's argument that since the cargo loaders did not actually accompany the cargo across state lines, like pilots and ship crews do, they cannot be engaged in interstate commerce. At the same time, the Court rejected the employee's argument that all employees in the transportation industry are exempt. Focusing on the words of the exemption itself, the Court concluded that "§1's plain text suffices to show that

airplane cargo loaders are exempt from the FAA's scope, and we have no warrant to elevate vague invocations of statutory purpose over the words Congress chose." *Southwest Airlines Co. v Saxon,* 2022 WL 1914 099 (U.S.). Cf. *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022) (local driver, who picked up goods from warehouse and delivered to clients, not exempt under FAA transportation worker exemption as once goods were picked up "anyone interacting with those goods was no longer engaged in interstate commerce"); *Archer v. Grubhub*, 190 N.E.3d 1024 (Mass. 2022) (last-mile food delivery drivers not covered by the FAA transportation worker exemption as they are not engaged in interstate commerce as "they transported goods that had already completed the interstate journey by the time the goods arrived at the restaurant, delicatessen, or convenience store to which they were sent").

Individual, Not Representative, PAGA Claim Arbitrable. California's Private Attorneys General Act ("PAGA") affords an aggrieved employee the opportunity to initiate an action against a former employer "on behalf of himself or herself and other current or former employees" to obtain civil penalties otherwise recoverable by the State's Labor & Workforce Development Agency ("LWDA"). The California Supreme Court in *Iskanian v. CLS Transportation* ruled that PAGA claims may not be waived and cannot be split between individual claims relating to the plaintiff and representative claims. Therefore, under *Iskanian*, class action waivers were not enforceable because the plaintiff was deemed to be acting in a representative capacity. The Supreme Court, in an 8 to 1 decision, ruled that the FAA preempted PAGA to the extent that it is deemed to bar the arbitration of claims particular to the plaintiff. The Court reasoned that PAGA, which allows a plaintiff to join in a representative capacity "any claims that could have been raised by the State in an enforcement proceeding," greatly expands the reach and potential impact on the defendant of the proceeding. The ability of a PAGA plaintiff under California law to join the claims of others who are not party to the proceeding defeats the premise underlying the FAA, namely that arbitration is a matter of contract. In the Court's view, "state law cannot condition the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate." The joinder rule, in the Court's opinion, functions in that way by requiring the employer here to litigate both the plaintiffs' individual PAGA claims which it bargained for and the representative claims which the Court acknowledges was prohibited by the *Iskanian* decision. "Requiring arbitration procedures to include a joinder rule of that kind compels parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether. Either way, the parties are coerced into giving up a right they enjoy under the FAA." The Court explained that under *Iskanian* "the only way for parties to agree to arbitrate *one* of an employee's PAGA claims is to also 'agree' to arbitrate *all other* PAGA claims in the same arbitral proceeding." This, the Court concluded,

was coercive and forced parties to opt for a judicial forum at the expense of an agreement to arbitrate. The Court, relying on the severability clause in the parties' arbitration agreement, ruled that "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Viking River Cruises v. Moriana*, 142 S. Ct. 1906 (2022), reh'g denied, 2022 WL 3580311 (U.S. Aug. 22, 2022).

Court Declines to Review Merits of Arbitrator Ruling on Subpoena. Under Section 7 of the FAA, a court "may" issue an arbitration subpoena. CBS in this case refused to comply on privilege grounds with an arbitration subpoena which required the disclosure of an internal investigation of a sexual harassment complaint. Plaintiff labor union moved to compel enforcement of the subpoena under Section 7. The court noted that the application raised the "novel legal issue of whether the Court is authorized to consider privilege objections to a subpoena" issued by an arbitrator. The court concluded that it has the discretion to consider privilege objections but declined to do so in this case. The court explained that "the rationale for deferring to an arbitrator's decisions on privilege issues is particularly strong where the objecting respondent is a party to the contract that gave rise to the underlying arbitration." The court found that the arbitrator had sound reasons for compelling production as it was persuaded that CBS placed the investigation at issue in the proceeding. Moreover, "CBS elected to have an arbitrator, rather than a court, resolve any discovery disputes that might ensue, including making decisions about CBS's assertions of legal privileges." The court did, however, require that the name of the employee alleging harassment along with non-managerial employee witnesses be made available to the unions on an "attorney-eyes only" basis. *Turner v. CBS Broadcasting Inc.*, 2022 WL 1209680 (S.D.N.Y.).

ERISA Confers Federal Jurisdiction in Face of *Badgerow* Challenge. The court here confirmed an award which denied breach of fiduciary duty claims under ERISA. Two weeks later, the Supreme Court issued its decision in *Badgerow v. Walters* which rejected the "look through" approach to federal subject matter jurisdiction. The question for the court here was whether, following *Badgerow*, it had subject matter jurisdiction to issue its prior decision to confirm the award. The court concluded that in fact it did have such jurisdiction. The court emphasized that an arbitration award is no more than a contractual method for settling disputes. The issue before a court reviewing applications under Sections 9 and 10 of the FAA for subject matter jurisdiction purposes is limited to the specific contract terms for settling disputes. The Court in *Badgerow* determined that since contractual rights are generally governed by state law and resolved in state courts, application of the contractual right to arbitrate generally belongs in state court. "Thus, whether a non-diverse Section 9 or 10 application states a federal question on its face is a question that looks to the governing law of the *contract*, not to the law of the underlying claims." For this reason, the Supreme

Court in *Badgerow* concluded that since the employment agreement in that case was governed by state law, state law applied notwithstanding the substantial federal claims at issue. In this case, however, the applicable agreement was governed by ERISA and "questions of dispute resolution relating to an ERISA Plan including those concerning arbitration are governed exclusively by federal statutory and common law federal courts have developed for ERISA." As the narrow contractual rights at issue here related to the settlement of disputes in this case under an ERISA plan governed by federal law, the court concluded it had subject matter jurisdiction to rule under Sections 9 and 10 of the FAA. *Trustees of the New York State Nurses Association Pension Plan v. White Oak Global Advisors*, 2022 WL 2209349 (S.D.N.Y.). See also *Greenhouse Holdings v. International Union of Painters*, 43 F.4th 628 (6th Cir. 2022) (Labor Management Relations Act provides independent basis for federal court jurisdiction to rule on motion to vacate). Cf. *Rodgers v. United Services Automotive Association*, 2022 WL 2610234 (5th Cir.) (federal court, which has jurisdiction over FMLA claim and then refers matter to arbitration, retains jurisdiction "to review the arbitration award and confirm or vacate it").

Arbitration Award Does Not Preclude PAGA Claim. Plaintiff brought claims alleging wage and hour violations under California's Labor Law. She did so in two capacities, first as an individual and second under California's Private Attorneys General Act. As plaintiff had signed an arbitration clause, her individual claim was submitted to arbitration and the arbitrator found no merit to it and dismissed her claim. The district court confirmed the award and dismissed her PAGA claim, concluding that she was not an aggrieved employee under the statute. The appellate court affirmed the trial court's confirmation of the arbitration award but reversed the dismissal of plaintiff's PAGA claim. The court explained that in the arbitration plaintiff "was litigating her own individual right to damages for Labor Code violations, whereas in the present PAGA action, she is litigating the state's right to statutory penalties for Labor Code violations. It follows that the arbitrator's findings cannot have preclusive affect." The court emphasized that plaintiff's arbitration focused on the harm to her, where an aggrieved plaintiff in a PAGA claim functions as a substitute for the government seeking recovery of civil penalties, a different right than an individual exercises in pursuing his or her individual claims. *Gavriiloglou v. Prime Healthcare Management*, 83 Cal. App. 5th 595 (Cal. App.), as modified on denial of reh'g (Sept. 20, 2022).

Court's Failure to View Actual Webpage Requires Remand. An account holder brought a putative class action against a credit union. The Credit union moved to compel an individual arbitration on the basis that the plaintiff was bound by a mandatory arbitration clause and class action waiver. Plaintiff opposed the motion, claiming there was no arbitration clause or class action waiver in the agreement when she opened her account. The district court denied the motion to compel, and the credit union appealed. The preeminent issue on appeal was whether the parties agreed to

arbitrate. Noting that the arbitration agreement was part of an online transaction, the Second Circuit explained: "In the context of web-based contracts, we look to the design and content of the relevant interface to determine if the contract terms were presented to the offeree in [a] way that would put her on inquiry notice of such terms." The court then found that the district court erred in undertaking the "inquiry notice" analysis because it reviewed a printed version of the agreement rather than screenshots of the web-based agreement, finding that the printed version "does not depict the content and design of the webpage as seen by users signing up for online banking." The court concluded that "the record was not sufficiently developed to indicate whether [plaintiff] knowingly agreed to the arbitration clause" and the matter was remanded to the district court to "consider the design and content of the [Banking Agreement] as it was presented to users in determining whether [plaintiff] assented to its terms." *Zachman v. Hudson Valley Federal Credit Union*, 49 F.4th 95 (2d Cir. 2022).

Stay of Litigation Pending Arbitration Rejected. Google and Apple were sued on antitrust grounds. The court ruled that the claims against Google were arbitrable but those against Apple were not. Apple moved to stay the litigation during the pendency of the arbitration against Google. The motion to stay was denied. The court acknowledged that it had the discretion to stay the litigation but concluded that based on "concerns of efficiency and judicial economy" the litigation against Apple should proceed. The court acknowledged that "in a case like this, . . . redundancy seems inevitable." But here the court reasoned that the arbitration decision would not "be binding on this Court or otherwise have any impact on the non-arbitrable claims left here." Since plaintiffs and Apple would eventually have to litigate the non-arbitrable claims in any event, traditional judicial resources would not be wasted by proceeding with the litigation. "To the contrary, staying the non-arbitrable claims would only serve to needlessly delay their resolution." For these reasons, the court denied the motion to stay. *California Crane School v. Google*, 2022 WL 3348425 (N.D. Cal.).

Waiver of Sovereign Immunity Must Be Explicit. The Foreign Sovereign Immunities Act provides a foreign state's property with immunity from prejudgment attachment unless an exception applies. The relevant exception in this case requires a foreign state to explicitly waive its immunity from prejudgment attachment. 28 U.S.C. §1610(d). Interpreting §1610(d) for the first time, the Fifth Circuit concluded "today we hold that an explicit waiver must be, well, explicit. Anything short of a foreign state's clearly expressed waiver of immunity from prejudgment attachment will not suffice under §1610(d)." Based on this holding, the Fifth Circuit vacated the lower court's entry of a writ of attachment which was "based on the erroneous conclusion that Haiti and its agency waived their immunity from prejudgment attachment based on a contract that said nothing about prejudgment attachment." *Preble-Rish Haiti, S.A. v. Republic of Haiti*, 40 F.4th 368 (5th Cir. 2022). Cf. *Caremark, LLC v. Chickasaw*

Nation, 43 F.4th 1021 (9th Cir. 2022) (Indian tribes entering into an arbitration agreement did not serve necessarily as waiver of its sovereign immunity and, therefore, arbitration agreement will be enforced and arbitrability issues are properly delegated to the arbitrator under the express terms of the agreement).

Case Shorts

- *Direct Biologics v. McQueen*, 2022 WL 1693995 (W.D. Tex.) (presence of enforceable arbitration agreement did not prevent court from adjudicating application for preliminary injunctive relief particularly where, as here, that agreement included the carve-out for injunctive relief).
- *Field v. Anadarko Petroleum Corp.*, 35 F.4th 1013 (5th Cir. 2022) (entity recruiting oilfield workers by means of an app as well as the workers they place with employing entities may intervene in wage and hour litigation brought by workers where arbitration agreements between intervenor and workers provided for arbitration of disputes with third party beneficiaries and interrelatedness of the parties' contractual relationship gave intervenor a stake in the underlying litigation).
- *Love v. Overstock.com, Inc.*, 2022 WL 3345730 (D. Utah) (court decides unconscionability claim where, as here, challenge is directed specifically at the arbitration provision itself rather than the agreement as a whole).
- *People v. Maplebear, Inc.*, 81 Cal. App.5th 923 (2022) (city attorney, who brought civil action under California's Unfair Competition Law against operator of smart phone app alleging misclassification of workers, not bound by arbitration agreement in operative agreements; the city attorney is acting in a law enforcement capacity to vindicate public harm and not primarily to restore property of private individuals).
- *Department of Fair Employment and Housing v. Cisco Systems*, 82 Cal. App.5th 93 (2022) (California Department of Fair Employment and Housing could not be required, as a non-signatory to an agreement, to arbitrate claim on behalf of employee who agreed to arbitrate claims against employer).
- *Rabinowitz v. Kelman*, 2022 WL 2718483 (S.D.N.Y.) (federal court lacks jurisdiction to confirm arbitration award where applicable agreement provided that an arbitration award "'shall be enforceable in the courts of the State of New Jersey and/or New York'" and no reference to federal courts can be found in the relevant documents).
- *Crystal Point Condominium Association v. Kinsale Insurance Co.*, 251 N.J. 437 (2022) (claim under statute allowing direct action against insurance companies for unsatisfied judgment subject to terms of applicable insurance policy which provided for arbitration of claims).
- *R & C Oilfield Services v. American Way Wind Transport Group*, 45 F.4th 655 (3d Cir. 2022) (dismissal with prejudice upheld when plaintiff refused to comply with court's order compelling arbitration).

- *Mabe v. OptumRX*, 43 F.4th 307 (3d Cir. 2022) (party moving to compel arbitration entitled to discovery on question of arbitrability).
- *Leenay v. Superior Court of San Bernardino County*, 81 Cal. App. 5th 553 (4th Dist. 2022) (California law did not "authorize the court to stay a plaintiff's action on the basis of a pending arbitration to which the plaintiff is not a party").
- *Peraton Government Communications v. Hawaii Pacific Teleport*, 2022 WL 3543342 (9th Cir.) (amount at stake in underlying dispute, and not amount awarded by arbitrator, is proper measure for determining whether amount in controversy is satisfied for purposes of federal diversity jurisdiction).
- *Los Angeles College Faculty Guild v. Los Angeles Community College District*, 83 Cal. App.5th 660 (2022) (state statute requiring remedial classes did not confer on union faculty standing to challenge school district's decision to cancel such classes under the collective bargaining agreement).
- *Triplet v. Menard, Inc.*, 42 F.4th 868 (8th Cir. 2022) (court must determine whether employee, who was severely autistic and a ward of a guardianship and conservatorship, was competent when she signed an arbitration agreement at the time of hire; her guardianship and conservatorship status by itself was not enough to render the arbitration agreement void).
- *Kronlage Family LP v. Independent Specialty Insurance Co.*, 2022 WL 3444011 (E.D. La.) (the McCarren-Ferguson Act did not reverse-preempt statute implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a treaty).
- *Tra-Dor, Inc. v. Underwriters at Lloyd's London*, 2022 WL 3148980 (W.D. La.) (arbitration agreement arising under Convention on the Recognition and Enforcement of Foreign Arbitration Awards is not subject to reverse preemption under McCarren-Ferguson Act which applies to federal statutes and not treaties).
- *Tavenner v. IBM*, 2022 WL 4449215 (S.D.N.Y.) (plaintiff's motion for declaratory judgment seeking invalidation of arbitration agreement denied where arbitrator ruled that plaintiff's claims were untimely and plaintiff did not move to vacate the award).
- *Rodriguez-Rivera v. Allscripts Healthcare Solutions*, 43 F.4th 150 (1st Cir. 2022) (district court erred by commenting on merits of claims it ruled were subject to arbitration).
- *Taylor v. Taylor*, 517 P.3d 380 (Utah 2022) (divorce proceedings subject to arbitration upon consent under Utah law; "we see no reason to revoke the trust we place in arbitrators to decide a property dispute between parties, dealing at arm's length incapable of contracting, just because those parties are, (or were) married").
- *Korea Advanced Institute v. KIP Co.*, 2022 WL 6193347 (E.D. Wisc.) (litigation in Wisconsin dismissed in favor of arbitration in Korea on *forum non conveniens* grounds where the dispute "is between Korean parties over alleged breaches of

Korean contacts, and two of the three contacts at issue have binding arbitration clauses designating a Korean arbitration body for dispute resolution").

- *Reddy v. Buttar*, 38 F.4th 393 (4th Cir.), cert. denied, 2022 WL 9552625 (U.S. Oct. 17, 2022) (award issued in Singapore in favor of a Vietnamese resident enforced against the losing party in North Carolina under the Convention on the Recognition and Enforcement of Foreign Arbitration Awards).
- *Iraq Telecom Ltd. v. IBL Bank S.A.L.*, 43 F.4th 263 (2d Cir. 2022) (court, in determining whether to issue order of attachment in aid of arbitration under New York law, has discretion to consider non-statutory factors such as extraordinary circumstances faced during a drastic economic crisis in Lebanon).

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

Incorporation by Reference of AAA Rules Sufficient to Delegate Arbitrability to Arbitrator. Resolving a conflict in decisions issued by Florida's appellate courts, the Florida Supreme Court definitively held that a party's incorporation by reference of the AAA Rules in its Terms of Service constitutes "clear and unmistakable" evidence of the parties' intent to empower an arbitrator, rather than a court, to resolve questions of arbitrability. The appellate court below in *Doe v. Natt*, 299 So. 3d 599 (Fla. App. 2020), had previously held that Airbnb's reference to the AAA Rules in its "clickwrap agreement" failed to show "clear and unmistakable" evidence of the parties' intent to delegate arbitrability determinations to an arbitrator because the reference was "broad, nonspecific, and cursory" and "simply identified the entirety of a body of procedural rules." Upon review, the Supreme Court noted in contrast that "Airbnb's Terms of Service incorporate by reference more than one dozen extracontractual policies, programs, rules, guides, and other materials." The Court also observed that "all of the federal circuit courts of appeal to consider the issue have consistently agreed that incorporation by reference of arbitral rules into an agreement that expressly empower an arbitrator to resolve questions of arbitrability clearly and unmistakably evidences the parties' intent to empower an arbitrator to resolve questions of arbitrability." Noting that the current version of the AAA Rules includes language expressly granting an arbitrator the power to rule on "the arbitrability of any claim or counterclaim," the Florida Supreme Court joined those federal courts in concluding incorporation of the AAA Rules into Airbnb's Terms of Service is "clear and unmistakable" evidence that the parties intended to delegate issues of arbitrability to an arbitrator. *Airbnb, Inc. v. Doe*, 336 So.3d 698 (Fla. 2022). Cf. *Lavvan v. Amyris, Inc.*, 2022 WL 4241194 (2d Cir.) (ICC Rule not sufficient to constitute clear and unmistakable evidence that arbitrability issues are to be submitted to arbitrator for resolution where other aspects of the arbitration agreement created ambiguity as to the parties' intent); *Kuehne + Nagel, Inc. v. Hughes*, 2022 WL 2274353 (S.D.N.Y.) (CPR's Non-Administered Arbitration Rules, which allow but do not mandate delegation of arbitrability issues to arbitrator coupled with broad arbitration

clause, demonstrate parties' intent to delegate such issues to the arbitrator); *Love v. Overstock.com, Inc.*, 2022 WL 3345730 (D. Utah) (incorporation of AAA rules in arbitration agreement requires that arbitrability questions be submitted to the arbitrator for resolution); *Uber Technologies v. Royz*, 517 P.3d 905 (Nev. 2022) (delegation of arbitrability questions to arbitrator required based on incorporation of AAA Rules and explicit delegation provision in Uber's on-line terms and conditions).

Incorporation of AAA Rules Insufficient for Delegation. Many courts, including the Ninth Circuit, have ruled that incorporation of the AAA Rules constitutes a clear and unmistakable delegation of arbitrability questions to the arbitrator. But what if the contracting party is unsophisticated? Several courts, including this court, have ruled that the incorporation of the AAA Rules is insufficient for delegation in this setting. The court explained that unsophisticated parties could not be expected to appreciate the significance of the incorporation of the AAA Rules, particularly where, as here, they are not appended to the arbitration agreement. "Common customers of Verizon, including Plaintiffs, should not be expected to understand that the incorporation by reference of the AAA Rules – without spelling out the actual provision – would mean that the validity and enforceability of the arbitration provision would be resolved by an arbitrator rather than a court, a result contrary to common expectation." This is particularly so where parties with claims of less than $10,000 were offered a second provider whose agreement did not contain an express delegation clause. *MacClelland v. Cellco Partnership*, 2022 WL 2390997 (N.D. Cal.).

Case Shorts

- *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022) (claim of unconscionability of arbitration agreement goes to validity of agreement and not contract formation and therefore must be decided by arbitrator).
- *Attix v. Carrington Mortgage Services*, 35 F.4th 1284 (11th Cir. 2022) (claim that Dodd-Frank Act precludes arbitration of consumer claim is for arbitrator, not court, to decide where the arbitration agreement contains clear delegation of arbitrability questions to the arbitrator and challenge is to the arbitration agreement as a whole and not to delegation provision specifically).
- *AirBnB v. Rice*, 2022 WL 4595019 (Nev.) (Nevada Supreme Court rules that U.S. Supreme Court ruling in *Henry Schein v. Archer & White* "oddly, but explicitly" requires arbitrator rather than court rule on arbitrability claim where clear delegation provision is present, even if claim to arbitrate is wholly groundless).
- *Skillern v. Peloton Interactive, Inc.*, 2022 WL 3718279 (S.D.N.Y.) (Peloton's earlier waiver of arbitration before the AAA by failing to pay requisite fees did not extend to new claim under modified agreement proceeding before JAMS as its earlier default did not waive "its ability to arbitrate completely distinct actions against completely different parties").

- *Zirpoli v. Midland Funding*, 48 F.4th 136 (3d Cir. 2022) (where assignment agreement with arbitration provision is itself valid, question regarding the ultimate validity of the assignment is properly submitted to arbitrator where enforceable delegation provision is present).
- *Rivera v. Sharp*, 2022 WL 2712869 (3d Cir.) (defendant waived rescission claim where, after plaintiff breached settlement agreement's confidentiality provision by not filing enforcement action in court under seal, it entered into a new contract with plaintiff and continued to argue that the settlement agreement was enforceable).
- *Burnett v. National Association of Realtors*, 2022 WL 2820112 (W.D. Mo.) (defendant, which chose to litigate class action certification without mentioning any potential right to arbitrate, waived any right to arbitrate it possessed).
- *Kingery Construction Co. v. 6135 O Street Car Wash*, 312 Neb. 502 (2022) (following *Morgan v. Sundance* and overturning precedent, the Nebraska Supreme Court rules prejudice not required to demonstrate waiver of right to arbitrate).
- *Becker v. Delek U.S. Energy*, 2022 WL 24482875 (6th Cir.) (whether arbitration agreement signed by contractor requires that he arbitrate claim against client is one of contract enforceability, not formation, and delegation clause requires dispute to go to arbitrator to decide arbitrability question).
- *In re: IBM Arbitration Agreement Litigation*, 2022 WL 2752618 (S.D.N.Y.) (plaintiffs, who initiated and pursued claims in arbitration through to award, waived post-arbitration claim that they were fraudulently induced into entering agreement with arbitration provision).
- *Burnett v. National Association of Realtors*, 2022 WL 2820112 (W.D. Mo.) (non-parties may not rely on delegation provision to require arbitrator to address arbitrability question, as delegation provision in underlying agreement narrowly defined parties and "narrow, party-specific language at issue does not clearly and unmistakably delegate to an arbitrator threshold issues of arbitrability between non-parties").
- *Los Angeles College Faculty Guild v. Los Angeles Community College District*, 83 Cal. App.5th 660 (2022) (provision in CBA tasking arbitrator with authority to resolve disputes involving interpretation, application, or compliance with agreement did not constitute clear and unmistakable evidence that arbitrator was designated to decide question of arbitrability).
- *Noel v. Richard Paul et al.*, 2022 WL 4125216 (N.D. Tex.) (30-day limitation provision in arbitration agreement is a gateway issue for court where question is whether such provision is enforceable and not whether plaintiff complied with that provision).
- *Field Intelligence v. Xylem Dewatering Solution, Inc.*, 49 F.4th 351 (3d Cir. 2022) (court, rather than arbitrator, must decide whether 2017 agreement without arbitration provision superseded 2013 agreement which contained arbitration provision as the existence of the obligation to arbitrate is at issue).

- *Taylor v. Taylor*, 517 P.3d 380 (Utah 2022) (divorce proceedings subject to arbitration upon consent under Utah law; "we see no reason to revoke the trust we place in arbitrators to decide a property dispute between parties, dealing at arm's length incapable of contracting, just because those parties are, (or were) married").
- *Burnett v. National Association of Realtors*, 2022 WL 2820112 (W.D. Mo.) (waiver found where defendant actively litigated case for three years, including two interlocutory appeals on class certification in arbitration).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Verizon Cellular Customer Agreement Ruled Unconscionable. Verizon Wireless customers brought a putative class action alleging false advertising and related claims. Verizon's motion to compel was denied as the arbitration agreement was ruled by a California federal district court to be substantively unconscionable on various grounds. For example, the agreement required customers to provide notice of claims to Verizon within 180 days of disputed charges. While not technically a statute of limitations, the court reasoned that such a notice provision "sets a trap for the unwary. Functionally, this provision may well have the same effect as a statute of limitations in limiting the vindication of plaintiffs' rights." The court also ruled that the provision barring the award of punitive damages was unconscionable under California law. The court further cited the agreement's overbroad exculpatory provision and mass arbitration provision as being also substantively unconscionable. As unconscionability permeated the arbitration agreement, the court refused to sever the offensive terms and denied the motion to compel. *MacClelland v. Cellco Partnership*, 2022 WL 2390997 (N.D. Cal.).

Unconscionable Terms Severed. The arbitration agreement here required contractors to arbitrate disputes with Global Fixtures Services but to bear 50% of the costs of doing so. The arbitration provision also designated three possible administering agencies, Benchmark Arbitration Services, Judicial Workplace Arbitrations, and the AAA. The contractor sued Global which moved to compel. The contractors were willing to arbitrate before the AAA but not with Benchmark or Judicial, arguing that they did not have the ability to pay the fees required by these organizations. The court reviewed the contractor submissions and concluded that they lacked sufficient finances and the "roughly $5,000 in additional, up-front arbitration expenses would likely deter them from pursuing their claims." Nonetheless, the court granted the motion to compel but only before the AAA, the plaintiffs' chosen forum. "Global's decision to specify backup arbitrators suggests that arbitration with Benchmark or Judicial Workplace was its preference but not a core assumption of the contract." The court also ruled that claims that preceded the parties' entering into the agreement with the arbitration provision were not arbitrable as they were not encompassed by the agreement at issue. *Thompson v. Global Fixture Services*, 2022 WL 3693453 (S.D.

Tex.). See also *Love v. Overstock.com, Inc.*, 2022 WL 3345730 (D. Utah) (fees shifting and splitting of arbitration costs provisions in arbitration agreement ruled unconscionable with respect to FLSA claim but is appropriately severed as agreement expressly provided for severance of unenforceable provisions); *Gist v. ZoAn Management*, 370 Or. 27 (2022) (as arbitration provisions are severable under FAA, "courts can only consider the unconscionability of the arbitration provisions specifically, not of the [agreement] as a whole"); *Crespo v. Kapnisis*, 2022 WL 2916033 (E.D.N.Y.) (severance of substantive unconscionability provision such as drastic shortening of statute of limitations and limitation on award of attorneys' fees and damages is appropriate remedy where remainder of the arbitration agreement terms are enforceable). But see *MacClelland v. Cellco Partnership*, 2022 WL 2390997 (N.D. Cal.) (severance of numerous provisions from arbitration agreement rejected as agreement is permeated by unconscionable terms).

Case Shorts

- *Bridgecrest Acceptance Corp. v. Donaldson*, 648 S.W.3d 745 (Mo. 2022), as modified (Aug. 30, 2022) (unconscionability claim rejected where consumer can contest creditor's self-help right, e.g., to repossess automobile, which was excluded from arbitration and assert any defenses or counterclaims in court or before an arbitrator should the parties choose to bring a claim in arbitration).
- *Potthoff v. Bob's Discount Furniture*, No. 1:22CV01722 (N.D. Ill. August 19, 2022) (arbitration provision not procedurally unconscionable where "the provision is set off by a blank line, has a descriptive introductory title 'RESOLUTION OF DISPUTES', and appears in a full-size font").
- *MacClelland v. Cellco Partnership*, 2022 WL 2390997 (N.D. Cal.) (exculpatory clause that precludes all evidence outside of the agreement is broader than common integration causes as it excludes all extrinsic evidence without exception and is therefore substantively unconscionable).
- *California Crane School v. Google*, 2022 WL 3348425 (N.D. Cal.) (voluntary opt out procedure in website's terms of service defeat claims of procedural unconscionability).

IV. ISSUES RELATING TO AGREEMENT TO ARBITRATE

Non-Signatory May Not Compel Arbitration. An emergency doctor was fired and sued the hospital which terminated her. The hospital moved to compel arbitration based on an arbitration agreement the doctor signed with a sibling entity. The district court denied the motion, and the Third Circuit affirmed. The court noted, in rejecting the hospital's agency argument, that the arbitration agreement did not mention the hospital and the doctor did not allege that the hospital's liability was predicated on the sibling entity's conduct. The

court also rejected the hospital's equitable estoppel claim, finding that a sibling relation without more is insufficient to bind a non-signatory sibling in the absence of a close nexus between the two entities. In this case, the court found "two contracts with two sets of signatories, and both can be performed without conflict or inequity." The court also rejected the hospital's argument that the doctor purposefully did not sue the sibling entity with which she was bound to arbitrate. The court declined the hospital's invitation to establish "a new rule of law: a presumption that if (at least in the eyes of a defendant) a plaintiff declines to name a party whose presence might implicate arbitration, then a court should interpret the agreements as if the plaintiff did." The court did conclude that a named individual defendant, employed by the sibling entity, was covered by the arbitration agreement but ruled that the arbitration agreement did not encompass the defamation claim raised against him by the doctor. *Abdurahman v. Prospect CCMC*, 42 F.4th 156 (3d Cir. 2022). Cf. *Noel v. Richard Paul et al.*, 2022 WL 4125216 (N.D. Tex.) (NBA player's fraud and related claims against non-signatory sports agent arbitrable where related claims brought against signatory sports agency and claims against the agent are both intertwined); *Burnett v. National Association of Realtors*, 2022 WL 2820112 (W.D. Mo.) (defendant, which chose to litigate class action certification without mentioning any potential right to arbitrate, waived any right to arbitrate it possessed); *Board of Trustees v. Cigna Health and Life Insurance Co.*, 2022 WL 2805111 (9th Cir.) (non-signatory union welfare fund equitably bound to arbitrate dispute against Cigna based on ERISA Plan where underlying claim cannot be resolved without reference to the services agreement containing an arbitration provision which specified the fees that Cigna could charge and which was at issue in this case). But see *Skillern v. Peloton Interactive, Inc.*, 2022 WL 3718279 (S.D.N.Y.) (husband, who paid subscription charge but did not create an individual account, is estopped from arbitrating statutory claim under direct benefit theory where his misrepresentation claim is based on same Terms of Service containing arbitration provision).

Non-Signatory Is Not Bound to Arbitrate. A Texas district court declined to compel BGP, a production company, to arbitrate its copyright infringement suit against a former show collaborator. The arbitration agreement at issue was contained in a Settlement Agreement resolving a lawsuit between Robert Goldstein, the Director of BGP, and the same individual defendant here. BGP was neither a party to that lawsuit nor a signatory to the Settlement so the question to be resolved was "whether Goldstein signed the [Settlement Agreement] as an agent for BGP or as an individual." The court noted that "an agency relationship may be demonstrated by written or spoken words or conduct by the principal, communicated either to the agent (actual authority) or to the third party (apparent authority)." Observing that Goldstein had generally acted as BGP's agent in other settings, the court remarked "that is not sufficient on its own to show that Goldstein acted as an agent for BGP when he negotiated and signed the Settlement Agreement." In addition, the court found that defendants failed to establish "any spoken or written words or conduct of BGP" where it

authorized Goldstein to act on its behalf or "any act or statement by BGP that it intended for Goldstein to act as its agent when negotiating and signing the Settlement Agreement." Rather, "the record shows that Goldstein signed the [Settlement Agreement] in his individual capacity and for his personal benefit . . . and his actions cannot be imputed to BGP." *Bobby Goldstein Productions, Inc. v. Habeeb*, 2022 WL 1642466 (N.D. Tex.).

On-Line Notice of Terms of Use Sufficient to Create Arbitration Agreement. LowerMyBills.com is owned by LMB, an entity that offers a free referral service matching consumers with mortgage loan providers, including Rocket Mortgage. After visiting the website, Shirley received numerous promotional texts from Rocket Mortgage, which did not stop until three weeks after Shirley replied with a 'Stop' request. Based on this, Shirley filed a putative class action alleging that Rocket Mortgage violated the TCPA by "deliberately program[ming] its telephone dialing system to continue sending telemarketing messages to consumers for more than three weeks after receiving a 'Stop' request." Rocket Mortgage moved to compel arbitration, claiming that Shirley agreed to both LMB's and Rocket Mortgage's Terms of Use while navigating LMB's site. Shirley opposed, arguing that notice of the Terms of Use was not conspicuous and there was no indication that clicking a "Calculate" button would result in accepting the terms. The court observed that there were three distinct pages on LMB's website where Shirley provided personal information and was required to click a bold, colorful "Calculate" button before navigating forward. "Under the first button, grey and underlined hyperlinks to LMB's and Rocket Mortgage's Terms of Use appeared below an advertisement. Under the second and third buttons, a blue and underlined hyperlink to LMB's Terms of Use appeared directly beneath the buttons." The court questioned whether notice of the first set of terms – and, notably, the only Rocket Mortgage notice – was reasonably conspicuous "because the hyperlinks were not in a different color nor were they in capital letters to distinguish them from the rest of the text." With regard to LMB's notice under the remaining buttons, the court concluded they were reasonably conspicuous because "a user of the website (such as Shirley) would clearly see the hyperlinks directly below the second and third buttons before he clicked on them." The court further found that Shirley unambiguously manifested his assent to the Terms of Use by continuing to click buttons on the site and granted its motion to compel. *Shirley v. Rocket Mortgage*, 2022 WL 2541123 (E.D. Mich.).

No Evidence Consumer Accepted Modified Terms of Service Adding Arbitration Provision. Dropbox moved to compel arbitration of Plaintiff's action claiming damages caused by a data breach that Dropbox experienced in 2012. Plaintiff created his Dropbox account in 2011 and did not dispute that he agreed to Dropbox's then-current Terms of Service ("TOS"). The issue before the court was whether plaintiff agreed to the subsequent modifications Dropbox made to its TOS, including the addition of an arbitration clause. The court noted that where, as here, there is no evidence that plaintiff received actual notice of

the modifications, "an enforceable contract will be found based on an inquiry notice theory only if: (1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms." The court rejected Dropbox's position which it characterized as essentially arguing that it contracted for a unilateral right to change the TOS without any obligation to notify plaintiff and that continued use of the service manifests assent to those modifications regardless of whether the consumer was notified of them. The court instead found "nothing in the record to suggest that Plaintiff could not use the service until he indicated his assent, that he would have been advised of new terms and conditions while using Defendant's services, or that Defendant ever tracked whether Plaintiff had opened its email" with notice of certain modifications. The court therefore held that Dropbox failed to establish inquiry notice of its updated TOS and Dropbox's motion to compel was denied. *Sifuentes v. Dropbox, Inc.*, 2022 WL 2673080 (N.D. Cal.).

Fact Question Prevents Determination of Whether Offer to Arbitrate Was Accepted. A New Jersey court order compelling arbitration was reversed and remanded upon the appellate court's finding that the motion judge failed to resolve the parties' conflicting factual allegations concerning a key fact - whether the employee ever saw or signed the arbitration agreement. Noting that a signed arbitration agreement was never presented, that the record lacked any affirmative indication that the employee assented to arbitrate, and that the motion judge made no credibility determinations with regard to the parties' conflicting declarations, the appellate court held that the judge's findings lacked the required evidentiary support to grant employer's motion to compel arbitration. Concluding that "questions of fact concerning the mutuality of assent to the arbitration provision" still exist, the order compelling arbitration was vacated, and the matter was remanded to the motion court "for the judge to conduct a plenary hearing to resolve the disputed factual issues pertaining to [employee's] receipt of and assent to the Arbitration Agreement." *Bhoj v. OTG Management, LLC*, 2022 WL 2794086 (N.J. App.). See also *Ahmed v. Domino's Pizza*, 2022 WL 2666005 (S.D.N.Y.) (hearing would be required to determine whether plaintiffs, who spoke Bengali, were bound by arbitration agreement in employee handbook in face of claims of translation errors); *Crespo v. Kapnisis*, 2022 WL 2916033 (E.D.N.Y.) (inability to speak English insufficient to negate acceptance of arbitration agreement as employee who signed did not make a reasonable effort to have document read to him and the agreement was not procedurally unconscionable).

Question of Fact Concerning Existence of "Superseding" Arbitration Agreement Defeats Motion to Enjoin. Willow Run petitioned to enjoin SMS from arbitrating its breach of contract claims, arguing that an agreement dated April 7, 2003, replaced and superseded the 1998 Distribution Agreement that SMS was relying on. The alleged 2003 Agreement

could not be located by either party and Willow Run argued that without the ability to resort to its terms, the parties could not be bound to arbitrate. Before denying Willow Run's petition, the New York district court observed that when "deciding a motion to enjoin arbitration, courts apply a standard similar to that used to evaluate a motion for summary judgment," noting that this is the appropriate standard to determine arbitrability "regardless of whether the relief sought is an order to compel arbitration or to prevent arbitration." Thus, when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law" the arbitration will be enjoined. In opposition to the motion, SMS asserted that the alleged 2003 Agreement was born from a series of clerical errors made by the parties over the course of their business relationship. The parties amended the 1998 Distribution Agreement seven times, each time attaching a new "Exhibit A" extending the term of the agreement. Based on the parties' course of dealing, the court found that at minimum there were genuine issues of material fact present at to which agreement "was the operative agreement between SMS and Willow Run for the entirety of the parties' business relationship." Accordingly, Willow Run's motion to enjoin the arbitration was denied. *Willow Run Foods, Inc. v. Supply Management Services, Inc.*, 2022 WL 1813984 (N.D.N.Y.). See also *Anadarko E&P Onshore v. California Union Insurance Co.*, 2022 WL 2093836 (5th Cir.) (dispute under addendum to earlier agreement which contained arbitration provision subject to arbitration as addendum expressly incorporated by reference terms of earlier agreement).

Tort Claims Not Encompassed by Arbitration Agreement. In a matter of first impression, the Eighth Circuit held that tort claims arising from a sexual assault are not encompassed by the scope of an arbitration agreement contained in an employment contract. The tort claims at issue arose from plaintiff's allegations that defendant, another company employee, sexually assaulted her in her hotel room during a work conference. Plaintiff's arbitration agreement provided that "any dispute arising under or related in any way to th[e] [Associate's] Agreement . . . shall be subject to mandatory and binding arbitration." Based on this language, the defendant moved to compel arbitration, claiming he was a third-party beneficiary of the agreement. The district court denied the motion, holding that the claims did not arise under or relate in any way to the arbitration agreement. The Eighth Circuit looked to the decisions of sister circuits which had considered "arbitration provision[s] and factual allegations similar to those in the present case" and noted that those courts had determined "in the context of an employment arbitration agreement, a claim will 'relate to' employment only if the merits of that claim involve facts particular to an individual plaintiff's own employment." Applying the reasoning of those courts, the Eighth Circuit found that the "underlying factual allegations of sexual assault must have some 'direct relationship'" with the arbitration agreement in order to be encompassed by its scope and concluded that "nothing about those allegations arose under or related in any way to" the arbitration agreement. As such, the court held that the tort claims do not fall within the scope of the

agreement and affirmed the judgment of the district court. *Anderson v Hansen*, 47 F4th 711 (8th Cir. 2022). See also *Maglana v. Celebrity Cruises*, 2022 WL 3134373 (11th Cir.) (cruise crew members need not arbitrate false imprisonment and intentional infliction of emotional distress claims based on COVID-related detention on ship as those claims were "unrelated to the plaintiffs' duties as beverage handlers").

Case Shorts

- *Knapke v. PeopleConnect, Inc.*, 38 F.4th 824 (9th Cir. 2022) (discovery required on question whether attorney was acting as agent for client when he agreed to terms of service for online site, including whether client ratified attorney's agreement).
- *Kuehne + Nagel, Inc. v. Baker Hughes*, 2022 WL 2274353 (S.D.N.Y.) (arbitration agreement which provides that parties "may refer" disputes to arbitration enforceable when invoked as parties can always submit a dispute to arbitration which undercuts the argument that the arbitration clause here is permissive and requires both parties to agree).
- *Ballou v. Asset Marketing Services*, 46 F.4th 844 (8th Cir. 2022) (trial warranted on question whether customer account agreement containing arbitration clause was supported by consideration).
- *Beckley Health Partners v. Hoover*, 875 S.E.2d 337 (W. Va. 2022) (agreement to arbitrate disputes with assisted living facility signed by daughter on behalf of her mother is not a healthcare decision under West Virginia law allowing surrogate to make healthcare decisions on behalf of incapacitated person and, therefore, was not enforceable).
- *ExxonMobil Oil Corp. v. TIG Insurance Co.*, 44 F.4th 163 (2d Cir. 2022) (award of prejudgment interest by court on arbitration award vacated as being contrary to express contract language).
- *Logan v. Country Oaks Partners*, 297 Cal. Rptr. 903 (Cal. App. 2022), review filed (Sept. 26, 2022) (patient's nephew, acting as health care agent, lacked authority to enter into arbitration agreement on behalf of patient which was optional and not related to health care).
- *Mankin Media Systems v. Corder*, 2022 WL 2359375 (Tenn. App.) (arbitration provision contained in employee handbook which expressly stated it was not a contract and could be unilaterally modified ruled not to be enforceable).
- *ExxonMobil Oil Corp. v. TIG Insurance Co.*, 44 F.4th 163 (2d Cir. 2022) (compelling of arbitration upheld under ambiguous provision where interpretation in favor of arbitration has support in text of agreement and contrary position did not).
- *Outokumpu Stainless USA v. Coverteam SAS*, 2022 WL 2643936 (11th Cir.) (subcontractor bound to arbitrate where contract containing the arbitration provision expressly included subcontractors in definition of the parties to the agreement, and

therefore court need not address equitable estoppel and third-party beneficiary arguments raised).

- *Bridgecrest Acceptance Corp. v. Donaldson*, 648 S.W.3d 745 (Mo. 2022), as modified (Aug. 30, 2022) (consumer retail installment agreement, which expressly incorporated by reference separate arbitration agreement which in turn referenced the installment agreement, formed "a single integrated contract" binding consumer to arbitration claims).
- *Black v. Experian Information Solutions*, 2022 WL 1809307 (S.D. Tex.) (Citibank's broad arbitration clause in credit card agreement which includes disputes related to "relationship" with customer encompasses claim related to checking account and, in any event, questions of arbitrability are for arbitrator to decide).
- *Cornfeld Group v. Certain Underwriters at Lloyd's, London*, 2022 WL 2302123 (S.D. Fla.) (arbitration agreement that applies to all matters "in relation to this insurance" encompasses claimant's bad faith claim as statutory claim relates to alleged failure to adjust storm-related claim under applicable insurance policy).
- *Benchmark Insurance v. Sunz Insurance Co.*, 36 F.4th 766 (8th Cir. 2022) (question whether subsequent agreement superseded agreement with arbitration provision is a challenge to the contract as a whole and not specifically to the arbitration provision and is for the arbitrator rather than the court to decide).
- *CCC Intelligent Solutions v. Tractable, Inc.*, 36 F.4th 721 (7th Cir. 2022) (non-party, which fraudulently entered into contract with arbitration provision, is not a party or third-party beneficiary entitled to invoke arbitration).
- *Carlton Energy Group v. Cliveden Petroleum Co.*, 2022 WL 2240081 (S.D. Tex.) (award of attorneys' fees against non-party entities related to respondent which participated in the arbitration rejected; court instead will hold hearing whether related entities were in fact properly viewed as alter egos, an issue not decided in arbitration).
- *Brawerman v. Loeb & Loeb, LLP*, 81 Cal. App.5th 1106 (2022) (arbitration award denying negligence claim by client against law firm and attorney who was not licensed to practice in state upheld where retainer agreement was only partially illegal and such illegality did not impact arbitration clause).
- *Greenhouse Holdings v. International Union of Painters*, 43 F.4th 628 (6th Cir. 2022) (trial court must first determine whether parent company, against whom an award was issued based on its subsidiary's collective bargaining agreement with union, consented to arbitrate questions of arbitrability before court could rule whether arbitrator had authority to determine if parent company agreed to be bound).
- *Generali Espana de Seguros y Reaseguros v. Speedier Shipping, Inc.*, 2022 WL 1568829 (E.D.N.Y.) (two foreign arbitration awards enforced against nonparty under New York Convention where nonparty agreed to be represented by party's counsel).

- *Crystal Point Condominium Association v. Kinsale Insurance Co.*, 251 N.J. 437 (2022) (condominium association, invoking statute allowing it to seek relief directly from judgment debtor's insurer, is bound to arbitrate claim where insurance policy included broad arbitration clause).

V. CHALLENGES TO ARBITRATOR OR FORUM

FINRA Arbitrator Selection Process Not Manipulated. A Georgia trial court recently ruled that FINRA's arbitration selection process had been manipulated in favor of Wells Fargo and the FINRA panel engaged in misconduct. An independent inquiry found no impropriety in FINRA's process and now a Georgia appeals court rejected in full the trial court's findings. The appellate court found that the objections to, and removal of, two of the arbitrators were reasonably based and that FINRA did not abuse its discretion in upholding the challenges. Specifically, the court found that the first arbitrator who was removed had publicly criticized counsel for Wells Fargo and in the second instance the replacement arbitrator's law firm had sued Wells Fargo in an unrelated matter. The court also rejected the trial court's finding that the arbitration panel was guilty of misconduct in refusing to adjourn the hearing at claimant's request, just a short time before it was to begin, so he could review document production made on a schedule agreed to by the parties. Similarly, the court deferred to the panel's ruling not to hear the testimony from claimant's rebuttal witness as being cumulative as well as its rejection of the assertion that a Wells Fargo witness committed perjury by allegedly testifying inconsistently. Finally, the court ruled that the fees charged to the claimant by the panel in the award constituted sanctions for claimant's bad faith actions, including offering false testimony. In sum, the appellate court concluded that the trial court offered no proper basis for vacating the award and reversed that ruling. *Wells Fargo Clearing Services v. Leggett*, 365 Ga. App. 8 (2022).

Discovery into Presumed Bias of Arbitration Process Rejected. Coach Brian Flores alleged that the NFL and a number of teams engaged in systemic racial discrimination. The NFL moved to compel arbitration under the League's policy, and Flores opposed the motion. In doing so, Flores sought "documents concerning the parties' agreement to arbitrate and applicable arbitration policies, the arbitrator's relationship with the NFL and its history of arbitration rulings, as well as the NFL's relationship with NFL Teams." The court rejected Flores's request regarding the applicable arbitration agreement as an "impermissible fishing expedition" since he offered no basis to challenge the validity of the agreement itself. The court also denied discovery related to the impartiality of the process without evidence "of clear substantive or procedural bias baked into the arbitration agreement." The court added that the FAA provided a remedy for arbitrator bias, namely, motions for vacatur. The court also declined to order discovery regarding the history of the arbitration decisions by the NFL commissioner, who would be the arbitrator here, as such

evidence did not bear on the validity of the arbitration agreement itself. The court observed that Flores did not "cite a single case in which the court ordered discovery focused on the dealings and rulings of an individual arbitrator in the context of a motion to compel arbitration." Finally, the court noted that the requested discovery would not assist in determining whether the NFL, a non-signatory, may seek to enforce the arbitration agreement signed by the NFL Teams. *Flores v. National Football League*, 2022 WL 3098388 (S.D.N.Y.).

Case Shorts

- *Stavis v One Technologies,* 2022 WL 3274533 (N.D. Tex.) (consumer may proceed to litigation under AAA's Consumer Arbitration Rules despite enforceable arbitration provision where the AAA refused to administer arbitration based on credit-monitoring service's pre-existing failure to comply with AAA's procedures).

VI. CLASS, COLLECTIVE, AND GROUP FILINGS

Mass Arbitration Provision Ruled Substantively Unconscionable. Verizon Wireless's subscriber agreement required special treatment where 25 or more related filings were involved. In particular, the agreement required the plaintiffs' counsel and Verizon counsel each to select five cases to go to arbitration while holding the remaining claims unfiled and in abeyance. If the parties were not able to reach a global resolution after the first 10 bellwether cases are resolved, then the parties are required to continue with this process until all the claims are resolved. Verizon moved to compel a class action brought by subscribers; the court denied the motion on substantive unconscionability grounds, including on the basis of the contractual mass arbitration provision. The court calculated that under this process it would take 156 years to resolve all 2,658 pending claims in arbitration. In doing so, the court rejected Verizon's argument that the approach adopted in the agreement was specifically designed to expedite resolution of these cases. "Requiring the consumers who retain counsel willing to represent them in cases such as this to wait months, more likely years before they can even submit a demand for arbitration is 'unreasonably favorable' to Verizon." The court also noted that Verizon, by requiring all cases except the initial 10 not to be filed (presumably to avoid the administrative agency's filing fees), those claims may be ruled untimely. The court also found a lack of mutuality as a result of Verizon's counsel being allowed to represent it in all proceedings while the subscribers' counsel with 25 or more claims can only proceed with the ten selected cases at a time. The court reasoned that "Verizon is thus able to enjoy all of the advantages that come from being a 'repeat player,' while law firms that represent twenty-five or more of Verizon's customers may be forced to sideline any claims which would exceed the numeric cap." The court emphasized that the mass arbitration provision here stood in sharp contrast to those issued by CPR and the AAA. For example, the court pointed out that under CPR's

process the first ten cases were required to be resolved within 120 days followed by a global mediation to be completed within 90 days. As a result, CPR's Protocol "did not create the possibility of significant delay that is facially presents here." Similarly, the AAA's Supplementary Rules do not require that claims be held up or filed in tranches and requires the mediation to take place concurrently with the arbitrations. The court found that Verizon's mass arbitration provision had "little in common with the Supplementary Rules. It is one thing to set up a bellwether system to adjudicate a group of cases with the purpose of facilitating global or widespread resolution via ADR. It is another to formally bar the timely adjudication of claims that do not settle." For these reasons, the court concluded that Verizon's mass arbitration provision was substantively unconscionable and denied the motion to compel. *MacClelland v. Cellco Partnership*, 2022 WL 2390997 (N.D. Cal.).

Case Shorts

- *In Re: A&D Interests, Inc.*, 33 F. 4th 254 (5th Cir. 2022) (notice of a FLSA collective action need not be sent to employees who are subject to arbitration provision even if employer had not yet moved to compel arbitration).
- *Evenskaas v. California Transit*, 81 Cal. App.5th 285 (2022), review denied (Oct. 19, 2022) (class of drivers providing paratransit services compliant with federal disability law requirements are involved in interstate commerce and therefore motion to compel arbitration granted as the FAA applies and preempts California law which would have precluded class claims).

VII. HEARING-RELATED ISSUES

Award Vacated Where Fraudulent Testimony Discovered After Issuance. Two NFL player agents had a dispute. Bernstein claimed that France poached his client, pointing to an event at which the player appeared three days before the player terminated his agreement with Bernstein. France denied having anything to do with the event and failed to produce requested documents which he claimed were not in his custody or control. The arbitrator ruled against Bernstein, finding that he did not carry his burden of proof. Based on discovery in a related litigation, as stated by the Third Circuit, "it is plain that France both lied under oath and withheld important information demanded in discovery." France was in fact deeply involved in the event at issue and the court concluded that clear and convincing evidence existed for a finding of fraud. The court rejected the argument that Bernstein should have discovered the fraud through reasonable diligence. "In fact, the fraud occurred directly in response to the reasonable diligence that Bernstein exercised in his discovery attempts leading up to the arbitration." The court also rejected the argument that Bernstein should be faulted for not seeking to enforce third party subpoenas signed by the arbitrator which likely would have uncovered the fraud. "It is true that Bernstein did not pursue every possible discovery mechanism, but a litigant's diligence can be legally adequate even if

some stones are left unturned. 'Reasonable' does not mean 'perfect.'" Finally, the court concluded that the withheld evidence was material to the arbitrator's decision. "Had Bernstein been able to present the evidence that France should have produced before the arbitration hearing or that Bernstein might have sought more aggressively from non-parties had France not testified falsely, the arbitrator would have had to weigh the parties' respective stories – both of which would have had some evidentiary support – and could have found in favor of Bernstein." For these reasons, the court vacated the award as having been procured by fraud. *France v. Bernstein*, 43 F.4th 367 (3d Cir. 2022).

Arbitration Ruling Denying Deposition of Senior Executive Upheld. Claimant in this disability accommodation case sought 15 depositions, including that of her employer's senior executive, Dr. Prem Reddy. The arbitrator ordered the parties to meet and confer and denied claimant's application to take Dr. Reddy's deposition. The arbitrator did allow plaintiff to issue 15 interrogatories to be answered by Dr. Reddy. Based on these interrogatories, claimant moved to compel the deposition which was denied. Claimant moved to vacate, based on the arbitrator's denial of the taking of Dr. Reddy's deposition. The district court declined to vacate the award and the California appellate court affirmed. The court explained that when a senior official's testimony is sought the moving party must show good cause and that the potential deponent has unique information or superior personal knowledge of discoverable information that cannot be obtained otherwise. The court observed that claimant failed to show that the evidence sought from Dr. Reddy could not be obtained elsewhere or that the information sought was necessary to her case. The court concluded that claimant failed to show "that her rights were substantially prejudiced by the arbitrator's refusal to let her depose Dr. Reddy or call him to testify. It follows that the trial court properly refused to vacate the award on this ground." *Gavriiloglou v. Prime Healthcare Management*, 83 Cal. App. 5th 595 (Cal. App.), as modified on denial of reh'g (Sept. 20, 2022).

Case Shorts

- *West Warwick Housing Authority v. RI Council 94*, 277 A.3d 707 (R.I. 2022) (failure to raise before arbitrator challenge to renewal clause in collective bargaining agreement is fatal to union's attempt to introduce this contention on appeal).
- *McKinnon v. Hobby Lobby Stores*, 2022 WL 3042283 (E.D. Tex.), report and recommendation adopted, 2022 WL 3036001 (E.D. Tex.) (arbitrator's refusal to allow testimony from witnesses about discrimination against them rather than related to plaintiff's claim of discrimination not prejudicial or grounds for vacatur).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Failure to Hold Hearing Not Ground for Vacatur. The guaranty agreement between the parties included an expedited arbitration procedure that required each party to submit its position and materials to the arbitrator within seven business days following his or her appointment. The agreement also stated that the arbitration would be administered under the JAMS Streamlined Arbitration Rules and Procedures. The arbitrator was required to issue a final award within 30 days of the submissions. The arbitrator here complied with the timeliness mandates of the agreement and awarded $185,000,000 to claimant under the guaranty and respondent moved to vacate the award on the ground that the arbitrator's failure to grant its request for discovery and to hold an evidentiary hearing rendered the process fundamentally unfair. The court rejected respondent's argument and agreed with the arbitrator that the extremely expedited arbitration process that the parties agreed to did not contemplate time for discovery or hearing. "While the arbitrator in this case did not hold an evidentiary hearing, she considered extensive submissions by the parties in connection with both the scheduling decision and the final merits decision." The court also rejected respondent's contention that discovery was required because the agreement also incorporated the JAMS Rules which contemplate discovery being exchanged. "The arbitrator reasonably concluded that these contract terms conflict with, and displaced, the JAMS Rules providing for discovery and a hearing. The arbitrator noted that the JAMS Rules explicitly allow parties to waive an oral hearing and agree on procedures not contained in the JAMS Rules." The court concluded by noting that in further support of its conclusion "the parties are sophisticated commercial entities who operated with equal bargaining power" and that the arbitrator provided "more than a colorable justification for her interpretation of the arbitration agreement." *245 Park Member LLC v. HNA Group (International)*, 2022 WL 2916577 (S.D.N.Y.).

Detailed Award Proper Under JAMS Rules Despite Contract Provision to Contrary. The LLC agreement in this case provided that the "arbitration award will not include factual findings or conclusions of law." The agreement also incorporated the JAMS Comprehensive Arbitration Rules and Procedures. The arbitrator issued two interim awards, one which was 54 pages in length, and a final award. The losing party sought to strike any portion of the final award, including the interim awards which were attached, on the ground that the arbitrator exceeded his authority by ignoring the express language in the agreement precluding reasoned awards. The Delaware Court of Chancery rejected this claim. The court noted that the arbitrator relied on the LLC agreement's incorporation of the JAMS Rules which permitted reasoned awards. The court emphasized that the arbitrator considered and rejected the losing parties' assertion that the agreement "only provided for a bare award, which he dismissed as inconsistent with the JAMS Rules that were incorporated into the Arbitration Provision. The Arbitrator determined that he was entitled to issue a reasoned

award, and the LLC Agreement did not preclude him from providing rationales and explanations for his rulings." The court agreed that there was "room for interpretation as to whether [the agreement] permitted a reasoned award under the JAMS Rules." The court added that the JAMS Rules authorized the arbitrator to interpret and apply those rules. Finally, the court pointed out that the arbitrator had issued numerous reasoned decisions throughout the proceeding without objection. *Polychain Capital LP v. Pantera Venture Fund II*, 2022 WL 2467778 (Del. Chanc.).

Arbitrator Issued Requisite "Reasoned Award." The parties to a construction dispute agreed that the arbitrator would issue a "reasoned award". The arbitrator issued a 14-page interim award finding a material breach of the agreement by one of the parties, and then issued a final award. The Montana trial court vacated the award, finding that the arbitrator failed to issue "a reasoned opinion" as required. The Montana Supreme Court reversed. The Court, while acknowledging that no clear definition of what constitutes a reasoned award was available, concluded that it rested between a standard short form award and a full finding of facts and conclusions of law. The Court explained that the arbitrator's interim award "does more than simply declare a prevailing party and assess damages. The document is over 14 pages long, including nine pages of the Arbitrator's exploration of the facts and his resolution of the parties' claims, with the remainder providing the Arbitrator's rationale regarding the damages award." The Court noted that the interim award contained the arbitrator's ultimate factual determination but did not discuss certain claims raised that were nonetheless dismissed. The court concluded that the arbitrator satisfied his obligation to issue a reasoned award and it noted that while "at times the Arbitrator's reasoning might not be entirely explicit, it was nonetheless understandable given a fair reading and the deference we afford an arbitrator's decisions." The Court also rejected the claim that the arbitrator's failure to offer legal citations did not, by itself, constitute a failure to follow established law. Finally, the Court rejected the argument that the arbitrator exceeded his authority by making findings regarding a party's "subjective beliefs." The Court emphasized that these findings were not the arbitrator's ultimate findings but rather "provided context for the Arbitrator's ultimate conclusions about breaches of the contract and the covenant of good faith and fair dealing." For these reasons, the Montana Supreme Court reversed the trial court and reinstated and confirmed the arbitrator's award. *M. K. Weeden Construction v. Simbeck and Associates*, 409 Mont. 305 (2022).

Order Resolving Independent Claim Final. A Tribunal remained constituted to address several phases of a coverage dispute under an excess liability insurance policy. The Tribunal issued two orders – one related to reimbursement of a payment prematurely made and the second setting procedures for future submission of claims. A motion to confirm was filed. The question for the court was whether the Tribunal's order with respect to these two issues was "final" and therefore subject to confirmation. The court concluded that the first issue

was in fact final as it resolved a separate and independent claim, namely, whether the premature payment was to be refunded. The court noted that "the repayment has no bearing on future claims and is, therefore, a severable issue." The court reached a different result with respect to the second issue. There, the court reasoned that the panel's interpretation of the insurance policy merely decided issues that would bear on future determinations to be made by the Tribunal. The parties themselves acknowledged that the Tribunal's rulings would establish a framework for future payments and the Tribunal informed the parties that they could challenge its rulings and that those challenges would be addressed at the next phase of the proceedings. For these reasons, the court concluded that the Tribunal's rulings on the second issue were not final but rather were interlocutory and not subject to confirmation. *HDI Global SE v. Phillips 66 Co.*, 2022 WL 3700153 (S.D.N.Y.).

Award on Separate, Independent Claim Ruled to Be Final. The parties agreed to bifurcate the liability and damages stages of their foreign arbitration proceeding. When it came to damages, the arbitrator issued a series of awards over the course of four years concerning various costs that stemmed from the breach established in the liability stage. After the last award was issued, Petitioner moved to confirm. Respondents challenged certain awards on the grounds that they were barred by the FAA's three-year limitations period for confirmation of awards falling under the New York Convention. The district court found to the contrary and held that the statute of limitations began to run upon issuance of the final award "as it was only at this time that the arbitrator had 'issued a decision as to all th[e] sub-categories' of awards, and therefore arrived at a 'final comprehensive damages determination' that 'definitively and comprehensively settl[ed] the parties' dispute regarding damages." The First Circuit affirmed, concluding that "the damages do not correspond to 'separate' and 'independent' claims, but rather all flow from the same breach of contract established at the liability stage." *University of Notre Dame (USA) in England v. TJAC Waterloo, LLC*, 49 F.4th 12 (1st Cir. 2022).

Arbitrator Authorized to Clarify Award. Starr and Hunt brought claims in arbitration against their partner, Mayhew, following the sale of a shopping center that the three had developed. Mayhew sought an advance of attorneys' fees under the partnership agreement and the arbitrator ordered that $250,000 be advanced to Mayhew. The arbitrator ruled in favor of Starr and Hunt and awarded damages and attorneys' fees. She also declined to increase the fees awarded to Mayhew beyond the $250,000 advance which she deemed to be reasonable. Mayhew moved for clarification of the award to determine whether he was entitled to be indemnified for the damages and fees he was ordered to pay. The arbitrator clarified her award by noting that the damages and fees Mayhew was obligated to pay were his personal obligations not covered by the indemnification provision. Mayhew sought to vacate the award, arguing that the arbitrator was not empowered to amend her original

award. The trial court denied the motion and the California appellate court affirmed. The court observed that arbitrators "have wide latitude in crafting awards." The court noted that beyond the narrow grounds permitted under California law for an arbitrator to clarify an award there exists a broader non-statutory basis for doing so. The court explained that unlike "the power to correct, the power to amend allows an arbitrator to address substantive issues." This power is present when an award omits an issue due to inadvertence or mistake and the amendment is consistent with other merits findings and is not demonstrably prejudicial. The court explained any ambiguity in the award was clarified and this "finding was consistent with the final award, which had already concluded additional indemnity for attorney fees was reasonable due to Mayhew's poor management …" The court added that it was Mayhew's application which led to the amendment which was not shown to be "substantially prejudicial to his legitimate interests." The court also rejected Mayhew's contention that the arbitrator exceeded her authority by failing to fully indemnify him. The court explained that nothing in "the operating agreement prevented the arbitrator from limiting the amount of his indemnity based on equitable principles." On this basis, the appellate court affirmed the trial court's denial of the motion to vacate. *Starr v. Mayhew*, 83 Cal. App.5th 842 (2022), reh'g denied (Oct. 21, 2022).

Rights of Intervenor Limited in Action to Confirm Award. When there is a dispute concerning coverage between an insurer and insured, a Missouri statute, Mo. Ann. Stat. § 537.065, allows the insured to enter into an agreement with the claiming party providing that any judgment will only be collected from the insurer. Here, Geico denied coverage and the Insured entered into one of these "065 Agreements" with Claimant and also agreed to arbitrate the claims. The arbitrator held in favor of Claimant and awarded $5.2 million in damages. When Claimant sought judicial confirmation of the award, Geico moved to intervene. The trial court confirmed the award and entered judgment in favor of Claimant. Geico appealed, asserting the trial court erred in confirming the arbitration award without giving Geico a meaningful opportunity to defend its interests. The Missouri Court of Appeals affirmed the lower court decision. The court recited the text of the statute, which provides: "Before a judgment may be entered . . . the insurer or insurers shall be provided with written notice of the execution of the contract and shall have thirty days after receipt of such notice to intervene as a matter of right in any pending lawsuit involving the claim for damages." Thereafter, the court noted that it has "consistently recognized the limited nature of this right of intervention, finding that it does not provide for the 'unconditional right to litigate the injured party's claims on the merits,' but merely requires that insurers be provided with notice of an agreement entered under § 537.065 before a judgment may be entered." Stating that the law does not guarantee anything more than intervention, the court concluded that the intervenor must accept the action as he finds it at the time of intervention. The trial court's judgment was therefore affirmed. *M.O. v. Geico*, 2022 WL 2032309 (Mo. App.). [**Note**: On June 29, 2021, while *M.O. v. Geico*, 2022 WL 2032309 (Mo.

App.) was pending, Missouri's Governor signed into law a bill which, among other things, repealed and replaced Mo. Ann. Stat. § 537.065. The amendments guarantee not only an insurer's right to intervene but also provides that the intervenor has all rights afforded to Missouri defendants, including the rights to conduct discovery, engage in motion practice, have a jury trial, and to assert or raise any defenses that would have been available to the tort-feasor in absence of a contract.]

Annulled Foreign Arbitration Award Partially Enforced. An arbitration award rendered in Nigeria was partially annulled by a Nigerian Court. The district court, applying applicable Second Circuit precedent, declined to enforce the award, including that portion of the award which was enforced by the Nigerian court. The Second Circuit reversed that part of the district court's ruling which failed to enforce what had been upheld on the ground that the Nigerian court's ruling was entitled to full comity. The Second Circuit explained that "a district court should enforce an award that was set aside in the primary jurisdiction – and thereby deny comity to the relevant foreign judgment – only if the judgment setting aside the award can be properly characterized as 'repugnant to fundamental notions of what is decent and just' in the United States, in which case reliance on the judgment would be contrary to U.S. public policy." The court reasoned that the district court was required to enforce those portions of the award which the Nigerian Court upheld. In doing so, the Second Circuit noted that "questions may reasonably be raised regarding the correctness of the Nigerian appellate court's legal conclusions, as well as a practical effect of its judgments, but our role in secondary jurisdiction is not to second-guess the Nigerian court's substantive determinations made under Nigerian law. We assess that court's rulings only so far as required to ascertain whether they are plainly incompatible with U.S. notions of justice." The Second Circuit observed that the parties had an adequate opportunity to be heard by the Nigerian court and could point to no glaring procedural irregularities. The court rejected the broad argument that Nigerian courts lack sufficient independence from government pressure to warrant deference, stating that "broad, non-specific evidence does not form an appropriate basis for a judicial conclusion in U.S. courts that a specific foreign judgment is necessarily repugnant to notions of justice in this country so as to require the abandonment of comity." For these reasons, the Second Circuit remanded the case to the district court to formulate a partial enforcement order based on its ruling. *Esso Exploration and Production Nigeria Ltd. v. Nigerian National Petroleum Corp.*, 40 F.4th 56 (2d Cir. 2022).

Case Shorts

- *Atlantic City Superior Officers' Association v. City of Atlantic City*, 2022 WL 2352376 (N.J. App.) (New Jersey's Municipal Stabilization and Recovery Act grants to the state broad authority to protect designated municipalities, such as Atlantic City, including authority to overturn arbitration awards such as the one in this case granting police officers lump sum payments for sick leave owed to them).

- *Rodgers v. United Services Automotive Association*, 2022 WL 2610234 (5th Cir.) (claim that counsel coached witness during video deposition by sending text messages did not satisfy FAA standard for procurement of the award by fraud as issue was discoverable and known at the time of the arbitration).
- *Polychain Capital LP v. Pantera Venture Fund II*, 2022 WL 2467778 (Del. Chanc.) (arbitrator did not exceed his authority by deciding a common law breach of fiduciary duty claim where applicable LLC agreement "neither waived the corporate opportunity doctrine nor eliminated fiduciary duties").
- *Greenhouse Holdings v. International Union of Painters*, 43 F.4th 628 (6th Cir. 2022) (an award is only final, and time to file a motion to vacate only begins to run, when "it determines both liability and damages").
- *ExxonMobil Oil Corp. v. TIG Insurance Co.*, 44 F.4th 163 (2d Cir. 2022) (confirmation of arbitration award by judge with undisclosed conflict could be, but was not, vacated upon review by unconflicted judge).
- *Vital Pharmaceuticals v. Orange Bang, Inc.*, 2022 WL 3007631 (C.D. Cal.) (motion to vacate on irrationality and manifest disregard grounds denied where arbitrator's 177-page final award "grapple[d] in good faith with the various conflicts in the case" and "consistently provided a reasoned basis for his rulings and grounded them in both law and fact").
- *Tecnicas Reunidas de Talara v. SSK Ingenieria*, 40 F. 4th 1339 (11th Cir. 2022) (motion to vacate award under Panama Convention based on attorney's switching sides during arbitration denied as party waived objection by not raising it until after the award was issued even though all relevant facts were known during the arbitration).

IX. ADR – GENERAL

Motion to Confirm Award Under Seal Rejected. Bristol-Myers Squibb ("BMS") prevailed in an arbitration brought against it by Novartis. BMS moved to confirm the award under seal, but the motion was denied and its motion to confirm, without the award attached, was filed publicly. Novartis then moved to seal the award and added an alternative request to file a redacted version of the award. Novartis argued that the redactions, 11 of 30 pages, would prevent the disclosure of trade secrets and proprietary information. The court noted that "the proposed 'redacted' version of the award leaves the reader pretty much in the dark about the arbitration and the basis of the award, accomplishing essentially the same result as full sealing does." The court rejected Novartis's application. The court emphasized that under both the common law and the First Amendment there is a strong presumption of access to court filings to ensure the public confidence in the integrity of court proceedings. That presumption can only be overcome if sealing is deemed essential to preserve higher values and is narrowly framed. The court noted that arbitration is a "purely private

proceeding to which no public right of access attaches." The court added that that arbitration "has become the dispute resolution mechanism of choice for those who wish to keep the public from knowing about their business. As long as the parties confine themselves to their chosen private venue, they are free to conduct themselves under a veil of privacy." The court concluded, however, that "privacy considerations go by the board if a party comes to court in order to obtain an enforceable judgment on his award." The court characterized Novartis's claim that sealing was warranted because the parties have treated the proceeding as confidential as "just plain wrong." The court described the parties' confidentiality agreement as being "worth the paper on which it is written only as long as the matter remains a private matter – which is to say, only as long as no party seeks to involve the court, and through the court the Government and the people, in its resolution." The court also rejected Novartis's argument that the FAA clearly established a federal policy favoring confidentiality in arbitration. The court "emphatically disagreed" and noted that if parties abided by the arbitration award their concern for confidentiality would be respected. The court opined, however, that "in this Court's experience, there are a lot of sore losers in arbitration – and because they have chosen arbitration, they have no right to appeal an adverse decision to a higher tribunal. So they simply do not comply with the award." The court also remind the parties that it "is not a party to any confidentiality agreement they have made with themselves or the arbitrators" but rather is bound to comply with the law "even if courts have on occasion winked at the law and mistakenly allowed confirmation proceedings to be conducted under seal." For these reasons, the court rejected Novartis's motion to seal the award. *Bristol-Myers Squibb Co. v. Novartis Pharma AG*, 2022 WL 2133826 (S.D.N.Y.), reconsideration denied, 2022 WL 2274354 (S.D.N.Y. June 23, 2022).

Daughter of Arbitrator Deposed. During the pendency of an arbitration, the arbitrator's daughter accepted an offer from one of the law firm's representing a party in the arbitration. The arbitrator disclosed this fact, and ultimately ruled in favor of that party. The losing party moved to vacate on evident partiality grounds. That party requested and the court granted the opportunity to depose the arbitrator's daughter. Following the deposition, the same party sought to depose a number of the law firm's lawyers in an effort to determine whether any partner contacted the arbitrator or was involved in the hiring of the arbitrator's daughter. Extensive electronic discovery was also requested. The court rejected these requests in favor of a less "intrusive and burdensome" approach. The court directed that certain relevant law firm personnel provide declarations answering the question whether they were aware of any partner recommending the hiring of the arbitrator's daughter and, if so, to provide the details surrounding such recommendation. *Salzgitter Mannesmann International v. Sun Steel Co.*, 2022 WL 3041134 (S. D. Tex.).

Case Shorts

- *Smith v. Lindemulder*, 512 P.3d 260 (Mont. 2022) (agreement reached in mediation enforced where plaintiff failed to provide adequate medical support for her claim of "weakness of mind" due to a medical condition and to demonstrate that counsel's advice in support of accepting settlement terms constituted coercion).

X. COLLECTIVE BARGAINING SETTING

Award Vacated as Arbitrator Imperfectly Executed Authority Under CBA. The collective bargaining agreement ("CBA") here required the Town of North Providence to fill a police vacancy "within 45 days after the vacancy is recognized." The arbitrator ruled that the Town violated the CBA by not filling the police position within 45 days after a detective resigned. The Rhode Island Supreme Court vacated the award on the ground that the award contravened the essence of the CBA. The Court criticized the arbitrator for equating the word "recognize" with "notice of" a vacancy. "The arbitrator's interpretation of the CBA relies on decades-old definitions of the word 'recognize' to nullify the distinction between 'creation' and 'recognition' of a vacancy, and thus deprives the town of its reserved managerial discretion." The Court reasoned that the arbitrator did not merely misconstrue the CBA but rather manifestly disregarded its terms in contravention of its essence. In the Court's view, the arbitrator's award defeated the Town's managerial prerogative to fill vacancies when it "recognized" or determined the necessity of filling such vacancy. As a result, the award produced completely irrational results in the Court's view and the Court ruled that the arbitrator therefore imperfectly executed his authority. *Town of North Providence v. Fraternal Order of Police*, 276 A.3d 1281 (R.I. 2022).

Case Shorts

- *Los Angeles College Faculty Guild v. Los Angeles Community College District*, 83 Cal. App.5th 660 (2022) (CBA provision providing that faculty wase responsible for preparing class schedules not sufficient to make arbitrable school district decision to cancel all remedial English and math courses).

XI. NEWS AND DEVELOPMENTS

AAA Commercial Arbitration Rules Revised. Significant revisions to the AAA's Commercial Arbitration Rules took effect on September 1, 2022. Revisions of note include: (1) a stated commitment to the confidentiality of arbitration proceedings; (2) discretion afforded arbitrators in explaining and interpreting awards upon a party's motion; (3) authority to consolidate existing arbitrations or the joinder of additional parties; (4) greater flexibility in determining the method of hearing; (5) reinforcing the importance of

cybersecurity; (6) increasing the upper limit to $100,000 for use of the AAA's Expedited Procedures; (7) identifying the Administrative Review Council as the body to determine challenges to the appointment or continuing service of arbitrators and for selecting the locale of proceedings when disputed; (8) requiring that the time and cost associated with granting permission to file dispositive motions be considered; (9) increasing the threshold for application of the Large, Complex Case Procedures to $1 million, and (10) expanding the acceptable forms of transcription of a hearing.

Changes to UK Arbitration Law Proposed. The Law Commission of England and Wales recently proposed a number of changes to the Arbitration Act of 1996, including: (1) that confidentiality of arbitration proceedings be considered on a case-by-case basis rather than by code; (2) the institution of summary proceedings in limited circumstances; (3) codification of existing caselaw requiring arbitrators to disclose any connections to parties, and; (4) prohibiting challenges to arbitrators based on race or gender. Comments on these proposals may be submitted until December 15, 2022, and a report and recommendation is anticipated to be issued in the summer of 2023.

Russian Soccer Clubs Banned. An appellate panel of the Court of Arbitration in Switzerland upheld the ban imposed by the European Football Association and the Federation Internationale de Football Association against Russian football clubs from competition in Europe for the upcoming season. The basis for the ban was Russia's invasion of the Ukraine. The Panel stated that it finds it "unfortunate that the current military operation in Ukraine, for which Russian football teams, clubs and players have themselves no responsibility, had, by reason of the decisions of FIFA and UEFA, such an adverse effect on them and Russian football generally, but those effect were . . . offset by the need for the secure and orderly conduct of football events for the rest of the world."

XII. TABLE OF CASES

Cases