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AAA Case Summaries:
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I. JURISDICTIONAL ISSUES: GENERAL

Amazon Delivery Drivers Subject to FAA Transportation Worker Exemption. The transportation worker exemption under the FAA applies to workers "engaged in foreign or interstate commerce." Amazon utilizes independent contractors to make its deliveries, so-called "last mile" drivers. A putative class action was brought on behalf of the drivers alleging wage and hour violations. Amazon moved to compel arbitration based on an agreement signed by the drivers. The drivers opposed the motion arguing that they are subject to the FAA's transportation exemption. A trial court denied the motion and the First Circuit affirmed. In doing so, the appellate court took a broad view of the scope of the transportation worker exemption, taking into account "the nature of the business to assess whether workers' activities include the transportation of goods or people in the flow of interstate commerce." Looking to precedence from the time of enactment of the FAA the court concluded that "workers moving goods or people destined for, or coming from, other states – even if the workers were responsible only for an intrastate leg of that interstate journey – were understood to be 'engaged in interstate commerce' in 1925." In rejecting arbitration of the plaintiffs' claims here, the First Circuit recognized "that the FAA was enacted to counter hostility toward arbitration and that, accordingly, we must narrowly construe the statutory exemption from the Act." Nonetheless, the court concluded this pro arbitration policy evident in the FAA could not "override the original meaning of the statute's text." *Waithaka v. Amazon.com*, 966 F.3d 10 (1st Cir. 2020). See also *Rittmann v. Amazon.com*, 971 F.3d 904 (9th Cir. 2020) (exemption for transportation workers applies to Amazon "last mile" drivers "who are engaged in the movement of goods in interstate commerce, even if they do not cross state lines"); *McDonnell v. Maplebear, Inc.,* Case No. CGC-20-585037 (Cal. Sup. Ct. S.F. Cty. October 22, 2020) (same).

Grubhub Drivers Not Engaged in Interstate Commerce. GrubHub drivers deliver on-line food orders locally. Two groups of Grubhub drivers brought wage and hour actions claiming, among other things, overtime violations. Grubhub moved to compel arbitration and the drivers countered by arguing that they were engaged in interstate commerce and therefore covered by the exemption in the FAA for transportation workers. The district court rejected the drivers' exemption argument, and the Seventh Circuit affirmed. The court emphasized that being "engaged" in interstate commerce as required under the FAA exemption is narrower than "affecting" commerce which reaches Congress's full commerce powers. The court rejected the drivers' argument that they carry goods that have moved across state lines. In the drivers' view, the "residual exemption is not so much about what the worker does as about where the goods have been." But this ignores the FAA's requirement that the drivers must engage in the act of moving goods across state or national borders. The court observed that "the plaintiffs' interpretation would sweep in numerous categories of workers whose occupations have nothing to do with interstate

transport – for example, dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling treats made with milk from an out of state dairy." The court concluded that to qualify for the exemption plaintiffs must have demonstrated that "the interstate movement of goods is a central part of the job description of the class of workers to which they belong." This they failed to do and on this basis the court ruled that the transportation worker exemption does not apply. *Wallace v. Grubhub Holdings*, 970 F.3d 798 (7th Cir. 2020).

New Jersey Requires Arbitration of Disputes Involving Transportation Workers. Section One of the FAA exempts transportation workers from the obligation to arbitrate claims. New Jersey's Arbitration Act (NJAA) has no such exemption. The New Jersey Supreme Court ruled that the FAA does not preempt the NJAA as the latter does not disfavor arbitration. The New Jersey high court found in two consolidated cases that truck drivers who signed arbitration agreements could be required to arbitrate their wage and hour claims despite the fact that the FAA would not preclude the arbitration of those claims. The Court noted the NJAA, by its terms, applies to all non-exempt employees unless the statute was preempted by the FAA. The Court concluded that the NJAA did not frustrate the principle purposes of the FAA and was not preempted. Moreover, the court ruled that the NJAA "will apply unless preempted even without being explicitly referenced in an arbitration agreement; no express mention of the NJAA is required to establish a meeting of the minds that it will apply in as much as its application is automatic." *Arafa v. Health Express Corp.,* 243 N.J. 147 (2020).

Second Circuit Rejects Discovery Request for Foreign Private Arbitration. Federal appellate courts have split on the question of whether 28 U.S.C. § 1782 authorizes production of discovery in the United States relating to foreign-based private arbitrations. The Second Circuit, reaffirming its prior non-precedential decision, ruled in this case that § 1782 does not allow federal courts to order discovery in support of private arbitrations abroad. In contrast, the Fourth and Sixth Circuits have ruled that discovery may be granted in aid of foreign private arbitrations. The Second Circuit reasoned in this case involving an arbitration before the China International Economic and Trade Arbitration Commission (CIETAC) that determining what constitutes a "foreign or international tribunal" for purposes of § 1782 does not turn on one single factor but rather on a range of factors including "the degree of state affiliation and functional independence possessed by the entity, as well as the degree to which the parties' contract controls the panel's jurisdiction. In short, the inquiry is whether the body in question possesses the fundamental attributes most commonly associated with private arbitration." The court concluded that the arbitration here was a private commercial arbitration. In doing so, the court emphasized that "CIETAC possesses a high degree of independence and autonomy, and, conversely, a low degree of state affiliation." Further, the grounds for overturning awards under Chinese law parallels U.S. law, including "a lack of agreement to arbitrate, the scope of the matters to be arbitrated, improper appointment of arbitrators, and fraud or bribery by the arbitrators or

parties." Finally, the arbitrator's authority derives from the parties' agreement and not government-backed jurisdiction. For these reasons, the court concluded that the arbitration here was best categorized as a private commercial arbitration not subject to assistance under § 1782. *In re: Application and Petition of Hanwei Guo*, 965 F.3d 96 (2d Cir. 2020), as amended (July 9, 2020). Accord: *Servotronics v. Rolls-Royce PLC,* 975 F.3d 689 (7th Cir. 2020) (Section 1782 authorizing discovery for "foreign tribunals" not applicable to private foreign arbitrations but is limited to "governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure'").

New York Statute Barring Arbitration of Discrimination Claims Not Preempted. In 2018, the New York legislature enacted a statute barring the arbitration of employment discrimination claims. A female vice president at LVMH sued in state court under the New York State and New York City Human Rights Laws alleging sexual harassment. LVMH moved to compel arbitration based on an arbitration agreement signed before enactment of New York's law. The court denied the motion. In doing so, the court rejected LVMH's argument that New York State's law was preempted by the FAA. Preliminarily, the court ruled that the question of arbitrability was for the court rather than the arbitrator to decide because "of the profound policy interests underlying the enactment" of the New York law. The court reasoned that the FAA did not preempt New York State's law because "claims for sexual harassment, or other discrimination-based claims, cannot reasonably be characterized as claims concerning or 'arising out of a transaction involving commerce . . .." The court added that sexual harassment was not a "transaction involving commerce." The court also noted that LVMH issued a handbook in 2018, after the 2014 Arbitration Agreement which specifically identified proceedings in state court as avenues for addressing harassment and discrimination claims and, therefore, superseded the Arbitration Agreement. For these reasons, the court denied LVMH's motion to compel. *Newton v. LVMH*, 2020 WL 3961988 (N.Y. Sup. Ct. N.Y Cty.).

FAA Prevails Over New York Statute Barring Arbitration of Discrimination Claims. Plaintiff agreed to be bound to WeWork's dispute resolution program when she accepted employment as its director of employee relations. She later sued for race discrimination in New York federal court and WeWork moved to compel arbitration. Plaintiff opposed the motion, noting that New York enacted legislation barring the mandatory arbitration of discrimination claims. The court rejected plaintiff's argument, ruling that the FAA governed the agreement and preempted New York's statute because it applied to a specific arbitration claim "rather than a generally applicable defense." The fact that the program applied New York law did not change the result, according to the court. "Therefore, a court considering arbitrability in the face of a New York choice of law provision that is silent as to enforcement must keep in mind that such provisions '[do] not . . . modify the default rules of the FAA' with respect to questions of arbitrability." For these reasons, WeWork's motion to compel was granted. *White v. WeWork Companies*, 2020 WL 3099969 (S.D.N.Y.).

Third-Party Discovery in Arbitration Not Permitted in California. The Ninth Circuit, as have most federal circuit courts, ruled that the FAA does not authorize third-party discovery in arbitration. California law with respect to third-party discovery in arbitration has, however, been uncertain. No more. The California Court of Appeals for the Sixth District ruled that the California Arbitration Act ("CCA") did not confer on arbitrators unlimited powers to issue subpoenas. Rather, the CAA would only support issuance of arbitral subpoenas for third party discovery where the parties' arbitration agreement expressly provided for such enhanced discovery. The court quashed discovery subpoenas issued in the underlying case because the relevant arbitration provision did not provide for broad discovery and, therefore, neither the FAA nor the CAA empowered the arbitrator to issue these subpoenas. *Aixtron v. Veeco Instruments*, 52 Cal. App.5th 360 (2020).

Arbitrator to Determine Challenges of Fraudulent Inducement to Entirety of Contract. The primary question presented to the Oklahoma Supreme Court was whether a court or the arbitrator was authorized to rule on challenges of fraudulent inducement to the entirety of a contract containing an arbitration clause under the Oklahoma Uniform Arbitration Act ("OUAA"). The OUAA replaced the original Oklahoma Uniform Arbitration Act ("Original Act") and governs all Oklahoma arbitration agreements after January 1, 1996. The Court had previously decided that there was no doctrine of separability under the Original Act and therefore any fraudulent inducement challenge to an arbitration agreement, whether it be to the entire agreement or only to the arbitration clause, was an issue to be decided by the court. In its analysis of the question under the OUAA, however, the court recognized that the Original Act and its earlier decision were not in line with the FAA on the doctrine of separability. The Court then noted that when the Oklahoma legislature enacted the OUAA, they included a provision that "[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." Finding that this new provision signaled the legislature's clear intent to recognize the doctrine of separability, the Court concluded that the OUAA "in light of its amendment after prior judicial pronouncement, mandates that determination of fraudulent inducement to the entire contract is a question for the arbitrator." *Signature Leasing, LLC v. Buyer's Group, LLC*, 466 P.3d 544 (Okla.).

Failure to Take Permissive Interlocutory Appeal Does Not Forfeit Right to Challenge Final Judgment. A cattle owner and cattle feeder were parties to a cattle finishing contract that contained an arbitration provision. The cattle owner alleged contract-based claims against the cattle feeder in court and the feeder moved to compel arbitration. The motion to compel was denied and, after jury trial, the trial court entered judgment in favor of the cattle owner. The court of appeals reversed the judgment and remanded the case for submission to arbitration. On appeal to the Supreme Court of Texas, the cattle owner argued that a Texas statute provided the feeder with the chance to take an interlocutory appeal and its failure to do so constituted a waiver of its right to appeal the order after final judgment. The statute at issue provides that "'in a matter subject to the Federal Arbitration

Act . . ., a person may take an appeal . . . to the court of appeals from the [trial court's] . . . interlocutory order . . . under the same circumstances that an appeal . . . would be permitted' in federal court." The Supreme Court of Texas stated that when a final judgment is rendered, the Court's interlocutory orders merge into the judgment and may be challenged by appealing that judgment. Turning to the statute at issue, the court concluded that although it gives a party discretion to pursue an interlocutory appeal of an arbitration order, it does not bar review of the order after final judgment. The court of appeals' decision and order remanding the case for arbitration was affirmed. *Bonsmara Natural Beef Company, LLC v. Hart of Texas Cattle Feeders, LLC*, 603 S.W.3d 385 (Tex. 2020).

Notice of Arbitration by Certified Mail Upheld. Van Dyke, a broker registered with FINRA, agreed under FINRA's rules to notice being provided by certified mail. That occurred here but Van Dyke either never received the notice or declined its delivery. The arbitrator proceeded in Van Dyke's absence and an award of over $3 million was issued against Van Dyke who later challenged the award on constitutional grounds. The trial court denied her application, and the appellate court affirmed. The court rejected Van Dyke's argument that "service by certified mail was not reasonably calculated to place her on notice of the arbitration because the petitioner knew that she could be contacted by e-mail and knew or should have known that she spent long periods of time away from her New York residences." The court emphasized that "in the context of binding arbitration, it is the parties' consent which vests the authority in the arbitrator to decide a particular dispute." The parties here agreed on the method of service and Van Dyke did not deny that she agreed to arbitrate claims in accordance with FINRA's rules. The court confirmed that the parties had agreed to empower the arbitrator to determine the dispute as well as the sufficiency of any notice provided. Further, the court found that Van Dyke's "contention that the contractual notice provision, to which she agreed, was inadequate in light of her travel habits, without more, does not justify their invalidation on public policy grounds." The fact that Van Dyke did receive actual notice or did not claim the notice mailed to her "did not render the contractual provision as void against public policy." The court concluded that the principle of freedom of contract and public policy were not infringed by confirmation of the award here. *New Brunswick Theological Seminary v. Van Dyke*, 184 A.D.3d 176 (N.Y. App. Div. 2d Dep't 2020).

Agreement Void Where It Waives Statutory Rights in Favor of Tribal Law. Plaintiffs entered into payday loan agreements with AWL, Inc., an online entity owned by the Otoe-Missouria Tribe of Indians. Plaintiffs subsequently sued AWL for charging unlawfully high interest rates, alleging various claims under federal and state law. Defendants moved to compel arbitration. The district court denied the motion, concluding that the loan agreements, which provided that only tribal law would apply in arbitration, stripped plaintiffs of their right to assert statutory claims and were therefore unenforceable. The Third Circuit affirmed. The court held that because the agreement permits borrowers to raise disputes in arbitration only under tribal law, and such a limitation constitutes a

prospective waiver of statutory rights, it violates public policy and is therefore unenforceable. *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020). See also *Gibbs v. Haynes Investments*, 967 F.3d 332 (4th Cir. 2020) (choice of law provision requiring application of tribal law is against public policy where it may serve as prospective waiver of federal remedies and on this basis court may conclude that arbitration agreement and delegation clause are unenforceable).

Case Shorts:

- *Dohrmann v. Intuit, Inc.*, 823 F. App'x 482 (9th Cir. 2020) (language in arbitration agreement allowing parties to seek injunctive relief in court did not authorize court to decide the merits of the underlying dispute, but rather only to issue injunctive relief in aid of arbitration by preserving the status quo).
- *Badgerow v. Walters,* 975 F.3d 469 (5th Cir. 2020) (court must "look through" FAA petition to underlying dispute when determining whether federal jurisdiction is present).
- *Harper v. Amazon.com Services*, 2020 WL 4333791 (D. N.J.) (court orders further discovery to determine whether FAA transportation worker exemption applies to independent drivers using personal vehicles to make local deliveries for Amazon).
- *SSI (Beijing) Co. v. Prosper Business Development*, 2020 WL 5253515 (S.D.N.Y.) (federal law, rather than Chinese law which was identified as the governing law in the contract, applies and arbitration compelled where objections to arbitration under Chinese law went to content of the contract and not to the agreement to arbitrate and the parties incontrovertibly agreed to arbitrate).
- *Sayers Construction v. Timberline Construction*, 2020 WL 3443268 (Fla. App.) (personal jurisdiction to confirm arbitration award in Florida against out of state party exists where parties consented to and did arbitrate dispute in Florida).
- *Corporacion AIC v. Hydroelectrica Santa Rita*, 2020 WL 4478424 (S.D. Fla.) (arbitration awards subject to New York Convention may only be challenged in the Eleventh Circuit under the provisions of the Convention and not the FAA).
- *Process and Industrial Developments Ltd. v. Federal Republic of Nigeria*, 962 F.3d 576 (D.C. Cir. 2020) (court must first decide foreign nation's sovereign immunity defense under Foreign Sovereign Immunities Act before addressing that nation's defense in opposing motion to confirm).
- *New York Marine Highway Transportation v. Fidelity and Deposit Co. of Maryland*, 2020 WL 3799134 (N.Y. Sup. Ct. N.Y.Cty.) (court action stayed in favor of arbitration where many, but not all, of the same issues addressed in both proceedings; "simply because the arbitration will not resolve every issue in the instant case does not mean that a stay is inappropriate").
- *Gold Group Resources v. Dynaresource de Mexico*, 2020 WL 4271701 (D. Colo.) (enforcement of monetary portion of arbitration award stayed pending appeal to the

10th Circuit, but a cash appeal bond must be obtained in accordance with the court-ordered terms).

- *Robertson v. Intratek Computer,* 976 F.3d 575 (5th Cir. 2020) (availability of jury trial under federal whistleblower statute not sufficient to bar arbitration of claims under statute).
- *In re Petition of the Republic of Turkey*, 2020 WL 4035499 (D. N.J.) (subpoena under Section 1782 seeking information relating to the sale of shares in a Turkish media corporation denied were Turkey told judge it was "not at liberty" to deny that the information would not be used against the producing party in criminal proceeding in Turkey).

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

Court Must Decide Gateway Issues Where Formulation of Both Underlying Agreement and Arbitration Agreement Disputed. The doctrine of severability provides that a challenge to an arbitration agreement must be directed specifically to the arbitration provision and not to the agreement as a whole. Here, the construction company disputed that it had agreed to be bound by a collective bargaining agreement beyond a single project and argued fraud in the execution of the agreement in question. But the agreement incorporated the collective bargaining agreement that contained the arbitration provision. The Third Circuit, in resolving this "mind-bending" question concluded "unless the parties clearly and unmistakably agreed to arbitrate questions of contract formation in a contract whose formation is not an issue, those gateway questions are for the courts to decide." The court explained that on the one hand under the FAA an unchallenged delegation provision in a disputed contract is presumptively valid and enforceable, while on the other hand courts are required to rule on the formation of the underlying container agreement here. In this setting, the court concluded that the severability doctrine does not apply. "For good reason: Lack of assent to the container contract necessarily implicates the status of the arbitration agreement, when the container contract and the arbitration provision depend on the same act for their legal effect. . .. It is thus inevitable that a court will need to decide questions about the parties' mutual assent to the container contract to satisfy itself that an arbitration agreement exists and *vice versa*. That is no less true when the container contract includes or incorporates a delegation provision." In doing so, the court observed that it "can hardly be said that contracting parties clearly and unmistakably agreed to have an arbitrator decide the existence of an arbitration agreement when one of the parties has put the existence of that very agreement in dispute." For these reasons, the court concluded that the gateway questions are for the court and not the arbitrator to decide. *MZM Construction Co. v. New Jersey Building Laborers*, 974 F.3d 386 (3d Cir. 2020).

Waiver Claim Rejected Where Party Did Not Act Inconsistent with Right to Arbitrate. A California federal court consolidated two proposed class actions and granted American Honda Motor's motion to compel as to each. In doing so, the court rejected plaintiffs' arguments that Honda waived its right to arbitrate by acting inconsistent with its right to do so. As to the first case, the motion to compel was directed to plaintiff's proposed addition of co-lead plaintiff, Andrew Paltarak, whose lease included an arbitration clause. The parties did not dispute that the arbitration clause covered the alleged claims; the dispute was centered on whether Honda waived its right to arbitrate. The court explained that a party acts inconsistent with its right to arbitrate "when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court." The court then addressed plaintiff's contentions, holding that Honda's filing of a motion to dismiss and opposing plaintiff's motion to amend occurred before Honda was informed that Paltarak had signed an arbitration agreement and the other actions Honda took were necessary because only Paltarak's matter would be arbitrated; the other proposed plaintiffs would continue to proceed in court. In the second case, the judge found that Honda did not waive its right to arbitrate the claims by participating in litigation in a parallel Illinois state court action because Honda was never put on notice that it was a third-party beneficiary of the lease at issue in the Illinois matter and did not learn that it was until the instant California action was filed. The court also found that plaintiff suffered no prejudice and "all of the alleged prejudice cited to by plaintiff – costs associated with litigating and two tracks to this case – are either self-inflicted wounds or would have existed regardless of when Honda compelled its right to arbitrate." *Cadena v. Am. Honda Motor Co., Inc.*, 2020 WL 3107797 (C.D. Cal.).

Participating in Arbitration Does Not Waive Statute of Limitations. Plaintiff joined defendant in an arbitration arising out of a construction project. Defendant maintained throughout the arbitration, and expressly communicated to plaintiff, that it was not a proper party to the arbitration and, after about a year, defendant was dismissed from the arbitration. Shortly thereafter, plaintiff asserted its claims against defendant in court. Defendant moved for summary judgment and to dismiss on the grounds that the statute of limitations expired. Plaintiff opposed, arguing that defendant's participation in the arbitration was an "affirmative inducement," leading plaintiff to believe that defendant was committed to resolving the dispute in arbitration and, therefore, defendant should be estopped from asserting a limitations defense or the statute of limitations should be tolled. The Texas district court disagreed, finding "Defendant never consented to the arbitration and expressed on multiple occasions, both in filings and in correspondence, its position that Defendant was not a proper party to the arbitration. . .. Thus, rather than making a promise that tricked Plaintiff or otherwise induced Plaintiff into inaction, Defendant maintained its position throughout the Arbitration that it was not a proper party." Accordingly, the court held that a limitations defense was permissible and dismissed the case on the grounds that

the statute of limitations expired. *Charro Boring, Inc. v. Philadelphia Indemnity Insurance Company*, 2020 WL 4284928 (E.D. Tex.).

Waiver of Arbitration Rejected. A Colorado district court granted BMW's motion to compel arbitration. Consumers had argued that BMW waived its right to arbitration by filing a motion to dismiss prior to filing its motion to compel arbitration. Citing plaintiff's "heavy burden of proof in light of the strong federal policy favoring arbitration," the court found that the parties engaged in minimal litigation and plaintiffs were not prejudiced. As such, BMW's motion to compel arbitration was granted. *O'Connor v. BMW of North America, LLC*, 2020 WL 5260416 (D. Colo.). See also *Magee v. Francesca's Holding Corp.*, 2020 WL 3169518 (D. N.J.) (waiver of right to arbitrate rejected where motion practice was non-merits based or based on the merits of the claims of plaintiffs who were not bound to arbitrate and defendants' unwillingness to proceed with discovery related to plaintiffs who were not subject to arbitration).

Case Shorts:

- *Adams v. Postmates,* 823 F. App'x 535 (9th Cir. 2020) (arbitration agreement clearly delegates responsibility for deciding whether over 5000 Postmates couriers violated class action waiver by filing individual arbitration demands raising related issues).
- *McClenon v. Postmates*, 2020 WL 4053472 (N.D. Ill.) (Postmates ordered to pay $11,000,000 in fees to AAA where its challenges to propriety of filing one claim listing 200 separate claimants in face of class action waiver was ruled for arbitrator rather than court to decide).
- *PB Life and Annuity Co. v. Universal Life Insurance Co.*, 2020 WL 2476170 (S.D.N.Y.) (question whether broad arbitration clause in Reinsurance Agreement was still enforceable after subsequent Trust Agreement entered into is for arbitrator to decide due to breadth of arbitration agreement and incorporation of AAA rules).
- *MaGee v. Francesca's Holding Corp.*, 2020 WL 3169518 (D. N.J.) (waiver claim due to delay in filing motion to arbitrate undercut where defendants could not know who was subject to arbitration until opt-in period for FLSA collective action had expired).
- *Babcock v. Neutron Holdings, Inc.*, 454 F. Supp.3d 1222 (S.D. Fla. 2020) (arbitrability question is for arbitrator to decide where challenge is to the agreement as a whole and not to the delegation clause specifically).
- *Williams v. Medley Opportunity Fund*, 965 F. 3d 229 (3d Cir. 2020) (explicit reference to delegation provision in arbitration agreement sufficient to require court determination of that provision's enforceability even if they are the same arguments raised to challenge the enforceability of the arbitration agreement as a whole).
- *Gibbs v. Sequoia*, 966 F.3d 286 (4th Cir. 2020) (party may rely on same arguments it employs in challenging enforceability of other arbitration provisions in challenging delegation clause).

- *Cipolla v. Team Enterprises*, 810 F. App'x 562 (9th Cir. 2020) (remand to district court ordered where lower court ruled on merits of motion to compel without first addressing the effect of the delegation clause contained in the arbitration agreement).
- *Blanton v. Domino's Pizza Franchising*, 962 F. 3d 842 (6th Cir. 2020) (parties clearly and unmistakably agreed to arbitrate gateway questions of arbitrability where the arbitration agreement expressly incorporated AAA rules and those rules provided that arbitrators decide arbitrability questions).
- *Cohen v. MyLife.com,* 2020 WL 57565509 (Cal. App. 4th Dist.) (arbitration agreement clearly and unmistakably delegated arbitrability issue to arbitrator both in its language and by incorporating AAA's rules which empowers arbitrator to rule on arbitrability).
- *Shivkov v. Artex Risk Solutions*, 974 F.3d 1051 (9th Cir. 2020) (reference to arbitration before AAA without the adoption of AAA rules for adjudication of dispute insufficient to establish clear and unmistakable reference of arbitrability issue, here application for class arbitration, to arbitrator).
- *Johnson v. Maker Ecosystem Growth Holdings,* Case No. 20-cv-02569 – MMC (N.D. Cal. September 25, 2020) (question whether dispute was subject to later rather than earlier arbitration agreement was for arbitrator to decide where AAA rules governed).
- *Gaynor v. Nixon Peabody, LLP,* 2020 WL 5900022 (N.Y. Sup. Ct. N.Y. Cty.) (question whether condition precedent, namely mediation step, was satisfied was for arbitrator to decide under AAA's Commercial Rules).
- *Fedor v. United Healthcare*, 976 F.3d 1100 (10th Cir. 2020) (issue of whether an arbitration agreement was formed between the parties to be decided by a court, regardless of whether the agreement contained a delegation clause or whether one of the parties specifically challenged that clause).
- *Alcoa Corp. v. Anheuser-Busch Inbev*, 2020 WL 5229706 (S.D.N.Y.) (use of wrongfully obtained confidential information was an indirect rather than direct benefit and, therefore, was insufficient to constitutes grounds for estoppel).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Exclusive Control Over Selection of Arbitrator Substantively Unconscionable. A professional boxer brought an action against the World Boxing Organization ("WBO") raising various claims and the WBO moved to compel. The district court granted the motion, but the First Circuit reversed. The court concluded that the arbitrator selection provision in the WBO's regulations was unconscionable. Under those regulations, disputes must be submitted to a grievance committee made up of three individuals selected by the President of the WBO. The only limitation was that the arbitrators could not be members of the WBO executive committee. The WBO conceded that the President could select his own

assistant to serve on the grievance committee. The court concluded that the arbitration selection process was unconscionable where the WBO's grievance committee could appoint arbitrators "under the direct control of the head of the WBO itself and that anyone so chosen is for that reason presumptively not 'independent' in the least." The court remanded the case to the district court to determine whether severance of the offensive arbitrator selection provision was feasible. *Trout v. Organizacion Mundial de Boxeo, Inc.*, 965 F.3d 71 (1st Cir. 2020).

Procedural Unconscionability Voids Arbitration Agreement. A Texas district court denied an employer's motion to compel arbitration, holding that the agreement was procedurally unconscionable. The employee, a Spanish-speaker, did not speak or read in English and her onboarding was handled by a company representative who spoke with her exclusively in Spanish. The representative never provided the employee with an English or Spanish copy of the arbitration agreement and only presented her with an Acknowledgment form written in English. Furthermore, the representative described the Acknowledgement as a payroll registration document. The employer argued that the Acknowledgement had a Spanish-language version on the backside but the court found the employee was "still prevented from reading or noticing the Spanish-language version due to 'trick or artifice' of [the employer]." Taking into account the totality of the circumstances, the court held the agreement was procedurally unconscionable and denied employer's motion to compel. *Carrillo v. ROICOM USA, LLC*, 2020 WL 5517200 (W.D. Tex.).

Case Shorts:

- *Williams v. Community Bank, Ellisville*, 821 F. App'x 292 (5th Cir. 2020) (arbitration agreement requiring claimants to pay arbitration and administration fees not substantively unconscionable where plaintiffs can recover fees if they prevail in arbitration and protects "against excessive fees in the event the [plaintiffs] were to lose the arbitration.").
- *Cohen v. MyLife.com,* 2020 WL 57565509 (Cal. App. 4th Dist.) (substantive unconscionability challenge to delegation clause rejected where it is directed at arbitration agreement as a whole and not specifically to delegation clause).
- *Arkin v. Doordash*, 2020 WL 4937825 (E.D.N.Y.) (unconscionability claim for arbitrator rather than court to resolve where "the parties have clearly and unmistakably agreed to delegate issues of enforceability of the arbitration agreement to the arbitrator").

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Non-Signatories Who Directly Benefit Under Agreement Bound to its Arbitration Provision. Plaintiffs retained Easy Expunctions to remove their expunged criminal record information from public records. Easy Expunctions subscribed to defendants' people search companies in an agreement which included an arbitration provision. Defendants moved to compel arbitration and plaintiffs opposed the motion under California law arguing that they were non-signatories and not bound to arbitrate. The federal district court disagreed, ruling that plaintiffs were bound to arbitrate under equitable estoppel principles. The court noted that without Easy Expunction's acceptance of the defendants' terms of service, plaintiffs would have had no basis to sue defendants. "Thus, in relying on Easy Expunctions' website subscriptions, Plaintiffs seek to benefit from the 'terms of use' without being bound by the contract's provisions. Equity precludes such selective enforcement of a contract." Because plaintiffs' complaint "arises out of, relates to, and exploits the benefits of said subscriptions" it did not matter whether Easy Expunctions was representing plaintiffs when it subscribes to defendants' services. For these reasons, the court granted defendants' motion to compel arbitration. *Bentley v. Control Group Media*, 2020 WL 3639660 (S.D. Cal.). See also *Shivkov v. Artex Risk Solutions*, 974 F.3d 1051 (9th Cir. 2020) (non-signatory may compel arbitration against signatory under Arizona law where signatory's claims against non-signatories refer to or rely on terms of agreement with arbitration clause); *Bonsmara Natural Beef Company, LLC v. Hart of Texas Cattle Feeders, LLC,* 603 S.W.3d 385 (Tex. 2020) (non-signatories to arbitration agreement permitted to compel signatory to arbitrate under direct-benefits estoppel doctrine where the language of the agreement is broad and non-signatories were owners of the company subject to arbitration).

Non-Signatory Debt Collector Cannot Compel Arbitration. Under Massachusetts law, a non-signatory seeking to enforce an arbitration agreement must provide "clear and definite" evidence of the parties' intent. The debt collector here sought to compel arbitration under the agreement between a customer and a car rental company. The Massachusetts Supreme Judicial Court ruled that the rental agreement failed to provide such clear and definite intent and confirmed the denial of the motion to compel. The Court rejected the rental company's agency theory because the claim did not relate to any breach of the rental agreement, but rather related to the oppressive debt collector's activities as the rental company's agent. The Court also rejected the debt collector's third-party beneficiary theory because the agreement's language was vague and susceptible to multiple interpretations regarding which parties could enforce the agreement. As a result, the Court affirmed the denial of the motion to compel. *Landry v. Transworld Systems, Inc.*, 485 Mass. 334 (2020). See also *Ryan-Blaufuss v. Toyota Motor Corp.*, Case No. 8:18-cv-00201-JLS-KES (C.D. Ga. October 20, 2020) (Toyota, a non-signatory to dealer lease and purchase agreements, could not compel arbitration of class action raising safety issues with Prius line of cars on equitable estoppel grounds as terms of these agreements not at issue in plaintiffs' class claims); *Becker v. Delek*

US Energy, 2020 WL 5983115 (M.D. Tenn.) (entity for whom services were provided but not signatory to vendor's employment agreement with FLSA plaintiff could not invoke arbitration provision under equitable estoppel doctrine where non-signatory was not seeking to enforce any provision of employment agreement); *Bedford Courts v. Concrete Structures*, 68 Misc.3d 1224 (a) (N.Y. Sup. Ct. Suffolk Cty. 2020) (subcontractor may not invoke arbitration clause in agreement with general contractor to initiate arbitration against development corporation which had prime agreement with contractor where dispute does not arise out of the terms of the prime agreement).

Narrow Scope of Arbitration Clause Does Not Encompass Claims. Plaintiff opened a savings account with HSBC through the bank's online application and entered into a number of agreements including a Master Agreement, the bank's Terms and Charges Disclosure, and a Service Agreement. Only the Service Agreement contained an arbitration clause. Plaintiff alleged claims against the bank relating to the accrual of interest on electronic deposits. The bank moved to compel arbitration, relying on the arbitration clause in the Service Agreement. The bank argued that because plaintiff's claims deal with the timing of electronic deposits, the evidence it will submit in support of its defense will "necessarily touch on the substance of the Service Agreement." Applying the Second Circuit's three-part inquiry to determine whether a particular dispute falls within the scope of an arbitration clause, the court distinguished between broad and narrow arbitration clauses: "Where the arbitration clause is broad, 'there arises a presumption of arbitrability' and arbitration of even a collateral matter will be ordered if the claim alleged 'implicates issues of contract construction or the parties' rights and obligations under it.'" However, where the arbitration clause is narrow, "the court must determine whether the dispute is over an issue that 'is on its face within the purview of the clause' . . . a collateral matter will generally be ruled beyond its purview." Here, the court found that the arbitration agreement was narrow in scope. The court explained that although it uses some "broad prefatory phraseology . . . that language is immediately qualified by 'regarding this Service'" and "Service" is defined as "an Electronic Balance Transfer Service." The court therefore concluded that given the narrow scope of the Service Agreement's arbitration clause, "the claims plaintiff brings . . . may relate to, but are not regarding, the relevant "Service," there is no reasonable expectation that plaintiff had pre-committed himself to arbitration for a dispute like this." *Cheng v. HSBC Bank, USA, N.A.,* 2020 WL 3165214 (E.D.N.Y.).

Compliance with Provisions for Opting Out of Arbitration Not Demonstrated. A number of Uber drivers had the opportunity to opt out of the arbitration provision provided to them. They failed to comply with the opt out provisions but argued that Uber's "offer" to allow them to opt out was accepted by their words and conduct. The court declined the plaintiffs' "invitation to dismiss as procedural niceties the requirements for opting out that are plainly set forth" in the agreement. The court concluded that it was required to "give a contract's plain language its ordinary meaning" and on that basis granted Uber's motion to compel with respect to those drivers who failed to follow the procedures set forth for opting

out of arbitration. The court also enforced a contractual provision in a 2019 agreement that provided that drivers who signed earlier agreements with Uber that included arbitration provisions were bound by those provisions and could not opt out of the later agreement. *Nicholas v. Uber Technologies*, 2020 WL 4039382 (N.D. Cal.).

Failure to Add Initials to Arbitration Agreement Insufficient to Establish Lack of Mutual Assent. A California superior court denied an employer's motion to compel arbitration, finding the parties did not mutually assent to arbitrate. The agreement at issue was signed by both parties but neither party had affixed their initials next to the paragraph stating that they agreed to waive their respective rights to a jury trial. The employee submitted a declaration stating he withheld his initials from the jury waiver paragraph to express his subjective intent not to be bound to arbitrate. The superior court found that the declaration, together with the lack of initials, was credible evidence to establish the parties had not mutually assented. The court of appeal reversed, stating that "mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." Turning to the objective language of the arbitration agreement, the court concluded it was not ambiguous. "Three separate terms of the agreement acknowledge the parties' mutual intent to arbitrate all disputes; two of those terms also acknowledge the parties' mutual intent to waive their right to jury trial". Accordingly, the court of appeal held that the superior court erred in considering the employee's declaration and ordered the parties to arbitrate. *Martinez v. BaronHR, Inc.*, 51 Cal. App.5th 962 (2020).

Electronic Acknowledgment of Arbitration Agreement Enforceable. Pfizer sent employees two announcements relating to its arbitration program and instructed employees to complete a "training module" that included the arbitration agreement. At the end of the module, employees were required to electronically "acknowledge" the agreement. The arbitration agreement was available by link in an e-mail and provided that continued employment for 60 days after receipt of the agreement constituted acceptance of it. Skuse, who completed the training module, sued Pfizer for discrimination and Pfizer moved to compel arbitration. The New Jersey Supreme Court rejected Skuse's contention that she did not agree to arbitrate her claims and granted Pfizer's motion. The Court ruled that the agreement made clear that continued employment for 60 days after completion of the training module constituted consent to arbitration. The Court rejected Skuse's argument that the characterization of the information provided to employees as a "training module was a misnomer and deceptive . . . Pfizer plainly informed employees that they needed to understand and act on the new policy, and that they should seek the advice of counsel if they had legal questions about it. Although a reference to all 'training' in an employer's communication of an arbitration policy might be regarded as misleading an employee in a different setting, Pfizer's use of the term does not invalidate the Agreement in the circumstances here." The Court also rejected the argument that e-mail was an

inadequate means for binding employees to arbitration agreements because employees are inundated with e-mails and often only skim them. "No principle of New Jersey contract law bars enforcement of a contract because that contract is communicated by e-mail, rather than by transfer of a hard-copy document. If we were to adopt such a rule, it would invalidate contracts that have been negotiated and transmitted electronically for decades. We decline to do so here." Finally, the Court found sufficient the use of the word "acknowledge" rather than "agree" when confirming acceptance of the arbitration policy. "Although the word 'acknowledge' could be vague or misleading in a different setting, it was an appropriate term as used here." *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020).

Existence of Arbitration Agreement Not Demonstrated. Applebee's failure in a putative class action to produce the prospective plaintiffs' arbitration agreements, as well as the arbitration agreements of 71 opt-in plaintiffs, precluded granting of its motion to compel arbitration. The Fourth Circuit, affirming the district court, applied the heightened standard of clear and convincing evidence for proving the existence of lost contracts under West Virginia, Kentucky, Ohio, and Virginia state law. Applebee's primarily relied on an affidavit submitted by its Director of Human Resources to prove the existence of the agreements. The affidavit stated that all new employees were required to sign the arbitration agreement as a condition of employment and there were "no exceptions." The court was unconvinced. Finding that "a human resource official's expectations or assumptions about what happened during a hiring process conducted by individual managers on many dates, in many locations is of little probative value," the court held that Applebee's failed to prove that the arbitration agreements existed. *Hill v. Employee Resource Group, LLC*, 816 F. App'x 804 (4th Cir. 2020), as amended (June 12, 2020).

"Tacit Acquiescence" Insufficient to Form Valid Arbitration Agreement. Buyer purchased a power generator from Imperial and subsequently was the victim of a house fire, allegedly caused by the generator. Buyer initiated arbitration proceedings by sending Imperial a document entitled "Conditional Acceptance for the Value/For Proof of Claim/Agreement" which purported to be a "binding self-executing irrevocable contractual agreement." The document demanded that Imperial propound 15 different "Proofs of Claim" to buyer to avoid, among other things, "admitting by 'tacit acquiescence' that the generator caused the fire." Imperial did not respond. An arbitration hearing took place, resulting in an award in buyer's favor. The award indicated it was based on Imperial's "tacit acquiescence." Imperial moved to vacate the award. Applying Mississippi law, the Southern District of Mississippi found the arbitration agreement void for lack of mutual assent and vacated the award. The Fifth Circuit affirmed, holding that "'tacit acquiescence' to the agreement was insufficient to constitute a valid agreement." *Imperial Industrial Supply Co., v. Thomas*, 2020 WL 5249574 (5th Cir.).

On-Line "Sign Up" Arbitration Agreement Enforced. Courts continue to refine their analyses of what constitutes an enforceable on-line offer and the acceptance of that offer. Clickwrap agreements (where the user affirmatively clicks acceptance of the terms of use) and browsewrap agreements (where the user continues through the website after being notified that doing so constitutes acceptance of the terms of use) are now well-established in this developing jurisprudence. A federal district court in Florida enforced a web-based arbitration agreement in what it called a "sign in" online agreement. According to the court, a sign in agreement is one "where a user signs up to use an internet product or service, and the sign-up screen states that 'acceptance of a separate agreement is required before the user can access the service.'" In this case, the court found that the hyperlink to the terms of use was in "blue boldface" and was conspicuous. The court added that the phrase "User Agreement" was in large black boldface print and was followed by a representation that by tapping "I agree" the user was actually accepting the User Agreement. "Taken together, the large black boldface User Agreement title, the non-bold black User Agreement acknowledgement, the blue boldface User Agreement hyperlink, and the lime-green 'I Agree' confirmation button create a user-friendly display." The court found significant that the Arbitration Agreement is contained within the full User Agreement in the online application here which would put "a reasonably prudent smartphone user on inquiry notice of the terms of the User Agreement, including the Arbitration Provision." The court noted that its analysis was in keeping with enforcement of "sign-in agreements" in Texas and California. *Babcock v. Neutron Holdings, Inc.*, 454 F.Supp.3d 1222 (S.D. Fla. 2020).

Arbitration Agreement Enforced Despite Missing Key Terms. Arbitration agreements must be placed on equal footing with other contracts. Contracts are enforceable where the essential terms are sufficiently definite and the parties manifest an intent to be bound. On this basis, the New Jersey Supreme Court enforced an arbitration agreement which failed to identify a specific arbitrator or arbitration provider. The Court emphasized that the New Jersey Arbitration Act "authorizes the court, upon application of a party, to decide an issue left open by the parties with respect to the selection and appointment of their arbitrator, thus facilitating the performance of the agreement." Relying on the New Jersey Arbitration Act's default provisions that serve to supply missing terms for an arbitration contract, the Court concluded that enforcing the agreement comported with common law principles for enforcement of agreements. "Although the parties may choose to agree upon an arbitrator or arbitral organization or set forth a plan for such a designation, the NJAA's default provisions are available to parties who leave those issues unresolved." The court ruled that the parties may choose to leave open the selection of an arbitrator or arbitration provider until they are "in a position to assess the scope and subject of the dispute, the complexity of the proposed arbitration, and considerations of timing and cost." *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119 (2020).

Valid Arbitration Agreement Demonstrated. A Texas district court held that an employer met its burden of proof to establish that a valid arbitration existed under Texas law which requires a showing that the employee received notice of the arbitration policy and accepted it. The employer established notice by submitting evidence of the employee's onboarding documents, all of which were signed on the same day and bore the same signature. The employer also submitted evidence showing that the employee used the company's electronic onboarding system, which does not progress until each document is acknowledged. The employee submitted an affidavit opposing the motion to compel, claiming the signature on the agreement was not his and that he was not in the employer's offices on the day the documents were purportedly signed. The court found the employee's evidence, which was uncorroborated, unconvincing. The court held that the employee's continuing to work for employer with knowledge of the arbitration policy was sufficient to establish acceptance as a matter of law and granted the employer's motion to compel arbitration. *Banuelos v. Alorica, Inc.,* 2020 WL 4060781 (W.D. Tex.).

Proof of Acceptance of Arbitration Agreement Lacking. Plaintiff had searched online for a specific mortgage company that handles VA loans and came upon a site called YourVASurvey.Info. After entering some personal information, plaintiff noticed a button at the end of the form reading "See My Results" followed by a blue hyperlinked text reading "Terms of Use". She claims she did not click either because she realized it was not the site she was searching for and suspected it would send her spam. If she had clicked through to the Terms of Use, she would have seen the operative terms were between consumer and a company called Lower My Bills (LMB), which controls the mortgage website plaintiff had visited, and included a mandatory arbitration provision. Sometime thereafter, plaintiff received a text message from LMB and admits she clicked the hyperlink to LMB's website. However, once there, she claims she did not click the Terms of Use hyperlink on that site either. Ultimately, LMB matched plaintiff with Quicken Loans for mortgage services and plaintiff received a series of text messages from Quicken Loans soliciting her business. After her attempts to opt out by replying "STOP" to the messages were unsuccessful, plaintiff filed a putative class action against Quicken Loans alleging violations of the Telephone Consumer Protection Act. Relying on the mandatory arbitration provision in LMB's Terms of Use, Quicken Loans moved to compel arbitration. The California district court ruled that the parties did not enter into a valid arbitration agreement as plaintiff did not accept the Terms of Use. Quicken Loans presented evidence including website tracking software that made a video recording of plaintiff's visit to both websites. The software showed plaintiff visiting both sites but did not show her accepting the terms of use on either visit. Quicken asserted the software would have only recorded the visit if plaintiff accepted the Terms of Use but the court was unconvinced. Instead, the court credited plaintiff's declaration stating that she did not accept the Terms of Use and entered an email address she uses when she suspects she will receive spam. Holding that the parties did not form a valid arbitration

agreement, the motion to compel arbitration was denied. *Hill v. Quicken Loans Inc.*, 2020 WL 5358394 (C.D. Cal.).

Arbitration Agreement Enforceable Despite Claim It Was Never Adopted. In 2011, Roger Leon sold Denver Global Products ("Denver") to Chongqing Rato Power Co., Ltd. ("Rato"). The parties entered into a series of agreements which were all written in Chinese and called for disputes to be resolved before the Chongqing Arbitration Commission located in Chongqing, China. Leon remained as the company's president but in 2015 a dispute arose prompting Denver to file an action against Leon in North Carolina state court. Leon asserted third-party claims against Rato and Rato moved to compel arbitration, arguing that the third-party claims arose under the parties' agreements. Leon opposed the motion on the grounds that he never assented to arbitration because he neither had the benefit of Chinese counsel nor the assistance of an honest interpreter when the agreements were executed. While the motion was pending in state court, Rato commenced arbitration proceedings against Leon in China, asserting claims under the agreements and seeking a declaratory judgment that the agreements were valid and binding. Leon did not appear at the arbitration. The Commission subsequently issued awards in favor of Rato and Rato returned to the North Carolina state court to confirm the award. Leon removed the action to federal court and Rato refiled its motion to compel which Leon opposed on the ground that he did not assent to arbitrate. The district court was not persuaded by Leon's arguments, finding that his contentions were unsupported by the record and did not give rise to any material factual disputes. The district court granted Rato's motion to confirm as well as the motion to compel. The Fourth Circuit affirmed. Recognizing that parties who voluntarily sign contracts are "charged with knowledge of their contents," the court found that Leon "was a sophisticated businessman knowingly engaging in an international transaction," and held that his alleged failure to hire independent Chinese counsel or his own interpreter did not provide a defense to enforcement of the agreements he signed. *Denver Global Products, Inc. v. Leon*, 815 F. App'x 714 (4th Cir. 2020).

Case Shorts:

- *Jin v. Parsons Corp.*, 966 F.3d 821 (D.C. Cir. 2020) (a trial on the issue of arbitrability must be conducted, rather than denying a motion to compel, where there are genuine issues of material fact as to the making of an arbitration agreement).
- *Pershing, LLC v. Fulcrum Capital Holdings*, 2020 WL 3883256 (W.D. Tex.) (non-signatory may not compel arbitration where no breach of operative agreement is alleged and no existing relations existed between the parties who were strangers when the contract was signed).
- *Magee v. Francesca's Holding Corp.*, 2020 WL 3169518 (D. N.J.) (plaintiffs' claim that they had no memory of signing the arbitration agreements not sufficient to create an issue of fact and, in any event, defendants produced sufficient evidence that plaintiffs executed arbitration agreements electronically).

- *Alcoa Corp. v. Anheuser-Busch Inbev*, 2020 WL 5229706 (S.D.N.Y.) (non-signatory Alcoa subsidiary, which was spun off by parent company, must arbitrate patent claim brought by Anheuser-Busch where it assumed agreement from parent company).
- *Mey v. DirecTV, LLC*, 971 F.3d 284 (4th Cir. 2020) (consumer who entered into arbitration agreement with AT&T in 2012 must arbitrate dispute with DirecTV, which was acquired by AT&T in 2015, as scope of arbitration agreement was broad and applied to AT&T's affiliates, even those acquired after the arbitration agreement was executed). Contra: *Revitch v. DirecTV, LLC,* 2020 WL 5814095 (9th Cir.) (customer agreement with AT&T Mobile phone service, which included claims against its "affiliates", signed in 2011 did not require arbitration of TCPA claims in 2018 against DirecTV merely because latter had been acquired by AT&T Mobility's parent company in the interim).
- *Miracle-Pond v. Shutterfly*, 2020 WL 2513099 (N.D. Ill.) (subscriber's acceptance of terms and conditions on Shutterfly mobile app that authorized subsequent modifications ruled enforceable under Illinois law where later addition made to arbitration agreement).
- *Shivkov v. Artex Risk Solutions*, 974 F.3d 1051 (9th Cir. 2020) (presumption in favor of survival of contractual arbitration provision following expiration of agreement not defeated by innocuous clause providing for post-expiration of specific contract terms without reference to arbitration obligation).
- *Stover v. Experian Holdings,* 2020 WL 6156048 (9th Cir.) (credit score subscriber bound to arbitrate under 2014 agreement where no notice given to her of 2018 updated arbitration provision).
- *Peres Bautista v. Juul Labs*, 2020 WL 4673915 (N.D. Cal.) (statutory wage claims not subject to arbitration clause in independent contractor agreement which was limited to "disputes over the terms of this agreement").
- *Acaley v. Vimeo*, 2020 WL 2836737 (N.D. Ill.) (exception in arbitration agreement for "invasion of privacy" claim encompassed alleged violation of Illinois' Biometric Information Privacy Act).
- *Williams v. Medley Opportunity Fund*, 965 F. 3d 229 (3d Cir. 2020) (choice of law provision in arbitration agreement not enforceable where it serves to prohibit the bringing of federal substantive claims).
- *Pilot, Inc. v. TYC Brother Industrial*, 2020 WL 3833597 (C.D. Cal.) (2020 Distributor Agreement without arbitration clause did not supersede 2017 Agreement with arbitration clause because 2020 Agreement never took effect and therefore dispute between the parties was arbitrable).
- *Shivkov v. Artex Risk Solutions*, 974 F.3d 1051 (9th Cir. 2020) (no "duty to point out and fully explain an arbitration clause" under Arizona law).

V. CHALLENGES TO ARBITRATOR OR FORUM

Motion to Enjoin Zoom Arbitration Hearing Denied : A FINRA arbitration panel ordered that an arbitration proceed electronically via Zoom. The respondents moved to enjoin the proceeding arguing that it would be cumbersome and procedurally irregular. They cited in support of their position, for example, that there were a large number of witnesses to be called and documents to be introduced into evidence and the need for an interpreter as the claimants were from Argentina. In respondents' view, a Zoom virtual hearing would deprive them of the ability to properly defend against claimants' arguments. The court declined to issue an injunction. The court rejected respondents' argument under the FINRA rules that the parties are entitled to attend all hearings. In the court's view, the parties may "still 'attend' the hearing remotely, just as [they] did for the telephonic temporary restraining order hearing in this court." Similarly, the court rejected the argument that under the rules a "location" must be designated. The court observed that "the parties, witnesses, and arbitrators are still 'located' somewhere in a remote proceeding, it is simply not all the same location." The court conceded that "remote hearings are admittedly clunkier then in-person hearings but in no way prevent parties from presenting claims or defenses. Moreover, the court sees no reason why the claimants would fare better than the respondent in a remote hearing." The court concluded that respondents failed to "meet the high bar for an injunction, let alone against a pending arbitration, which is immensely disfavored." *Legaspy v. FINRA*, 2020 WL 4696818 (N.D. Ill.).

Case Shorts:

- *Casey v. Reinhart Foodservice Louisiana*, 820 F. App'x 256 (5th Cir. 2020) (due process challenge to FAA based on alleged financial incentive of arbitrator to rule on delegated arbitrability issue in favor of arbitration rejected).

VI. CLASS & COLLECTIVE ACTIONS

FINRA Rule Does Not Bar Class Action Waivers. Credit Suisse's dispute resolution program includes a class action waiver. FINRA Rule 13204 precludes the arbitration of class action claims. The question posed for the Ninth Circuit here is whether Credit Suisse can compel the arbitration of its former employee's class action claim on an individual basis or does Rule 13204 bar enforcement of the firm's class action waiver. The court distinguished class action waivers from arbitration agreements. "A class action waiver is a promise to forego a procedural right to pursue class claims." In contrast, arbitration agreements, the court explained, promise only to have a dispute heard in a nonjudicial forum. The court ruled that the FINRA rule "restricts the latter, but not the former" and therefore the class action waiver was enforceable. The Ninth Circuit reasoned that "Rule 13204 specifically bars enforcement of certain arbitration agreements but does not mention class waivers, . . . [and] the Rule should not be read to prohibit a FINRA member from enforcing a class waiver –

which, as noted, is an agreement separate from an arbitration agreement . . .." The court concluded that the former employee here was required to arbitrate his class claim before FINRA on an individual basis. *Laver v. Credit Suisse Securities,* 976 F.3d 841 (9th Cir. 2020).

Case Shorts:

- *Shivkov v. Artex Risk Solutions*, 974 F.3d 1051 (9th Cir. 2020) (class arbitration is a gateway issue for court to decide in absence of clear and unmistakable provision in arbitration agreement to the contrary).

VII. HEARING-RELATED ISSUES

Bad Joke by Arbitrator Not Sufficient Grounds for Vacatur. An award was issued in favor of respondent Uber following a hearing in which its founder, Travis Kalanick, testified. Claimant sought to vacate the award on evident partiality grounds. In support of their position, plaintiffs alleged that the arbitrator took a photo of Kalanick with his cell phone after he testified and remarked at the close of the hearing that he "act[ed] out of fear" and that he "would need security" if he ruled against Uber. The court rejected plaintiff's motion to vacate. The court did not find credible the notion that the arbitrator's comments were a "sincere confession of fear" but rather "were simply an attempt at humor – one of many made by the arbitrator throughout the hearing." The court observed that if indeed the arbitrator was rendering his decision based on fear, "the last thing he would have done is placed that on the record." While acknowledging that the arbitrator's comments may have been "inappropriate (or, worse yet, not as humorous as some of the arbitrator's better jokes), the remarks are not inconsistent with impartiality once they are patently jestful intent is recognized." The court also found the claim of the alleged photographing of Kalanick to be speculative at best and insufficient to justify vacatur. Finally, the court also ruled that plaintiffs waived their objections by not raising them in a timely manner. *Meyer v. Kalanick*, 2020 WL 4482095 (S.D.N.Y.).

Arbitrator's Decision to Retain Case on Remand Upheld. The arbitrator, former Second Circuit Judge George Pratt, issued a class arbitration award in favor of claimants but the award was vacated after the Supreme Court's ruling in *Epic Systems v. Lewis* which upheld the enforceability of class action waivers. On remand, the AAA submitted to Arbitrator Pratt the question of whether he should hear the same case on an individual claimant basis. Over respondent's objection, Arbitrator Pratt retained the case and following a hearing ruled in the individual claimant's favor. In doing so, Arbitrator Pratt allowed the parties to use evidence from the prior class proceeding but did not authorize additional depositions. The final award granted approximately $15,000 in damages to claimant and $1.1 million in attorneys' fees. Respondent's motion to vacate was denied. The court first noted that the decision for Arbitrator Pratt to retain jurisdiction, and the AAA's decision to submit the question to him, was based on their interpretation of the applicable contract language. The

court also rejected respondent's argument that it was unfairly denied the opportunity to conduct additional discovery. That court noted that respondent was able to present additional evidence at the hearing and in fact called four additional witnesses. The court pointed out that Arbitrator Pratt refused to rely on the law of the case doctrine, as requested by claimant, but "reached his conclusions on the basis of evidence from the prior proceeding and the new evidence presented by the parties." For these reasons, the court denied respondent's motion to vacate. *Herrington v. Waterstone Mortgage Corp.,* 2020 WL 5640542 (W.D. Wisc.).

Question Whether Appraiser Received Pertinent Evidence Precludes Confirmation of Award. The parties to a limited liability corporation agreement selected PwC to appraise the value of the minority member's interest in the business. The minority member alleged that he was prevented by the majority member from providing PwC with pertinent evidence and therefore the process was rigged. For example, the engagement letter with PwC was with the LLC and not the two parties which even PwC believed could be perceived as presenting a conflict. Nonetheless, an appraisal was made which the majority member sought to confirm and the minority member sought to vacate. The court, under New York law, found that valuations and appraisals may be enforced as if they were arbitration awards. The court found that the case presented an "unusual circumstance in which there is evidence to suggest that the appraiser/arbitrator (*i.e.*, PwC) *wanted* to hear [the minority member's] side of the story, and repeatedly asked for that opportunity, but may have been hindered by [the majority member]." Both sides, the court concluded, presented evidence in favor and in opposition to the issue of whether the minority member was able to present material evidence to PwC. For this reason, the court concluded that the "record is not sufficiently clear at this stage to permit a decision on this question one way or the other. In those circumstances, the Court finds that the pending motions to confirm or vacate the award must be denied." *Yakuel v. Gluck*, 2020 WL 2219975 (N.Y. Sup. Ct. N.Y. Cty.).

Case Shorts:

- *Salem v. Feldstein*, 2020 WL 3473679 (N.Y. Sup. Ct. Kings Cty.) (award vacated where arbitrator refused to grant request by client in attorneys' fees dispute for an adjournment so she could retain counsel).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Evident Partiality Claims Against JAMS Arbitrators Rejected. In *Monster Energy v. City Beverage*, the Ninth Circuit vacated an award on evident partiality grounds in part based on JAMS arbitrators' failure to disclose the substantial business relationship between JAMS and Monster Energy. This case involves three JAMS arbitrators, two of whom are JAMS shareholders, who did not disclose their financial interest in the business before hearing the case. In rejecting a challenge to the award on evident partiality grounds, the judge

emphasized that, in contrast to the facts in the *Monster Energy* case, the level of business between JAMS and the prevailing party, Levi Strauss, was not sufficient to constitute a significant business interest. The court focused on "the importance of analyzing the details of the exact business relationships at issue in determining whether disclosure was required." Unlike the 97 cases that JAMS administered for Monster Energy, here JAMS administered one prior arbitration and six mediations for Levi Strauss. The court concluded that "six mediations (where the financial incentives are lower) and one arbitration over the course of nearly 10 years is trivial. That sporadic and limited business is nowhere near as significant as the dealings in *Monster Energy*" and in any event the party challenging the award here specifically selected JAMS over the American Arbitration Association. Further, the court noted that the arbitrators made appropriate disclosures at the commencement of this case with respect to any prior dealings with the parties. For these reasons, the court denied the motion to vacate. *Levi Strauss and Co. v. Aqua Dynamics Systems*, 2020 WL 4051672 (N.D. Cal.). See also *OOGC America v. Chesapeake Exploration*, 975 F.3d 449 (5th Cir. 2020) (evident partiality claim in nondisclosure case rejected where undisclosed information only indirectly bore on the arbitrator's status as arbitrator and required speculation as to arbitrator's awareness as to contractual disclosure requirements).

Parties Waived Limitation on Arbitrator's Authority. The parties' Engineering, Procurement, and Construction ("EPC") Agreement provided for arbitration but prohibited the arbitrator from awarding nonmonetary, injunctive, or equitable relief. Disputes arose and two arbitrations under the EPC Agreement were consolidated based on a stipulation entered into by the parties. The stipulation provided that the parties would submit to the arbitrator "to finally and expeditiously resolve all their claims against each other in one forum." Among the relief awarded by the arbitrator were attorneys' fees and prejudgment interest. The losing party alleged that the arbitrator exceeded his authority by awarding equitable relief contrary to the terms of the arbitration agreement. The Minnesota Court of Appeals rejected this argument. The court reasoned that the arbitrator viewed the stipulation as the source of his authority which gave him in the court's view "broad authority over all claims" between the parties. Moreover, the JAMS rules deemed jurisdictional challenges not raised as having been waived. "By entering into the stipulation and failing to object to the arbitrator's impending ruling on abandonment, [the losing party] intentionally and knowingly waived its right to challenge the arbitrator's authority to award equitable relief." *Faith Technologies v. Aurora Distributed Solar, LLC*, 2020 WL 3172835 (Minn. App.), review denied (September 15, 2020).

Award Finding Wrongful Discharge in At-Will State Vacated. Warfield, a mutual funds wholesaler and at-will employee in North Carolina, brought a "wrongful termination without just cause" claim before a FINRA panel. The panel upheld Warfield's claim, despite the fact that he was an at-will employee and awarded him over $1 million in damages. It also ordered that his financial industry Form U-5 which publicized his termination be modified. The district court vacated the award, finding that the panel exceeded its authority as the

award did not draw its essence from Warfield's employment agreement which provided that his employment was at-will. The court held that the law of North Carolina was clear and did not recognize claims for the wrongful discharge of at-will employees. The court also ruled that under Fourth Circuit precedent the panel manifestly disregarded the law as it had been informed at the hearing of Warfield's at-will status and of applicable North Carolina law. In contrast, the court left standing the panel's ruling with respect to Warfield's Form U-5 as it could not say that this ruling exceeded the panel's authority or was in manifest disregard of prevailing law. *Warfield v. Icon Advisors, Inc.,* 2020 WL 3260067 (W.D. N. Car.). See also *Magid v. Waldman*, 2020 WL 4891218 (S.D.N.Y.) (arbitrator exceeded his authority under New York law by directing court in any post-award proceeding to award fees to prevailing party in arbitration).

Arbitrator Did Not Exceed Powers in Finding Breach of Contract. Dr. Amarjit Virk was terminated as a shareholder and employee of an anesthesiologist practice. Dr. Virk brought an arbitration alleging discrimination and breach of contract. The arbitrator rejected Dr. Virk's discrimination claim but found for him on his breach of contract claim and awarded him over $2.6 million. The medical practice sought to vacate the award, arguing that the arbitrator exceeded his power and ruled in manifest disregard of law. The court rejected these arguments. The court found that, contrary to the medical practice's argument, the arbitrator fairly considered the conduct of an individual and shareholder and appropriately considered the private practice's bylaws in reaching his determination. The court also rejected the medical practice's manifest disregard claim. The court concluded that the arbitrator appropriately applied the relevant legal principles in rendering his award. *Virk v. Maple-Gate Anesthesiologists*, 2020 WL 3050398 (W.D.N.Y.). See also *Diverse Enterprises v. Beyond International,* 2020 WL 5580455 (5th Cir.) (arbitrator did not exceed authority by awarding hourly rates above what counsel actually charged where contract authorized "reasonable attorneys' fees" to be awarded to prevailing party); *Troegel v. Performance Energy Services*, 2020 WL 4370881 (M.D. La.) (arbitrator did not exceed authority by awarding attorneys' fees without statutory basis where the AAA rules applied and where both parties requested attorneys' fees); *Axia Netmedia Corp. v. KCST USA, Inc.*, 973 F.3d 133 (1st Cir. 2020) (award that prospectively voided guaranty was within arbitrator's authority when determining remedy for material breach of operating agreement and did not warrant vacatur).

Claim that Arbitrator "Exceeded Authority" Rejected. Petitioner moved to vacate an arbitration award in favor of AmFirst USA and AmFirst Bermuda, an affiliated but separate company who was not named as a party in the arbitration. Petitioner claimed the arbitrator exceeded his authority in determining that the "companies were one and the same for this arbitration." The district court denied the motion, finding that AmFirst USA asserted throughout the arbitration that it was the wrong named party because the insurance policy at issue had been assigned to AmFirst Bermuda. The court further found that "Petitioner sought to have the arbitrator determine 'the identity of the insurer and the terms of the

insurance policy in effect'" and those were the issues the arbitrator decided. Accordingly, the court held that the arbitrator did not exceed his authority and no basis exists to vacate or modify the award. *Jose Evenor Taboada A. v. AmFirst Insurance Company*, 2020 WL 4275823 (S.D. Miss.).

Case Shorts

- *Gherardi v. Citigroup Global Markets*, 975 F.3d 1232 (11th Cir. 2020) (award finding at-will employee had been wrongfully terminated confirmed as arbitration panel interpreted applicable agreement; "an arbitrator's actual reasoning is of such little importance to our review that it need not be explained – the decision itself is enough").
- *Country-Wide Insurance v. Epione Medical*, 2020 WL 2857652 (N.Y. Sup. Ct. N.Y. Cty.) (post-arbitration judicial decisions, as opposed to pre-arbitration decisions, may not be given preclusive effect or serve as grounds to vacate an award).
- *Salerno v. Credit One Bank*, 2020 WL 4339219 (W.D.N.Y.) (court declines to award post-award interest where actual damages, which is fundamentally punitive in nature, far exceeded statutory damages).
- *Magid v. Waldman*, 2020 WL 4891218 (S.D.N.Y.) (evident partiality claim under New York law rejected where petitioner "knew all of the relevant facts during the arbitration and did not adequately object on the grounds that he presses here").

IX. ADR – GENERAL

Discovery in Vacatur Proceedings Limited. Petrobras sought to vacate a $622,000,000 award in favor of Vantage Deepwater. In doing so, it served subpoenas seeking the depositions of the dissenting arbitrator and information from the American Arbitration Association regarding its investigation into Petrobras's application to disqualify one of the arbitrators. The district court declined to enforce the subpoenas, and the Fifth Circuit affirmed. Petrobras argued it needed the deposition of the dissenting arbitrator to address the question of arbitrator bias and partiality. The dissenter stated in his dissent that Petrobras had been denied due process in the hearing. Nonetheless, the court ruled that the AAA's Commercial Rules, which were incorporated into the arbitration agreement, precluded the calling of an arbitrator as a witness. The court also declined to enforce the subpoena against the AAA resulting from its investigation into Petrobras's claim of bias after the merits hearing. The court found the record did not evidence partiality or misconduct on the part of the arbitrators. The court found that the "arbitration agreement here is external to the underlying contract and the arbitration agreement's validity is not disputed." The appellate court noted, but did not rule, that another panel of the Fifth Circuit found that arbitrator immunity applied to the AAA. In denying the subpoena against the AAA, the court noted that the "arbitral record did not show signs of partiality or misconduct that

compelled the district court to delay the case in order for Petrobras to serve a subpoena on the AAA." For these reasons, the court declined to enforce the requested subpoenas. *Vantage Deepwater Co. v. Petrobras America*, 966 F 3d 361 (5th Cir. 2020).

Public Policy Claim Under Panama Convention Rejected. A $30,000,000 bribe was paid by Vantage Deepwater's largest shareholder to two Petrobras executives to secure a lucrative agreement. After disclosure of the bribe, Petrobras agreed to an amended agreement. A dispute arose between the parties and Vantage Deepwater obtained an arbitration award of $622,000,000 against Petrobras which then moved to vacate on public policy grounds. The district court denied the motion and the Fifth Circuit affirmed. The court concluded that Petrobras ratified the agreement by continuing to perform after disclosure of the bribe. The court reasoned that Petrobras was not challenging the award per se but rather the enforceability of the underlying agreement. The court noted that "the arbitration agreement here is external to the underlying contract and the arbitration agreement's validity is not disputed." The court concluded that the question whether the underlying agreement should be voided was for the arbitration panel to decide and here the majority found the agreement to be enforceable. For these reasons, the Fifth Circuit found no bar to confirmation on public policy grounds and affirmed the lower court's ruling confirming the award. *Vantage Deepwater Co. v. Petrobras America*, 966 F 3d 361 (5th Cir. 2020).

Case Shorts:

- *OOGC America v. Chesapeake Exploration*, 975 F.3d 449 (5th Cir. 2020) (arbitrator who was called a "liar and corrupt" by district judge may not intervene before circuit court where the lower court's decision was vacated and therefore rendered moot the motion to intervene).
- *Hill v. CAG 2 of Tuscaloosa*, 2020 WL 3207615 (N.D. Ala.) (sanctions awarded against party filing frivolous motion to vacate based on "old case law that has been expressly overruled and made no meaningful attempt at explaining how [the FAA] might support its argument for vacatur").

X. COLLECTIVE BARGAINING SETTING

NLRB Rules Employer Can Require Arbitration Confidentiality. Can an employer require participants in an arbitration to keep evidence obtained in the arbitration and the award itself confidential? The NLRB ruled that an employer's confidentiality rule is enforceable under Section 7 of the NLRA. The Board noted that the rule here did not prohibit the disclosure of information that the employee gained outside of the arbitration itself. "[W]hen reasonably read, the provision does not prohibit employees from disclosing the existence of the arbitration, their claims against the employer, the legal issues involved, or the events, facts, and circumstances that gave rise to the arbitration proceeding." The Board

acknowledged that the rule has the effect of limiting employees' right to discuss terms and conditions of employment, but that right must be balanced against an employer's legitimate interests. Here, the Board noted that the confidentiality rule "saves resources, protects all parties from reputational injury, and facilitates the cooperative exchange of discovery." The Board noted that the FAA applies and concluded, even assuming but not finding that the confidentiality rule infringes on Section 7 rights, that under the FAA the arbitration agreement must be enforced according to its terms. The Board added that the "FAA gives parties the discretion to design their own dispute-resolution procedures, tailored to the type of dispute, including that arbitral proceedings be kept confidential if the parties so choose." The Board concluded by noting that any discipline flowing from an alleged violation of the confidentiality rule would nonetheless be subject to arbitration. *California Commerce Club, Inc. -and- William J. Sauk*, NLRB Case No. 21-CA-149699 (June 19, 2020).

Award Ordering Union Members to Reimburse Employer Confirmed. Two former employees were awarded severance pay on false pretenses in the employer's view. An arbitrator ordered the employees to return the money, approximate $20,000, to the employer. The district court refused to confirm the award, ruling that the employees were not part of the arbitration proceedings and therefore the award was *ultra vires* as it sought to impose obligations on non-parties to the arbitration. The Second Circuit reversed. In doing so, the court emphasized that non-parties can be bound to arbitrate under agency principles. In the labor context, the court pointed out "a labor union is the exclusive agent for its members." From this, the court concluded "that the arbitrator did not exceed her authority because under both agency law principles and federal labor law, the Union possessed the authority to bind [the employees] to the award." Here, the plaintiffs manifested their intent to be represented by the union when they authorized the union to file grievances on their behalves. Beyond agency principles, the Second Circuit stated that existing federal labor law "confirms that when a union prosecutes employees' grievances against an employer, it represents those employees and those employees are therefore bound by the arbitral award." The court acknowledged that plaintiffs were not signatories to the collective bargaining agreement, but reiterated that "it is the nature of labor agreements and labor arbitrations that the unions are the exclusive bargaining agents for and the agents of the union members." *ABM Industry Groups v. International Union of Operating Engineers*, 968 F.3d 158 (2d Cir. 2020).

CBA Allows UPS to Enter Side Arbitration Agreement with Employees. UPS and Local 804 entered into a collective bargaining agreement which allowed UPS to enter into "Extra Contractual Agreements" ("ECA") with its employees, including Local 804 members, as long as those agreements did not conflict with the collective bargaining agreement. UPS entered into agreements with workers hired temporarily during peak seasons. Soon after signing their agreements, the plaintiffs joined Local 804. The ECAs provided for arbitration of statutory wage claims which the collective bargaining agreement did not address. Plaintiff employees sued UPS under federal and state wage and hour statutes and UPS moved to

compel. The court granted the motion. In doing so, the court rejected the argument that UPS was prohibited from directly dealing with employees rather than through the employees' representative, that is, Local 804. "Local 804 clearly and unmistakably waived its right to collectively bargain and negotiate over the arbitrability of an individual employee's statutory claims – an issue even plaintiffs concede remained unaddressed by the CBA." The court rejected the argument that the agreements were void once plaintiffs joined Local 804. The court reasoned that "if they could enter into an arbitration agreement now, as Local 804 members, without violating the CBA, it cannot be that they were prohibited from entering into the arbitration agreement when they were not even yet members of Local 804 or that the arbitration agreement they signed as non-union members became void when they became union members." In sum, the court ruled that the side agreements were enforceable and ordered plaintiffs' claims to arbitration on an individual basis as provided for under the ECA. *Hedges v. United Parcel Service*, 2020 WL 4481657 (E.D.N.Y.).

Court May Not Review Award Finding NLRA Violation. The employer here unilaterally changed its procedures for implementing FMLA leave for bargaining unit employees without consulting the union. The union filed a grievance and NLRB charges and the NLRB deferred to the arbitration but retained jurisdiction to review the arbitrator's ruling. The arbitrator found that the employer breached the collective bargaining agreement and violated the NLRA by unilaterally altering its FMLA procedures. The employer moved to vacate the award. The trial court denied the motion and the Eighth Circuit affirmed. In doing so, the court noted that it lacked original jurisdiction to review or rule on the finding of a NLRA violation. The court reasoned that its authority under Section 301 of the NLRA is limited to alleged violations of contract, not of the NLRA. The court noted, however, that the employer was not without remedy as it could return to the NLRB which had retained jurisdiction. If unsatisfied with the NLRB's decision, the court added that the employer could return to court to review that determination. *Exide Technologies v. International Brotherhood of Electrical Workers*, 964 F. 3d 782 (8th Cir. 2020).

Case Shorts:

- *Independent Union of Pension Employees v. Federal Labor Relations Authority*, 961 F. 3d 490 (D.C. Cir. 2020) (successor union bound by prior union's arbitration selection process under the collective bargaining agreement and committed an unfair labor practice by refusing to use the agreed upon arbitrators).
- *Evans v. Chicago Newspaper Guild*, 2020 Il. App. (1st) 200281 (1st Dist.) (procedural questions, here timeliness of arbitration, are for labor arbitrator and not court to decide).

XI. NEWS AND DEVELOPMENTS

FINRA Postpones In-Person Arbitration and Mediation Through January 1, 2021. FINRA has postponed all in-person arbitration and mediation proceedings scheduled through January 1, 2021 in response to the COVID-19 pandemic. FINRA's statement provided that all proceedings will be postponed unless the parties stipulate to proceed telephonically or by Zoom or the panel orders that the hearings will take place telephonically or by Zoom. It further provided that if all parties and arbitrators agree to proceed in-person based on their own assessment of public health conditions, the case may proceed provided that the in-person hearing participants comply with all applicable state and local orders related to the COVID-19 pandemic.

FINRA Proposes Amendments to Codes of Arbitration. In September 2020, FINRA proposed amendments to the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes (the "Codes"). The proposed rule change would amend the Codes to: (1) impose requirements on expungement requests (a) filed during an investment-related, customer initiated arbitration by an associated person, or by a party to the customer arbitration on-behalf-of an associated person, or (b) filed by an associated person separate from a customer arbitration; (2) establish a roster of arbitrators with enhanced training and experience from which a three-person panel would be randomly selected to decide straight-in requests; (3) establish procedural requirements for expungement hearings; and (4) codify and update the best practices of the Notice to Arbitrators and Parties on Expanded Expungement Guidance that arbitrators and parties must follow. In addition, the proposed rule change would amend the Customer Code to specify procedures for requesting expungement of customer dispute information arising from simplified arbitrations. The proposed rule change would also amend the Codes to establish requirements for notifying state securities regulators and customers of expungement requests.

Google Agrees to End Mandatory Arbitration. Google's parent company, Alphabet, agreed to end Google's policy of mandatory arbitration of harassment, discrimination, and retaliation claims. The decision was part of a settlement of a stockholder derivative lawsuit alleging Google fostered a "culture of concealment" leading to cover-ups of sexual harassment at the highest levels of the company. The settlement further provides that Google will limit the use of nondisclosure agreements, which will allow the company's employees to openly discuss the facts of an incident as well as the reporting process. The company also agreed to devote $310 million to diversity, equity, and inclusion efforts as part of the settlement.

XII. TABLE OF CASES