FELIU NEUTRAL SERVICES LLC

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

AAA Case Summaries:
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I. JURISDICTIONAL ISSUES: GENERAL

FAA Transportation Exemption Does Not Apply to Food Delivery Services. The question posed in this case is: are Grubhub food delivery couriers "engaged in interstate commerce" when they make deliveries intrastate. The court here ruled that they are not engaged in interstate commerce and therefore are not exempt under the FAA's transportation worker exemption. Grubhub moved to compel arbitration of the drivers' wage and hour claims. In finding that the couriers were not engaged in interstate commerce, the court noted that their "day-to-day duties do not involve handling goods that remain in the stream of interstate commerce, traveling to and from other states." The court observed that food delivery drivers are not comparable to the transportation worker categories listed in the FAA, including seamen and railroad workers. The court also rejected the plaintiff's argument that since the FAA applied, the court should also apply the transportation worker exemption. The court countered this argument by noting that the FAA jurisdictional provision only requires activities "involving commerce" rather than the standard for the transportation workers exemption, which is whether the employee was "engaged in commerce." The court concluded that the employees were required to arbitrate their claims which fell within the bounds of the arbitration agreement they signed. *Wallace v. Grubhub Holdings*, 2019 WL 1399986 (N.D. Ill.).

FAA Exemption Applies to Truck Driver. A delivery truck driver employed by a beverage distributor filed a class action complaint alleging various wage and hour violations under California law. The employer moved to compel arbitration, pointing to the parties' arbitration agreement and arguing that the FAA requires courts to enforce arbitration agreements for all contracts involving interstate commerce. The employee opposed the motion, asserting that as a delivery truck driver engaged in interstate commerce his employment was excluded from the FAA's coverage based on the statutory exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. § 1). The trial court agreed, holding that the employee was exempt from the FAA because his employment "involved transporting goods received from out of state." The Court of Appeal for the Fifth District affirmed. Citing the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001), the court first noted that Section 1 of the FAA is a narrow exemption that applies to transportation workers "*actually engaged in* the movement of goods in interstate commerce" and that it is not necessary for a driver to personally cross state lines to engage in interstate commerce. The court then found that the employee at issue did engage in interstate commerce because he "participat[ed] in the continuation of the movement of interstate goods to their destinations," and his deliveries "although intrastate, were essentially the last phase of a continuous journey of the interstate ecommerce." Accordingly, the employee was held to be a transportation worker exempt from the FAA

and could not be forced to arbitrate his employment action. *Nieto v. Fresno Beverage Co.,* 33 Cal. App. 5th 274 (2019), reh'g denied (Mar. 27, 2019), review filed (May 1, 2019). See also *Rittman v. Amazon.com, Inc,* 2019 WL 1777725 (W.D. Wash.) (delivery drivers for Amazon.com who deliver "packaged goods that are shipped from around the country and deliver to the consumer untransformed" fall within the transportation worker exemption "even if it is the last leg of the journey").

***Epic Systems* Did Not Require Arbitration of PAGA Claim**. The California Supreme Court in *Iskanian v. CLS Transportation* ruled that claims under California's Private Attorney General Act may not be forced into arbitration. The employer here argued that the Supreme Court ruling in *Epic Systems* overruled *Iskanian* and made PAGA claims arbitrable. The trial court rejected this claim and the California appellate court agreed. The appellate court noted that a PAGA plaintiff is serving as a proxy for the state and for enforcing state law and regulation. The court observed that the Supreme Court in *Epic Systems* addressed the enforceability of individual arbitration agreements under the NLRA, where in contrast the *Iskanian* decision addressed the situation where "the employee had been deputized by the state to bring a *Qui Tam* claim on behalf of the state, not on behalf of other employees." The court explained that that is because "the California Supreme Court found a PAGA claim involved a dispute not governed by the FAA, and the waiver would have precluded the PAGA action in *any* forum, it held its PAGA-waiver enforceability determination was not preempted." The court also ruled that because the state was the real party-in-interest, an individual could not agree to bring a PAGA claim in arbitration without state approval. "Thus, a single representative claim cannot be split into an arbitrable individual claim and a non-arbitrable representative claim." *Correia v. NB Baker Electric*, 32 Cal. App. 5th 602 (2019). See also, *Zakaryan v. Men's Wearhouse, Inc.*, 33 Cal. App. 5th 659 (2019), review filed (May 6, 2019) (PAGA claims may not be split into individual claims submitted to arbitration and statutory penalties adjudicated in court proceeding "because an individual employee bringing a PAGA claim is vindicating one *and only one* 'particular injury' – namely, the injury to the public that the 'state labor law enforcement agencies' were created to safeguard."); *Knepper v. Ogletree Deakins*, 2019 WL 1449502 (C.D. Cal.) (PAGA claim in court stayed while related arbitration proceeds "because an arbitration finding on [the plaintiff's] individual claims could impact her ability to be a representative on the PAGA claim").

Arbitration Agreement Binds Father of Signatory Based on Privity. A lawyer received unauthorized telemarketing calls and negotiated a settlement with the telemarketer which included a commitment to arbitrate future disputes. Two years later the same lawyer sued the telemarketer, this time on behalf of his father alleging the same injury asserted previously. The lawyer and his father lived together and share the same landline telephone at issue. The telemarketer moved to compel. The district court granted the motion, and the Sixth Circuit affirmed. The court found that under governing Ohio law privity existed between father and son. The court explained that "privity does not require identical interests – it just requires that the interests of one party adequately represent the interests

of another." The court pointed out that father and son "both sought relief for an alleged injury stemming from calls to the same *shared*, residential landline" and both sought injunctive relief. The court concluded that the injunctive relief would benefit both father and son and the son could adequately represent the father's interests. On this basis, the court compelled arbitration based on the earlier settlement agreement. *Reo v. Palmer Administrative Services,* 2019 WL 2306641 (6th Cir.).

Order Compelling Arbitration Not Subject to Interlocutory Appeal. Section 16(b) of the FAA bars appeals of interlocutory orders compelling arbitration and staying the judicial proceedings. Does the order compelling arbitration become appealable if the claimant dismisses his claims after they are compelled to arbitration? The Ninth Circuit ruled that it lacks jurisdiction to hear such an appeal. The court explained that the district court's order compelling arbitration and staying the proceeding was not a final decision subject to appeal. Further, claimant failed to "obtain the district court's permission for an interlocutory appeal under 28 U.S.C. § 1292(b)." The court also rejected claimant's procedural ploy of dismissing his claims solely to gain immediate review of the arbitration order. In the Ninth Circuit's view, it "makes no difference that [claimant] then secured a voluntary dismissal without prejudice" as such a dismissal was not a final judgment subject to appeal. *Gonzalez v. Coverall North America*, 754 F. App'x 594 (9th Cir. 2019). See also *Berkeley County School District v. Hub International*, 2019 WL 2233145 (D.S.C.) (appeal of order denying a motion to compel divests district court of jurisdiction unless the appeal is deemed frivolous).

Home State Law Governs Preclusive Effect of Arbitration Award in Diversity Proceeding. The arbitration award here was confirmed by a court. In a subsequent court proceeding, the claim was made that the prior confirmed award precluded a claim raised in a subsequent proceeding. What law governs the determination of the preclusive effect of the confirmed award? The Ninth Circuit ruled that "when a federal court sitting in diversity confirms an arbitration award, the preclusion law of the state where that court sits determines the preclusive effect of the arbitration award." The court observed that this mirrors the rule applicable when a federal court is asked to give preclusive effect to an arbitration award confirmed by a state court. In this case, the arbitration took place in Florida and was confirmed by a Florida district court. "Because a federal district court in Florida confirmed the arbitration award, we hold that Florida law governs its preclusive effect." *NTCH-WA, Inc. v. ZTE Corp.*, 921 F.3d 1175 (9th Cir. 2019).

Tribal Law Cannot Foreclose Applicable Federal and State Law in Arbitration. The Chippewa Cree tribe owned an online lending operation that required tribal law to be applied to any disputes which must be heard in arbitration. Borrowers brought a putative class action relating to payday loans made by the lending operation and defendants moved to compel arbitration. The trial court denied the motion, and the Second Circuit affirmed. The loan agreements required that tribal law be applied, provided that the claims were not governed by federal or state law and allowed tribal courts to set aside any arbitration award

that did not comply with tribal law. The Second Circuit, in declining to compel arbitration, found that "the arbitration agreements are unenforceable because they are designed to avoid federal and state consumer laws . . . by applying tribal law only, arbitration for the [lending firm's] borrowers appears wholly to foreclose them from vindicating rights granted by federal and state law." The court also ruled the arbitration agreements to be substantively unconscionable under Vermont law because tribal courts had "unfettered discretion to overturn an arbitrator's award." Tribal courts, the Second Circuit reasoned, by interpreting its only law "effectively insulates the tribe from any adverse award and leaves prospective litigants without a fair chance of prevailing in arbitration." It did not help that several tribal leaders pled guilty to federal corruption charges. "Requiring non-tribal plaintiffs to be subject to an illusory arbitration reviewed in toto by a tribal court with a strong interest in avoiding an award adverse to the lender is unconscionable." Finally, the court declined to sever the offensive provisions "because, given the pervasive, unconscionable effects of the arbitration agreement interwoven within it, nothing meaningful would be left to enforce. *Gingris v. Think Finance*, 922 F. 3d 112 (2d Cir.).

Fees Request Properly Directed to Arbitrator. Under California law "an arbitrator's authority does not expire at the moment an award is issued, even when the award was intended as final." Further, as in civil litigation, a party can recover its costs where a pre-hearing settlement offer is greater than that received at the conclusion of the proceeding. In this case, claimant was awarded less than respondent had offered in settlement prior to the hearing, and respondent sought its costs but only filed this request after the final award was issued. The arbitrator declined to award costs to respondent and the dispute made its way to the California Supreme Court. The Court ruled that the arbitrator maintained jurisdiction to entertain respondent's request after the final award was issued in the face of a challenge based on *functus officio* grounds but rejected the request that the award be vacated. The Court reasoned that while respondent was entitled to hold off submitting a fee request until after the final award was issued, "he ran the risk that the arbitrator would erroneously refuse to award costs, leaving him without recourse under the narrow grounds for vacation or correction contained in the statutory scheme." The Court concluded that arbitrators, like judges, are fallible and errors by arbitrators are not grounds for overturning an award. *Heimlich v. Shivji*, 2019 WL 2292828 (Cal.).

New York Convention Preempts Louisiana Statute Barring Arbitration. Louisiana law bars arbitration agreements in policies insuring property in the state. The insurance policy here contained an arbitration provision but was governed by the New York Convention requiring the enforcement of arbitration agreements governed by the Convention. The Fifth Circuit ruled that the New York Convention preempted Louisiana's statute. The court did this despite a provision in the insurance agreement that required any term that conflicted with Louisiana law to be conformed to state law. Because the state law was preempted, the court reasoned, the law did not apply and did not need to be conformed. The court also rejected the application of the McCarran-Ferguson Act which protects state laws regulating

the insurance industry from the preemptive effect of federal law. Here, however, it was a treaty that preempted state law, not federal law, and therefore the McCarran-Ferguson Act did not apply. For these reasons, the Fifth Circuit enforced the arbitration agreement despite Louisiana law rejecting the enforcement of such agreements in insurance agreements in that state. *McDonnel Group v. Great Lakes Insurance*, 2019 WL 2382061 (5th Cir.). Cf. *Stemcor USA v. CIA Siderurgica Do Para Cosipar*, 2019 WL 2041826 (La.) (Louisiana statute allowing creditors pursuing arbitration to seize assets applied where monetary damages sought, here a $15.5 million dispute over purchase of iron, and statutory requirements met).

Case Shorts:

- *Bernardino v. Barnes & Noble Booksellers*, 763 F. App'x 101 (2d Cir. 2019) (order compelling arbitration and staying court proceeding "was an interlocutory order rather than a final decision and is not appealable under the FAA").
- *Lambert v. Tesla, Inc.*, 923 F.3d 1246 (9th Cir. 2019) (Section 1981 race discrimination claims subject to mandatory arbitration).
- *Espiritu Santo Holdings v. L1bero Partners*, 2019 WL 2240204 (S.D.N.Y.) (injunction in aid of arbitration under the New York Convention granted in part as court found evidence of "corporate malfeasance" underlying the request for an injunction persuasive).

II. JURISDICTIONAL CHALLENGES: DELEGATION AND WAIVER ISSUES

Scope and Enforceability of Opt-Out Provision For Arbitrator to Decide. Plaintiff sued TitleMax alleging violations of consumer protection practices relating to three title loans the company made to him on three different dates. He used the second loan to pay off the first, and the third loan to pay off the second. Each loan agreement had the same broadly worded arbitration clause and stated it did not apply to "disputes about the validity, coverage, or scope of" the arbitration clause. The loan agreements also contained an opt-out provision allowing the borrower to opt out of the arbitration clause if he provided notice to TitleMax within 60 days of taking out the loan. Plaintiff did not opt out of the arbitration clause in his first or second loan agreements, but he did elect to opt out of the clause in his third agreement. TitleMax moved to compel all of plaintiff's claims to arbitration. Finding that the loan agreements were three individual agreements, the court granted the motion with regard to the first and second loans but denied it with regard to the third, stating that plaintiff properly opted-out of it. On appeal, TitleMax argued that the third loan was actually a refinancing of the second loan and since "refinancing" was not defined in the agreement, the question of arbitrability should have been determined by an arbitrator. The Tenth Circuit disagreed and affirmed the trial court's ruling that the loan agreements were individual. The court also rejected TitleMax's "refinancing" argument, stating "whether the third loan agreement is a refinancing of the second loan agreement is

actually a dispute about the coverage, scope, or another part (the opt-out provision) of the Arbitration Clause. Therefore, under the plain language of the Arbitration Clause, such a dispute is for a court to decide, not an arbitrator." *Romero v. Titlemax of New Mexico, Inc.,* 762 F. App'x 560 (10th Cir. 2019).

Arbitrator to Rule on Choice of Law Issue Despite Public Policy Concerns. Quinn Emmanuel moved to compel arbitration of a dispute with former partners who left to start their own firm. The former partners argued that a court must hear the dispute because public policy concerns were raised. In particular, the partners argued Quinn Emmanuel was seeking to enforce restrictive covenants contrary to New York's Rules of Professional Responsibility. The trial court granted Quinn Emmanuel's motion. In doing so, the court ruled that "the public policy issue here i.e. whether . . . the Partnership Agreement is prohibitively anticompetitive under New York law, does not overcome the broad Arbitration Provision, which must be given effect as overriding policy." The court noted that the former partners offered "competent proof" supporting their claim of a violation of New York's Professional Conduct Rules, but the court concluded that it was "for the arbitrator in the first instance to consider the submissions when determining whether the provision at issue is an unenforceable forfeiture-for-competition clause. Any further inquiry on my part is precluded by the broad arbitration provision and the strong public policy compelling its enforcement." The court also concluded that it was for the arbitrator to rule on the choice of law issue as to whether California law would apply and the extent to which it would respect New York public policy regarding the enforcement of restrictive covenants in the law firm context. *Selendy v. Quinn Emanuel Urquhart & Sullivan, LLP*, 63 Misc. 3d 954 (N.Y. Sup. Ct. 2019). Cf. *Gingris v. Think Finance*, 922 F. 3d 112 (2d Cir.) (allegation that arbitration clause and, in particular, delegation clause were fraudulent is "sufficient to make the issue of arbitrability one for a federal court").

Arbitrability Issue for Arbitrator Where Delegation Provision Not Challenged. The plaintiffs here, employees of Dollar General, were required to execute arbitration agreements that incorporated the AAA's Employment Arbitration Rules. Those rules grant to the arbitrator the authority to rule on his or her own jurisdiction. Plaintiffs sued for discrimination and Dollar General moved to compel arbitration. The employees acknowledged that they each signed the agreements but alleged that they did not understand its terms and were told that if they opted out of the agreement they would be fired. The employer's motion to compel was granted and the Missouri Supreme Court affirmed. The Court concluded that the AAA's rules constituted a clear and unmistakable delegation to the arbitrator of arbitrability issues. The Court also rejected plaintiffs' belated attempt to convert their lack of consideration argument relating to the entire agreement to an argument specific to the delegation clause. "Because the lack of consideration [plaintiffs] assert with respect to the delegation clauses is the same lack of consideration they claim should invalidate the overall arbitration agreements, they do not raise a unique challenge to the delegation clauses. Accordingly, the delegation provisions are valid . . .." *Newberry v.*

Jackson, 2019 WL 2181859 (Mo.). Accord: *Hughes v. Ancestry.com*, 2019 WL 2260666 (Mo. App.) (arbitrability issue for arbitrator where AAA's Commercial Rules adopted, and party challenging arbitration attacked the arbitration agreement as a whole and not the delegation term specifically). See also *Bolden v. DG TRC Management Co.*, 2019 WL 2119622 (S.D.N.Y.) (court rules broad referral of all claims arising out of or with respect to agreement constituted clear and unmistakable delegation of arbitrability question to the arbitrator, noting that "parties need not specifically reference arbitrability in order to demonstrate their intent to arbitrate all issues, including arbitrability").

Filing of Lawsuit Constitutes Waiver. An insurance company sued an agent alleging breaches of contract and of a noncompete agreement. In that action, the insurance company sought both injunctive relief and legal relief which "had a contractual nexus to the agent agreement that contained the arbitration provision." The agent counterclaimed and the insurance company then moved to compel arbitration. The trial court granted the insurance company's motion, but the Florida appellate court reversed. The appellate court emphasized that a "party which seeks to rely on its right to arbitration must safeguard the right and not act inconsistently with it." Here the court reasoned that "by filing its complaint, [the insurance company] actively participated in the lawsuit thereby waving its right to arbitration of [the agent's] counterclaims." The court concluded that by suing on arbitrable claims, the insurance company "acted inconsistently with its right to arbitrate the legal claims and as a result waived its right to seek arbitration of any claims arising out of the agent agreement." In doing so, the court rejected the argument that the agent, by counter claiming, revived the insurance company's claims, finding that the counterclaims were "reasonably foreseeable in the context of the complaint that was filed." *Wilson v. Aerilife of East Pasco*, 2019 WL 2017576 (Fla. App.).

No Waiver When Party Invoked Right to Arbitrate Early and Often. Plaintiff filed a putative class action against a collection agency alleging deceptive business practices. The collection agency moved to dismiss and, in the alternative, to compel arbitration. The district court granted the motion to dismiss but the Third Circuit reversed, finding that the complaint stated a plausible claim and remanded for further proceedings. On remand, the collection agency moved again to compel arbitration, arguing that the credit card agreement between plaintiff and the creditor contained an arbitration agreement. Plaintiff opposed, arguing that the collection agency waived any right to arbitrate by moving to dismiss the complaint and litigating its motion through appeal and on remand. The district court found otherwise. Holding that the collection agency "has proceeded as a party seeking to arbitrate should proceed: by invoking its right to arbitrate early and often, and by objecting to the further litigation of this dispute," the court refused to infer waiver. *Schultz v. Midland*, 2019 WL 2083302 (D.N.J.).

Case Shorts:

- *Bolden v. DG TRC Management Co.*, 2019 WL 2119622 (S.D.N.Y.) (court rules broad referral of all claims arising out of or with respect to agreement constituted clear and unmistakable delegation of arbitrability question to the arbitrator, noting that "parties need not specifically reference arbitrability in order to demonstrate their intent to arbitrate all issues, including arbitrability").
- *Gingris v. Think Finance*, 922 F. 3d 112 (2d Cir.) (allegation that arbitration clause and, in particular, delegation clause were fraudulent is "sufficient to make the issue of arbitrability one for a federal court").

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Substantive Unconscionability Not Established. A driver for Lyft sued the company alleging it wrongfully classified drivers as independent contractors. Lyft moved to compel, relying on an arbitration agreement the driver signed when he was hired. The motion to compel was granted and the driver appealed. On appeal, the driver argued that the arbitration agreement was substantively unconscionable because it selected the AAA Commercial Rules requiring the parties to split the arbitration fees and because it granted Lyft the unilateral right to modify the agreement's terms. The First Circuit rejected both arguments. Turning first to the AAA Rules, the court noted that when courts evaluate fee-splitting arrangements, they are permitted to consider facts developed during the litigation before them. Here, Lyft had offered to pay all arbitration fees. Therefore, the court held that the driver's argument, and any damage the fee-splitting arrangement would have caused him, were extinguished. The court then examined the modification of terms provision and found that it was not one-sided at all. Rather, the provision required both parties to act before any of the terms could be modified. Lyft was required to provide notice to the driver and the driver had to accept the modification in order for it to be effective. For these reasons, the lower court's order to compel arbitration was affirmed. *Bekele v. Lyft,* 918 F.3d 181 (1st Cir. 2019).

Substantive Unconscionability Determined at Inception of Agreement. The arbitration agreement here required a worker to waive claims including under California's Private Attorneys General Act ("PAGA") statute. Plaintiff brought a wage claim before California's Labor Commission but did not file a PAGA claim and the employer moved to compel. The court ruled that waiver of a PAGA claim, along with other terms, made the arbitration agreement substantively unconscionable. In determining whether the provision is unconscionable, the court held that it must "review the arbitration clause for substantive unconscionability at the time the agreement was made." The court found the agreement to be substantively unconscionable for, among other reasons, it required the worker to share costs of three arbitrators and barred recovery of attorneys' fees and other statutory remedies such as punitive damages and equitable relief. The agreement was also

procedurally unconscionable because the worker had no opportunity to negotiate its terms, was asked to sign it "on the spot", the agreement was in the English and the worker had only limited fluency in English, and the agreement was in small font and was five pages long. The court also found the agreement to be procedurally unconscionable because the applicable AAA rules were neither designated nor was a copy of those rules provided. The court ruled that the defects could not be remedied and declined to sever the unconscionable terms from the agreement and upheld the lower court's refusal to enforce the arbitration agreement. *Subcontracting Concepts (CT), LLC v. De Melo*, 34 Cal. App. 5th 201 (2019). See also *Abedi v. New Age Medical Clinic*, 2019 WL 1760845 (D. N.J.) (discovery ordered with respect to a unconscionability argument where "the determination of unconscionability is based on facts that are not presented in the four corners of the Arbitration Agreement, such as whether deceptive or high-pressured tactics were employed, the experience and education of [plaintiff], and whether there was a disparity in bargaining power").

Case Shorts:

- *Bolden v. DG TRC Management Co.*, 2019 WL 2119622 (S.D.N.Y.) (question of whether arbitration provision precluding discovery is unconscionable is for arbitrator to decide where delegation provision was not directly challenged and therefore "must be treated as valid and enforceable under the FAA").
- *Gutierrez v. FriendFinder Networks*, 2019 WL 1974900 (N.D. Cal.) (clear and unmistakable delegation present where arbitration agreement provided that any claim or dispute is subject to arbitration and where the AAA and JAMS Rules, were incorporated, both of which delegate arbitrability questions to arbitrator).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Sexual Assault Claim Not Arbitrable. Two law firm employees in separate suits accused Morse, the sole owner and the employing law firm's named partner, of sexual assault. The trial court granted the law firm's motion to compel arbitration, but the Michigan appeals court, by a 2 to 1 majority, reversed. The court reasoned that the fact that the sexual assault would not have happened but for employment with the firm "did not provide a sufficient nexus between the terms of the [dispute resolution program] and the sexual assault perpetrated by Morse." The court explained that the sexual assaults were unrelated to employees' roles as receptionist and paralegal. "Furthermore, under no circumstances could sexual assault be a foreseeable consequence of employment in a law firm." The court emphasized that "central to our conclusion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault." On these grounds, the appellate court refused to compel arbitration of these claims. *Lichon v. Morse*, 2019 WL 1217579 (Mich. App.).

Non-Signatories Not Bound to Arbitrate Where Contractual Benefits Indirect. Insureds and competing agents brought a series of arbitrations against an insurance agency and its agents. The respondents moved to compel arbitration against the non-signatory insureds and competing agents as third-party beneficiaries under an Agency Agreement signed by certain of the respondents. The South Carolina Supreme Court ruled that arbitration against non-signatories was not appropriate. The Court explained that non-signatories may be bound to arbitrate their claims where they directly benefit from the terms of the agreement containing the arbitration clause, that is, where a direct benefit "flows directly from the agreement." The Court added that in contrast "any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself." Here, the plaintiffs did not, in the Court's view, knowingly exploit or receive a direct benefit from the Agency Agreement. The Court found that the Agency Agreement "was purely for the benefit of the parties to the contract in outlining their business relationships and rights of the parties to the Agency Agreement." Indeed, plaintiffs did not know the Agency Agreement existed until the litigation was filed. For these reasons, the Court refused to apply the equitable estoppel doctrine and rejected the application to compel arbitration of the dispute. *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019). See also *McCullough v. Royal Caribbean Cruises*, 2019 WL 2076192 (S.D. Fla.) (non-signatory may not be bound under New York Convention based on third party-beneficiary or estoppel theories).

Employee Bound to Arbitrate Claim Against Non-Signatory Employer. An offer of employment was made to Noye by Kelly Services for work with Johnson & Johnson. Noye signed an employment agreement with J&J's logo on it, and an arbitration agreement bearing Kelly's logo. In the documentation Kelly was identified as the "employer" and J&J the "customer". Kelly obtained a consumer report for Noye and J&J informed Kelly that it "would not be hiring him." Noye brought a class action under the Fair Credit Reporting Act against Kelly and J&J asserting some of the same claims against both. The district court compelled arbitration as to Kelly, but not J&J. On appeal, the Third Circuit vacated and ruled that Noye must arbitrate his claims against J&J as well. The Third Circuit, applying Pennsylvania's equitable estoppel doctrine, noted that the claims raised by Noye against both J&J and Kelly were indistinguishable as they stemmed from the same incidents and invoke the same legal principles. The court pointed out that Noye's FCRA claim resulted from his employment relationship and the arbitration agreement contemplated the arbitration of employment disputes. Also, "Noye alleges concerted and interdependent misconduct by J&J and Kelly, collectively accusing them . . . of failing to provide Noye with proper background check information." For this reason, the court vacated the district court's order denying J&J's motion to compel. *Noye v. Johnson & Johnson Services*, 2019 WL 1499858 (3d Cir.). See also *Fridman v. Uber Technologies*, 2019 WL 1385887 (N.D. Cal.) (motion to stay denied for related class action filed by non-signatory who was not bound to arbitrate).

Equitable Estoppel Claim Rejected. Plaintiff worked in Tesla's Fremont, California factory for six months. During that time, he applied for a position as a permanent production associate and Tesla offered him the job. Tesla's offer letter contained an arbitration agreement providing: "If you choose to accept our offer . . . please indicate your acceptance, by signing below and returning it." Plaintiff never signed or returned the offer letter and Tesla withdrew the offer about two weeks later. Plaintiff then filed a putative class action against Tesla claiming discrimination and harassment stemming from his employment as a factory worker. Tesla moved to compel arbitration, arguing in part that although plaintiff never signed the arbitration agreement contained in the offer letter, the doctrine of equitable estoppel applied. Tesla reasoned that plaintiff's claims relied "on the existence of an employment relationship with Tesla, and in turn, the [offer letter] containing the arbitration agreement." The trial court denied the motion to compel, noting that the offer letter "was apparently intended to supersede some other contractual relationship" between the parties. The trial court also expressed "no opinion on the existence, terms, or effect of whatever contractual relationship governed the relationship between [the parties]" when plaintiff worked in the Fremont, California factory. On appeal by Tesla, the appellate court agreed that plaintiff was not relying on the offer letter to hold Tesla liable, and that the offer letter did not control the terms of his employment as a factory worker. The court therefore affirmed the lower court's denial of the motion to compel, holding that "the basis for equitable estoppel - relying on an agreement for one purpose while disavowing the arbitration clause of the agreement - is completely absent." *Vaughn v. Tesla*, 2019 WL 2181391 (Cal. App.).

Use of Website Constitutes Acceptance of Terms of Use. Plaintiff alleged that he used the adult dating website AdultFriendFinder for 20 years. The website did not require acknowledgement of acceptance of the Terms of Use but rather adopted the browse wrap approach which assumes consent based on notice of the Terms of Use and use of the website. A dispute arose and the defendant moved to compel arbitration based on an arbitration requirement in the Terms of Use. The court granted the motion, finding that under prevailing Ninth Circuit law the plaintiff did not need to affirmatively assent to the Terms of Use in order to be bound by them. Here, "he continued to use the website knowing that his use of the site was governed by the Terms." The court concluded "because Plaintiff had at least inquiry notice of his need to comply with the Terms in using the website, and he continued to use this site knowing he was bound by the Terms, the Court holds that Plaintiff accepted the Terms by using the site." *Gutierrez v. FriendFinder Networks*, 2019 WL 1974900 (N.D. Cal.).

Electronic Acceptance of Arbitration Agreement Sufficient. A Southwest Airlines employee sued the company for wage and hour violations and Southwest moved to compel arbitration. In support of its motion, Southwest presented evidence about its employee communication intranet, which it uses to distribute certain employment policies to its workers. Employees are given unique login credentials. When they login to the intranet,

any new policies or company announcements are posted on the main page. Electronic links to the written policies are provided and the employees are instructed to "CHECK THE BOX" to acknowledge they received, read, and reviewed the policies and that they understand and agree to comply with them. No actual signature is required but when an employee checks the box, an electronic record is created in Southwest's database with the employee's name, identification number, and the date and time that the employee executed the acknowledgement. Southwest presented a report of plaintiff's history accessing the intranet which showed that the employee checked the box affirming receipt of the arbitration agreement on August 14, 2017. Noting that the employee did not dispute whether she checked the box but "only generally declares that she 'could bypass' the announcements, and 'if' she checked the box, she did not understand what she was doing," the court found that no material issue of fact existed. Therefore, the court held that Southwest met its burden of authenticating the employee's signature and an arbitration agreement was formed. On this basis, Southwest's motion to compel was granted. *Tanis v. Southwest Airlines, Inc.*, 2019 WL 1111240 (S.D. Cal.). See also *In re: Randall Holl*, 2019 WL 2293441 (9th Cir.) (on-line arbitration provision enforceable, despite requiring "fair amount of web-browsing intuition" where "it is clear that a party is assenting to a contract that incorporates other documents by reference, the incorporation is valid – and the terms of the incorporated document are binding").

Trial Necessary to Resolve Genuine Issues of Fact on Whether Agreement Was Formed. A potential customer of concert promoter Live Nation sued the company for violations of the Americans with Disabilities Act after discovering that its website did not have wheelchair-accessible seating available at a concert venue. Live Nation moved to compel arbitration, arguing that in order to navigate its website, the customer must have agreed to its terms of use, which included an arbitration agreement. Live Nation also argued that the customer had previously purchased tickets through its ticket website and must have agreed to its terms of use then. The customer disputed that claim, claiming he never saw or agreed to the terms of use when he visited Live Nation's website. Applying a summary judgment standard, the district court held that Live Nation did not meet its burden to prove that the parties had agreed to arbitrate. On appeal by Live Nation, the Third Circuit explained that a district court should only use a summary judgment standard to decide a motion to compel arbitration when no genuine dispute of material fact exists. However, where, as here, genuine issues of fact exist as to whether the agreement was formed, a trial is necessary. Finding that the lower court erred in applying a summary judgment standard, the court vacated its order and remanded the case for trial on the existence of an arbitration agreement. *Egan v. Live Nation Worldwide, Inc.*, 764 F. App'x 204 (3d Cir. 2019). See also *Abedi v. New Age Medical Clinic PA*, 2019 WL 1760845 (D. N.J.) (expedited discovery ordered on the issue of arbitrability where arbitration agreement ruled ambiguous; arbitration issue will be addressed on summary judgment or at trial).

Signature Not Required for Arbitration Agreement. A former employee filed an action in court alleging various employment discrimination claims against her former employer. The employer moved to compel arbitration, relying on an arbitration agreement that the company emailed to all its employees. The arbitration agreement required all employees who did not wish to be bound by it to opt out by emailing the company within fourteen days of receiving it. The former employee did not opt out but also did not sign the agreement and therefore argued it was invalid and unenforceable. The court disagreed, finding that the lack of signature was immaterial and did not render the arbitration agreement invalid. The court granted employer's motion to compel arbitration, holding that the employee's failure to opt out and continued employment with the company demonstrated acceptance as well as the consideration required for an enforceable agreement. *Hoffman v. Compassus*, 2019 WL 1791413 (E.D. Pa.). See also *Gray v. Uber, Inc.,* 362 F. Supp. 3d 1242 (M.D. Fla. 2019), reconsideration denied, 2019 WL 1785094 (M.D. Fla. Apr. 10, 2019) (court rejects Uber driver's claim that he opted out of enforceable arbitration agreement and compelled arbitration of his claims where driver's evidence was conclusory and did not allege that the decision to opt out was timely). Cf. *Schultz v. Midland*, 2019 WL 2083302 (D.N.J.) (existence of an enforceable arbitration agreement not apparent when defendant relied on an exemplar agreement that did not contain plaintiff's signature or personally identifying information.); *Diaz v. Sohnen Enterprises*, 34 Cal. App. 5th 126 (2019) (arbitration compelled even though employee refused to sign arbitration agreement as continued employment constituted consent to employer's dispute resolution policy).

Arbitration Agreement Ruled to Exist Despite Employee's Failure to Recollect its Receipt. Knepper, a former lawyer with Ogletree Deakins, did not recall receiving the various e-mail transmissions relating to the firm's arbitration agreement and the employee's right to opt out of it. The firm was able to demonstrate both the transmission of the emails and that Knepper responded to one of them agreeing to turn in the agreement. The court rejected Knepper's argument that an evidentiary hearing was required on the issue. "Even taken in the light most favorable to Knepper, the only potential dispute is whether Knepper read the three e-mail notices, not whether she received them." The court also rejected Knepper's argument that no agreement was formed because she did not affirmatively agree to the obligation to arbitrate. The court found that Knepper was on notice that she could opt out of the agreement and continued to work after that date set by the firm to opt out. For these reasons, the court granted Ogletree Deakins' motion to compel arbitration of Knepper's claim. *Knepper v. Ogletree Deakins*, 2019 WL 1449502 (C.D. Cal.).

Case shorts:

- *Alliance Family of Companies v. Nevarez*, 2019 WL 1486911 (Tex. App.) (arbitration clause in nondisclosure agreement not applicable to claims of sexual assault and battery by employee against employer's CEO).

- *Liu v. Four Seasons Hotel*, 2019 Ill. App. (1st) 182645 (claims under Illinois' Biometric Information Privacy Act not encompassed by arbitration agreement covering wage and hour claims despite employer's claim that biometric data, i.e. fingerprints, were collected solely for timekeeping purposes).
- *Leber v. Citigroup*, 2019 WL 1331313 (S.D.N.Y.) (dispute between two firms regarding allocation of fees awarded by court must be submitted to mediation and arbitration in accordance with the terms of the co-counsel agreement).
- *SMJ Gen. Constr., Inc. v. Jet Commercial Constr., LLC*, 440 P.3d 210 (Alaska 2019) (settlement agreement releasing any and all claims between the parties precludes subsequent arbitration as obligation to arbitrate was released with all other obligations between the parties).
- *Medford Township School District v. Schneider Electric Buildings Americas*, 2019 WL 1868233 (N.J. App.) (party may not be required to arbitrate dispute where arbitration clause provides that claims "may be settled" by arbitration rendering arbitration permissive, not mandatory).
- *Monfared v. St. Luke's University Health Network*, 2019 WL 2068315 (3d Cir.) (arbitration appropriately compelled where agreement requires arbitration "if a dispute or claim should arise" which the court ruled as "functionally equivalent to more standard language that would expressly sweep in any claim" relating to plaintiff's employment).
- *Philbin v. Carneros Resort and Spa*, 2019 WL 1783718 (Cal. App.) (arbitration denied were agreement did not identify specific "employer" bound by the agreement where several changes of ownership occurred).

V. CHALLENGES TO ARBITRATOR OR FORUM

FINRA Arbitration Enjoined. When plaintiff joined MetLife's premium client division in 2002, MetLife was a NASD member and he registered with the NASD. MetLife terminated its NASD membership in 2007. Plaintiff was terminated in 2016 and filed an arbitration raising claims dating back to 2011. MetLife moved for and obtained a preliminary injunction barring plaintiff from pursuing his arbitration. The Second Circuit, in affirming the preliminary injunction, reasoned that the NASD and later the FINRA code could not "reasonably be interpreted to provide for arbitration of [the plaintiff's] claims" because the events at issue occurred years after MetLife terminated its NASD membership. The court found that plaintiff's interpretation that MetLife was still bound to arbitrate his claims would produce "untenable" and "absurd results" that could not have been intended by the parties. *Metropolitan Life Insurance v. Bucsek*, 919 F. 3d 184 (2d Cir. 2019).

VI. CLASS & COLLECTIVE ACTIONS

Supreme Court Rules Ambiguous Contractual Terms Insufficient Basis for Class Arbitration. The Supreme Court in *Stolt-Nielsen* ruled that agreements that were silent regarding class arbitration would not support compelling such arbitration. The Court now extends that ruling by holding that the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis." Here, the employee signed an arbitration agreement that provided that "any and all disputes, claims or controversies arising out of or relating to . . . the employment relationship between the parties" was required to be arbitrated. The Ninth Circuit, applying California law, ruled that the agreement was ambiguous with respect to class arbitration and, applying general contract principles holding that any ambiguity is to be read against the drafter, compelled class arbitration. By a 5-4 majority, the Supreme Court reversed. The Court reasoned that "[l]ike silence, ambiguity did not provide a sufficient basis to conclude that parties to an arbitration agreement" agreed to the benefits that come with bilateral arbitration such as expedition, simplicity, and cost savings. The majority emphasized that consent is essential in arbitration "because arbitrators wield only the authority they are given." Class arbitration, according to the majority, lacks the traditional benefits of bilateral arbitration and is likely to create a procedural morass and serious due process concerns. The majority compared the issue here to gateway questions where the Court has consistently held that such questions are presumed to be for the court rather than the arbitrator – silence or ambiguous terms are insufficient to overcome that presumption. The majority also reasoned that the otherwise neutral contract principle that ambiguity is to be construed against the drafter did not apply here because arbitration is a matter of consent and that this contract principle by its terms only applies after a court cannot discern the parties' intent. For this reason, the majority concluded that courts "may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (U.S.).

Notice of Collective Action Sent to Arbitration Eligible Employees. The court granted conditional certification of a wage and hour case involving the overtime eligibility of Facebook's Client Solutions Managers (CSMs). Over half and as much as 80% of the collective signed arbitration agreements and class action waivers. Facebook argued that notice should not be sent to the CSMs who signed arbitration agreements. The district court here acknowledged that courts were divided as to whether notice of a collective action should be sent to employees who signed arbitration agreements. The court concluded that notice should be sent to those arbitration-eligible employees. The court noted, however, that Facebook was not in a position to move to compel because the sole plaintiff here did not sign an arbitration agreement. In effect, the court reasoned, Facebook would be asking the court to issue an advisory opinion which it could not and would not do. The court also pointed out that the question of whether arbitration agreements are enforceable is a merits-based decision which was not appropriately addressed at the

conditional certification stage. Because two different arbitration agreements were at issue and state law contract principles govern contract formation, the court concluded that it would "determine whether to exclude CSMs who signed arbitration agreements at the conclusion of discovery, when it can properly analyze the validity of any arbitration agreements to which the opt-in plaintiffs may be a party." *Bigger v. Facebook, Inc.*, 375 F. Supp. 3d 1007 (N.D. Ill. 2019).

Case Shorts:

- *Herrington v. Waterstone Mortgage*, 2019 WL 1966314 (W.D. Wisc.) (class arbitration award of over $10,000,000 overturned where court had previously ruled class action waiver unenforceable under the NLRA which was later rejected by the Supreme Court in the *Epic Systems* decision).
- *Horton v. Dow Jones & Co.*, 2019 WL 952314 (S.D.N.Y.) (class action waiver present in arbitration provision ruled not limited to waiving class claims in arbitration where language, although in the arbitration setting, also referenced waiver of "class actions" and therefore applied to class actions in court).

VII. HEARING-RELATED ISSUES

Vacatur Based on Refusal to Hear Rebuttal Testimony Denied. An expert witness for claimant testified before a FINRA arbitration panel. Weeks after the expert's testimony was completed, respondent discovered that 30,000 pages of documents arguably contradicting the expert's testimony had not been produced. The panel granted claimant's motion to strike the expert's testimony in full, to draw an adverse inference against claimant, and ordered that respondent's fees for making the motion be paid by claimant. The panel also denied claimant's request to submit rebuttal testimony which was offered contrary to the panel's instructions and belatedly. Following an award in favor of respondent, claimant moved to vacate, arguing among other things that the refusal to hear rebuttal testimony prejudiced its case and the panel was guilty of misconduct in refusing to hear pertinent evidence. The court reviewed the parties' submissions to the panel with respect to this issue, as the panel offered no opinion with respect to its decision and concluded that the panel had "a reasonable basis to exclude the proposed rebuttal testimony." The court noted that the panel gave claimant a fair opportunity to present its case in chief (the hearing lasted 25 days) and accommodated claimant's "11th-hour request" to submit rebuttal testimony. The court also rejected claimant's argument that the panel arbitrarily applied evidentiary rules. The court explained that the panel's decision to apply the Federal Rules of Evidence occurred only after claimant's "attempt to essentially sandbag" respondent and the panel's warning, in its words, that the "full range of sanctions available to the panel may be imposed" for any "additional noncompliance" and in an effort to "stop trial by ambush." The court ruled that none of the panel's rulings rose to "the level of

misconduct demonstrating that the procedure was fundamentally unfair, and therefore vacatur is not warranted." *CRT Capital Group v. SLS Capital*, 2019 WL 1437159 (S.D.N.Y.).

Case Shorts:

- *Vantage Deepwater Co. v. Petrobras America*, 2019 WL 2161037 (S.D. Tex.) (dissenting arbitrator's claim that the proceeding denied respondent "the fundamental fairness and due process protections meant to be provided to arbitrating parties" not sufficient grounds to vacate award, particularly where the court found no support in the record for the claim that respondent was denied a fair arbitration or that the arbitration was fundamentally flawed).
- *Vantage Deepwater Co. v. Petrobras America*, 2019 WL 2161037 (S.D. Tex.) (refusal to order third-party depositions did not deprive party of a fair hearing).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Award Vacated on Manifest Disregard Grounds. The panel awarded damages and pre-award interest in this case. Following a motion to modify the award, the panel issued an amended award reducing the interest by over $2 million based on what it represented to be "a computational error when calculating interest [by] compounding interest . . .." Upon review, the district court concluded that "the arbitration panel exceeded its powers when it modified the calculation made in the final award that did not contain any evident material miscalculation of figures to conform it to the calculation it 'intend[ed]' to perform that contained substantive changes in the calculation method." The court made clear that the panel's amendment of its final award was more than a modification based on a calculation error. Rather, the "arbitration panel acknowledged the well-defined, explicit and clearly applicable law prohibiting the arbitration panel from exercising jurisdiction over an issue of law already determined in the final award and raised for the first time after the final award issued, but decided to ignore it and proceeded: (a) to discuss the merits of the substantive argument raised by the claimants; (b) rejected the claimants' legal argument; and (c) reverse its determination made in the final award by subtracting the distribution payments from the principal." For these reasons, the court concluded that the arbitration panel acted in manifest disregard of the law. *Credit Agricole v. Black Diamond Capital*, 18-CV-7620 (KNF) (S.D.N.Y. March 22, 2019). See also *Arabian Motors Group v. Ford Motor Co.*, 2019 WL 2305313 (6th Cir.) (manifest disregard claim rejected when the legal issue decided "has not been clearly established by any existing legal principles" and the "arbitrator applied traditional tools of statutory interpretation without the aid of precedent that directly addressed the question"); *Business Credit & Capital II v. Neuronexus*, 2019 WL 1426609 (S.D.N.Y.) (manifest disregard challenge based on claim that arbitrator misapplied governing usery laws rejected where arbitrator cited "dozens of appropriate New York cases" supporting his decision).

Appearance of Bias Insufficient to Prove Evident Partiality. A member of an arbitration panel disclosed that his former law clerk from the Iran-United States Claims Tribunal was a partner in the law firm representing claimant. The former law clerk was not involved in the arbitration. Respondent objected to the continuing participation of the panelist, and this objection was rejected by the ICDR. An award was issued in favor of claimant and respondent moved to vacate, arguing evident partiality on the part of the panelist whose former law clerk was a partner in claimant's law firm. The court rejected respondent's claim. The court explained that the "standard for assessing evident partiality is not the mere appearance of bias." The court reasoned that even if the former law clerk was involved in the arbitration, which was not the case, "this would not be a significant compromising relationship that establishes clear bias in an arbitrator. It is common knowledge in the legal profession that former law clerks regularly practice before judges for whom they once clerked. The court also rejected respondent's claim that the arbitrator's "aggressive questioning" of a witness in the hearing and snide off-the-record comments constituted evident partiality. While respondent may feel that the alleged comments made by the arbitrator such as "ridiculous" and "asked and answered" were inappropriate, "these same comments can be viewed as [the arbitrator's] effort to move the proceeding along or an expression of his perception that the questions were repetitive or irrelevant." Finally, the court found no basis to vacate based on the arbitrator's aggressive questioning and alleged interference with the Chair's ability to run the hearing. The court concluded that in "light of the strict standard of review of arbitration awards, a reasonable person would not have to conclude based on the facts before this Court that [the arbitrator] was evidently partial toward [respondent]." *Vantage Deepwater Co. v. Petrobras America*, 2019 WL 2161037 (S.D. Tex.).

Fifth Circuit Provides Contours For Reasoned Award. An accounting firm issued a final determination under an engagement letter and a sale and purchase agreement that required "reasoning supporting the determination." The accounting firm determined that $9.8 million was owed under the governing agreements but failed to provide its arithmetical calculations. The losing party moved to vacate, arguing that the accounting firm failed to provide its reasoning as required by the engagement letter and sale and purchase agreement. The Fifth Circuit, noting that it had never given a specific definition of a reasoned award, ruled that the determination in fact constitutes a reasoned award. The court explained that an arbitrator issues a reasoned award when the arbitrator has laid out the facts, described the parties' contentions, and decided who prevailed. In this case, the court found that the accounting firm "noted that it based its analysis on the parties' statements and accounting records, pointed to its finding on the accrual of liabilities, and explained what documentation it found relevant in evaluating the proper refund amount." The Fifth Circuit concluded that on this basis a reasoned award had been issued and confirmed the award. *YPF S.A. v. Apache Overseas*, 2019 WL 2237343 (5th Cir.).

Punitive Damages Award Reversed. A punitive damages award was reversed in an action between Twentieth Century Fox and certain actors, producers, and creators involved in the television series *Bones*. Fox was alleged to have breached their license agreements by licensing the television series to its affiliated networks for less than what an unaffiliated network might have paid, thereby negatively affecting plaintiffs' guaranteed contingent commissions. A California court ordered the parties to arbitration. The arbitrator ultimately ruled in favor of plaintiffs, awarding approximately $33 million in actual damages and $128 million in punitive damages. The parties returned to court, with plaintiffs moving to confirm the award and Fox moving to vacate or correct it. Fox argued that the arbitrator exceeded his authority because the agreements at issue expressly waived any right to punitive damages. Plaintiffs opposed, arguing that Fox waived its right to challenge the award by submitting the entire complaint to arbitration and agreeing that the causes of actions were "fully arbitrable." The court found in favor of Fox, holding that the agreement contained a clear and unambiguous provision waiving the right to seek or obtain punitive damages. The court refused to imply an agreement concerning the arbitrator's authority when there was an express contractual provision limiting it. The court also found that the record of the arbitration proceedings showed that "Fox clearly and cogently raised its objections to the arbitrability" of punitive damages. Accordingly, Fox's motion to correct the award was granted and the punitive damages were stricken from the award. *Wark Entertainment, Inc. v. Twentieth Century Fox Film Corp.*, 2019 WL 2137607 (Cal. Super.).

Partial Final Award Ruled Not Subject to Review. The arbitration panel issued a partial final award in which it decided to hold the respondents' amended counterclaims for the later "phase II" proceeding. Plaintiff moved to confirm the partial final award. The district court concluded that it lacked subject matter jurisdiction because the partial final award was not final and ripe for review. The court noted that although the award had the word final in its title, it was "incomplete in the sense that it leaves unresolved significant portions of the parties' multifaceted dispute regarding their performance" under the applicable agreement. The court pointed out that the parties had expressly scheduled phase II of the arbitration proceedings, so the panel's assignment was not complete. The court concluded that "this matter is not ripe for adjudication because the Panel's arbitration award was not a complete determination of all the issues submitted to the Panel." *Standard Security Life Insurance Co. v. FCE Benefit Administrators*, 2019 WL 1168109 (N.D. Ill.).

Remand Ordered Where Arbitrator Failed to Issue Requisite Reasoned Award. The parties requested a reasoned award. Following a hearing, the arbitrator issued a six-page award but did not explain why the counterclaims were dismissed. The court, on a motion to vacate, concluded that the award "does not meet the standard for a reasoned award because it contains no rationale for rejecting" respondent's counterclaims. Rather, the court found that the arbitrator in a "conclusory" manner stated that the evidence did not support the counterclaims but did not provide any reason for this finding other than a negative credibility determination with respect to respondent's expert witness relating to damages.

"Although the arbitrator was not obligated to discuss each piece of evidence presented by [Defendant], he must at least provide some rationale for the rejection of [respondent's] overall argument" for liability. On this basis, the court concluded that the award was not reasoned. The court, however, rejected respondent's request that it vacate the award, a remedy the court concluded must be "strictly limited." Rather, the court determined that "the proper remedy is to remand to the arbitrator for clarification of his findings." The court added that, as the arbitrator exceeded his authority, the award could not be confirmed at this time. *Smarter Tools v. Chongqing Senci Import and Export Trade Co.*, 2019 WL 1349527 (S.D.N.Y.).

Case shorts:

- *Konoike Construction Co. v. Ministry of Works, Tanzania*, 2019 WL 1082337 (D.D.C.) (defendant's reason for defaulting on motion to confirm, that it believed settlement of dispute was probable, was willful and not good cause to set aside a default and therefore arbitration award against defendant was confirmed).

IX. ADR – GENERAL

Settlement Agreement in Mediation Enforced. The parties reached an agreement in a court-annexed mediation. The settlement terms were memorialized in a Mediation Agreement which listed in summary fashion nine terms and concluded by reciting that the parties have "reached a settlement, the terms of which appear above. A formal settlement agreement will be finalized by July 30, 2018." The parties never agreed on a formal settlement agreement because they could not agree on a cap for fees in the event of a litigation to enforce the parties' agreement. Defendant's motion to enforce the Mediation Agreement was granted. The court focused on the parties' intent in executing the Mediation Agreement. The court cited the parties' express acknowledgement that they "reached a settlement" and informed the court that they had done so. "The text of the Mediation Agreement thus supports the conclusion that the parties understood it to state the material terms of a settlement to which all of them had agreed." The court added that the agreement was reached with counsel and in a court-annexed mediation with a court-appointed mediator. Finally, the court emphasized that "the Mediation Agreement contained no reservation of the right not to be bound in the absence of the contemplated formal settlement agreement, and this factor accordingly weighs in favor of enforcement. There has also been partial performance, at least to the extent that the parties began drafting a final agreement and allow the Court's ADR Administrator to report that the case has settled without correction or comment for nearly seven weeks thereafter." For these reasons, the court ruled that the Mediation Agreement constituted a binding settlement agreement. *Rivera v. The Crabby Shack, LLC*, 17-CV-4738 (SMG) (E.D.N.Y. May 1, 2019).

Auto Appraisal Process Constitutes Arbitration Under FAA. The FAA does not define arbitration. An insured disputed the amount that GEICO paid under an insurance policy, and the insured sued. GEICO sought to compel an appraisal as provided for under the applicable insurance policy. The trial court denied the motion, and the Second Circuit affirmed. But in doing so, the court analyzed whether an insurance appraisal process constitutes an "arbitration" under the FAA in determining whether it had appellate jurisdiction. The court made clear that the parties did not need to use the word arbitration for an arbitration under the FAA to exist. What is required, according to the court, is a clear manifestation of the parties' intent to submit a dispute to a specified third-party for a binding resolution. The court ruled that the appraisal process qualified as an arbitration under the FAA. "The appraisal provision identifies a category of disputes (disagreements between the parties over 'the amount of loss'), provides for submission of those disputes to specified third parties (namely, two appraisers and the jointly-selected umpire), and makes the resolution by those third parties of the dispute binding (by stating that '[a]n award in writing of any two *will determine* the amount of the loss')." These facts were sufficient, the court concluded, for the appraisal process to constitute an arbitration under the FAA. *Milligan v. CCC Information Services*, 920 F. 3d 146 (2d Cir.).

Court Orders Sealing of Arbitration Documents. Penn National and its reinsurer, Everest, entered into a series of loss reinsurance agreements, all of which contained arbitration provisions. The parties disputed whether an arbitration panel previously used by the parties should decide certain procedural issues or whether a newly-appointed panel should be formed. Both parties filed motions to compel with supporting documentation. Penn National also filed a motion to seal the reinsurance agreements and its arbitration demand, citing the commercially sensitive nature of the documents. The court began its analysis of the motion to seal by weighing certain factors set forth by the Third Circuit, including (1) whether disclosure will violate any privacy interests; (2) whether disclosure will cause embarrassment; (3) whether confidentiality is being sought over information important to public health and safety; (4) whether sharing information among litigants promotes fairness and efficiency; (5) whether the party seeking confidentiality is a public entity or official; and (6) whether the case involves issues important to the public. Weighing these factors, the court found that Penn National has a "significant privacy interest in [its] reinsurance contracts . . .. Because the various [reinsurance] agreements are likely similar but not necessarily identical, disclosure of the precise terms of any one agreement could reasonably have a significant impact on Penn National's ability to negotiate other agreements with different reinsurers." Therefore, the court concluded, the potential harm to Penn National "substantially outweighs" the public's minimal interest in having access to private commercial agreements concerning a private business relationship. The motion to seal was granted. *Pennsylvania National Mutual Casualty Insurance Company v. Everest Reinsurance Company*, 2019 WL 1205297 (M.D. Pa.).

X. COLLECTIVE BARGAINING SETTING

NLRB Rules Employer Can Seek to Enforce Arbitration Agreement. Matthew Brown agreed to submit any dispute to Anheuser-Busch's Dispute Resolution Program when he applied for employment. Once hired, Brown was represented by a union. Brown sued Anheuser-Busch for race discrimination following his termination, and Anheuser-Busch moved to compel. The employee filed an unfair labor practice charge with the NLRB, arguing that Anheuser-Busch's dispute resolution program had been unilaterally implemented without the union's consent. By a 2-1 vote, the Board ruled that Anheuser-Busch's motion to compel was a protected exercise of its First Amendment right to petition and concluded that employers may seek to enforce pre-hire arbitration agreements against former employees who are union members while employed. The Board rejected the employee's claim that Anheuser-Busch had an illegal objective in filing its motion since dispute resolution programs are legal. *Anheuser-Busch, LLC*, 367 NLRB 123 (May 22, 2019).

XI. NEWS AND DEVELOPMENTS

Proposed Amendments to NLRA. Democratic lawmakers have introduced new legislation in both the Senate and the House proposing wide-ranging amendments to the National Labor Relations Act. The Protecting the Right to Organize Act has several components, including a ban on the waiver of class and collective actions, which was a direct response to the U.S. Supreme Court's decision in *Epic Systems v. Lewis*. Another feature of the bill includes a change to the current procedure for employees to allege violations of the NLRA, permitting them to bypass the current procedure of first turning to the NLRB and go directly to court instead. The Act also requires employers to disclose efforts to fight union drives; prohibits companies from requiring employees to attend meetings encouraging them to vote against union representation; tightens up tests on the classification of workers, and; enhances unions' rights to collect bargaining costs.

New York State Court Announces "Presumptive" ADR Program. The New York State Unified Court System is rolling out a new ADR program in September 2019. A broad range of civil cases, from personal injury and matrimonial cases to estate matters and commercial disputes, will, at the onset of the case, be directed to ADR. The court system will issue uniform rules to authorize, endorse, and provide a framework for courts and individual jurisdictions will develop local protocols, guidelines, and best practices to facilitate the process. Comprehensive data will be collected to help evaluate the progress of court-sponsored ADR programs and allow for changes to improve the performance of programs going forward. In announcing the new program, Chief Administrative Judge Marks said "Court-sponsored ADR has a proven record of success, with high settlement rates and strong user satisfaction among litigants and lawyers. We are eager to move ahead as we bring ADR into the mainstream, offering a far broader range of options to conventional

litigation in our ongoing efforts to streamline the case management process and better serve the justice needs of New Yorkers."

NJ Law Bans Mandatory Nondisclosure of Certain Employment-Related Claims. New Jersey Governor Phil Murphy signed a bill, introduced at the height of the #MeToo Movement, that voids any employment agreement containing a mandatory nondisclosure provision relating to a claim of discrimination, retaliation, or harassment. The law does not create an absolute ban, however. It allows parties to agree to such a provision. Some critics have raised concerns about victim privacy, claiming the employee should be given the right to choose whether the claims are protected by confidentiality or not. In addition, some critics raised concerns about a potential conflict with federal arbitration law. During the committee hearing, the New Jersey Civil Justice Institute stated that the legislation may be in contravention to the FAA which preempts state law precluding arbitration agreements.

Kentucky Law Restores Employers' Right To Require Mandatory Arbitration Agreements. Kentucky Governor Matt Bevin signed into law Senate Bill 7 on March 25, 2019, restoring the rights of Kentucky employers to require employees to arbitrate claims as a condition of employment. The new law was a direct response to a recent decision issued by the Supreme Court of Kentucky in *Northern Kentucky Area Development District v. Snyder*, No. 2017-SC-000277-DG (Ky. Sept. 27, 2018) which held that the FAA did not preempt a Kentucky statute prohibiting employers from requiring employees to sign arbitration agreements as a condition of employment. The law now retroactively permits employers to require arbitration agreements as a condition of employment or continued employment. It also allows the parties to contractually limit the time period in which employees must file employment-related claims, allows an employer to require, as a condition of employment, a background check, and establishes certain procedural requirements for arbitration between the parties to safeguard their legal rights.

XII. TABLE OF CASES

Cases