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AAA Panel Case Summaries
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I. JURISDICTIONAL ISSUES: GENERAL

Arbitration Waived Where Litigation Substantially Invoked. Defendant cable company inserted arbitration clauses into customer contracts after a class action in 2009. In 2012, the cable company moved to dismiss and oppose class certification in a subsequent class action. After that motion was dismissed, the cable company petitioned for leave to appeal and when that was denied moved for summary judgment. At the same time it moved for summary judgment, the cable company asserted its right to arbitrate claims. The Tenth Circuit denied the motion to compel, finding that the cable company's delay in asserting its arbitration rights until shortly before trial constituted a waiver of such rights as the litigation machinery had been substantially invoked. The court found that the cable company's "heads I win, tails you lose" approach to the class action would cause substantial prejudice to the plaintiffs and would serve to waste substantial judicial resources. *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litigation*, 790 F.3d 1112 (10th Cir. 2015).

Defensive Participation in Litigation Not Waiver of Arbitration. A developer impleaded the general contractor into an insurance litigation. The general contractor pursued pre-trial motions and participated in discovery and then moved to compel arbitration. In affirming the granting of that motion, the Texas Supreme Court rejected the claim that the general contractor had waived arbitration by actively participating in the litigation. The Court noted that the general contractor's motion to transfer venue was intended to add efficiency by consolidating various claims in one venue and that its other actions were defensive in nature. While recognizing that the general contractor "could have been more prompt", the Court ruled that under the totality of the circumstances the general contractor had not "substantially invoked the litigation process." The Court also declined to rule on the timeliness of the arbitration under the arbitration agreement, concluding that the timeliness question was procedural and that procedural arbitrability issues were properly addressed to the arbitrators. *G. T. Leach Builders v. Sapphire V. P.*, 458 S.W. 3d 502 (Tex. 2015).

Waiver Argument Rejected and Arbitration Compelled. A dispute arose after a settlement agreement and consent decree was entered into which contained an arbitration clause. Plaintiff argued that defendant waived arbitration by its failure to seek arbitration earlier and by its participation in the litigation. The Sixth Circuit rejected these claims, finding that defendant's silence in response to the initial notice of a dispute was mere posturing and did not serve to prejudice plaintiff. Moreover, the Sixth Circuit found that defendant's participation in the litigation was defensive and was based in part on a pending motion it

made challenging intervention by a party. *Shy v. Navistar International Court*, 781 F.3d 820 (6th Cir. 2015).

Retroactive Effect Not Given to Arbitration Agreement. Two salesmen began their relationship with Cellular as independent contractors. Indeed, they were required to establish individual LLCs and become their only employee. A year and a half later, they entered into an employment relationship with Cellular under a compensation agreement that included an arbitration clause. The salesmen brought suit alleging that they were misclassified as independent contractors during their preliminary term with Cellular, and Cellular moved to compel arbitration. The Second Circuit refused to compel arbitration, finding that when the compensation agreements were signed "the parties' contractual positions changed in a way that impacted arbitrability." The court concluded that Cellular's "change in course is just the type of positive assurance required to show that the parties did not intend for the arbitration clause to cover the current dispute." Notably, this panel of the Second Circuit took issue with the decision of another panel, *Lloyd v. J. P. Morgan Chase*, 791 F.3d 265 (2d Cir. 2015). The court in this case rejected the *Lloyd*'s court statement, which it characterized as *dicta*, that the presumption of arbitrability was "soft" and instead applied existing Second Circuit law requiring a positive assurance to rebut the presumption of arbitrability. *Holick v. Cellular Sales of New York*, 802 F.3d 391 (2d Cir. 2015).

Continued Employment Constitutes Consent to Arbitrate. The employee here began employment in 1991 and an arbitration provision was added to the employee handbook in 1993. The record reveals that the employee acknowledged the handbook on computer screen shots years later. The Second Circuit ruled that there was sufficient acknowledgement, as evident in the continued employment and agreement to the handbook terms, to render the arbitration provision enforceable against the employee. The court rejected the employee's claim that she had no knowledge or recollection of agreeing to the handbook terms. The employee's "bare denials" were insufficient to defeat the motion to compel. Instead, the court ruled that the employee must provide evidentiary facts sufficient to demonstrate a dispute of fact to be tried, which was not the case here. *McAllister v. East*, 611 Fed. Appx. 17 (2d Cir. 2015).

Exhaustion of Administrative Remedies Not Required. The arbitration agreement here required that the arbitration be initiated within six months of the arising of the claim. Claimant proceeded to arbitration without filing an administrative charge. Plaintiff argued that the six month limitation on filing a claim in arbitration would effectively preclude his federal discrimination claims from being heard. The court rejected this argument, finding that the exhaustion requirements apply only in federal court and not in the context of private arbitration. The court concluded that "an arbitration provision that requires an employment discrimination claim to be arbitrated before statutory exhaustion procedures

could possibly be completed is easily construed as reflecting the party's agreement to waive such requirement, as well as any defense based on that requirement." *Virk vs. Maple –Gate Anesthesiologists*, 80 F.Supp.3d 469 (W.D.N.Y. 2015). See also *Fowlkes v. Iron Workers Local 40*, 790 F.3d 378 (2d Cir. 2015) (exhaustion of remedies under Title VII not jurisdictional but rather is subject to such equitable defenses as a claim of futility).

Clickwrap Agreement Rejected. Defendants moved to compel arbitration of a pending class action, relying on their clickwrap agreement which required signatories to click a button to indicate that person's acceptance of the terms on the website. The court rejected the defendants' motion, finding that the clickwrap agreement in this case was confusing. The court noted that even though the font was reasonably clear, the placement of the "accept" button was confusing which made it difficult for the applicant to know precisely what was being accepted. The court concluded, after reviewing the legal landscape on clickwrap and browsewrap agreements, that "an increasing number of courts in both federal district and appellate levels require an explicit text informing users that they are giving their assents to agreements when they navigate web sites." *Sgouros vs. Trans Union Court*, 2015 WL 507584 (N.D. Ill.).

Consumer Bound to Arbitrate with Successor. The consumer in this case brought a class action under the Telephone Consumer Protection Act against Sprint alleging that the phone solicitations it received were unauthorized. The consumers here were customers of US Cellular which was acquired by Sprint. Sprint notified those customers that their service would be terminated at a point in time due to the incompatibility of the two systems and offered alternatives to the US Cellular customers. The consumers argued that they were not bound by the arbitration clause in the US Cellular contract. The Seventh Circuit disagreed. Judge Posner questioned why Sprint wanted to arbitrate rather than litigate this matter, but concluded that "doubtless it wants arbitration because the arbitration clause disallows class action arbitration." The court questioned the merits of plaintiffs' position, but nonetheless concluded that those issues were for the arbitrator and granted the motion to compel. *Andermann vs. Sprint Spectrum L. P.*, 785 F.3d 1157 (7th Cir. 2015).

Arbitration Agreement Enforced Despite Offensive Provision. The arbitration provision in this law firm agreement required that the costs of arbitration be shared. An attorney raised sex discrimination and harassment claims and the firm moved to compel. The court recognized that the cost-sharing provision was contrary to federal law and refused to enforce it. However, since that provision did not permeate the arbitration clause the court compelled arbitration. The court also rejected the attorney's claim that the AAA's Commercial Arbitration Rules undermined her statutory rights by limiting discovery. The court noted that plaintiff "has failed to show that AAA's Commercial Arbitration Rules *prohibit* certain discovery processes, including, but not limited to depositions, document

production, information request, and subpoenas." The court concluded that the silence of the rules with respect to these discovery devices does not by itself require the invalidation of the arbitration agreement. *St. Charles vs. Sherman & Howard LLC*, 2015 WL 1887758 (D. Colo.).

FINRA Arbitration Preempted by Party's Agreement. The parties agreed in their broker-dealer agreement to submit disputes to New York courts for resolution. A dispute arose, and one party filed for arbitration before FINRA. The second party moved in federal court to enjoin the arbitration and an injunction issued. The court ruled that under Second Circuit law parties can opt out of FINRA arbitration procedures and irreparable injury exists where a party is required to arbitrate a dispute that it did not agree to submit to arbitration. The court concluded that the balance of hardships favored the party resisting arbitration and noted that the losing party could appeal the court's ruling to the Second Circuit if it so chose. *J. P. Morgan Securities v. Quinnipiac University*, 2015 WL 2452406 (S.D.N.Y.).

Form U4 Not Clear and Unambiguous Waiver of Judicial Forum. A stockbroker signed a Securities Industry Form U4 in 1997 and again in 2009. The stockbroker brought suit and the brokerage house sought to compel arbitration. The New Jersey appellate court rejected the effort to arbitrate the dispute, finding that the Form U4 did not sufficiently explain what arbitration is and how it differs from court proceedings. The court rejected attempts to apply a 2000 memorandum which contained clear language of waiver of the judicial forum. The court found that the span of nine years between the date of the memorandum and the latest signing of the Form U4 was too great to allow the 2000 waiver language to govern. *Barr v. Bishop Rosen & Co.*, 2015 WL 6442284 (N.J. App.).

Non-Signatory Claims Not Compelled. A dispute among board members of a LLC following an acquisition resulted in a multitude of claims being brought against the parties to the operating agreement and various non-signatory parties. The court compelled arbitration of claims between and among the parties to the operating agreement, including waiver of an arbitration claim which the court noted was merely a defense against a facially arbitrable claim. The court also compelled a claim under an employment agreement. The court acknowledged that a problem existed with respect to that claim because the operating agreement required arbitration before JAMS and the employment agreement required arbitrations before the AAA, but concluded the issue was for an arbitrator to decide and analogized it to a venue dispute in court. The court refused to compel tortious interference claims by one party against third parties even though it acknowledged the claims were intertwined with the claims against signatories. The court reasoned that there was no unfairness in allowing the party, the alleged victim of tortious interference, to litigate claims against non-signatories who allegedly subjected their rights under the arbitration

agreement to resolution. The court agreed to stay all claims not subject to arbitration, except claims against a completely separate business venture which allegedly brought a frivolous lawsuit against it as part of a campaign of harassment by signatories to the operating agreement. *Winter Investors v. Panzer*, 2015 WL 5052563 (S.D.N.Y.).

Anti-Competitive Claims Against Employer Arbitrable but Not Against Competitors. A DreamWorks Animation animator brought claims against his employer and competitors in the industry and DreamWorks moved to compel arbitration. Judge Lucy Koh of the Northern District of California ruled that the animator must arbitrate his claims against DreamWorks but is not required to do so against the competitors. The court ruled that the animator's claims against DreamWorks arose out of his employment with DreamWorks and held that conspiracy claims against non-signatories did not arise out of the animator's employment agreement and therefore equitable estoppel did not require the arbitration of those claims. Moreover, with respect to the claims against DreamWorks, the court ruled that the threshold question of arbitrability of those claims is to be decided by the arbitrator under the terms of the arbitration agreement. DreamWorks conceded that claims against it arising from the animator's employment by Sony are not subject to arbitration. *Nitsch vs. DreamWorks Animation SKJ, Inc.*, 100 F.Supp.3d 851 (N.D. Cal. 2015).

Arbitration Warranted Where Policyholders Failed to Investigate Terms of Agreement. The policyholders in this case did not sign, read, or even receive the insurance forms that contained arbitration agreements. They argued that as a result they were not bound to arbitrate their disputes. The Alabama Supreme Court disagreed, finding that the policyholders have a duty to investigate the documents provided to them. In this case, the insurance policy stated that it was not complete without the declarations page and that page listed two forms that contained the arbitration agreements but were not included. The Court concluded that the policyholders "manifested their assent to those policies and, necessarily, the arbitration provisions in them, by accepting and acting upon the policies, inasmuch as they all affirmatively renewed their policies and paid their premiums, thus ratifying the policies." *American Bankers Insurance Company of Florida vs. Tellis*, 2015 WL 3935260 (Ala.).

Failure to Comply With Court Order to Compel Constitutes Waiver. The court compelled arbitration of this collective action in 2012. Claimants failed to initiate the arbitration and an order to show cause was signed in June 2015. Claimants' reason for the delay was that they were awaiting a determination by the National Labor Relations Board on a related pending charge. The Board ruled in favor of Claimants in October 2014 finding that the employer violated the NLRA by requiring arbitration of employment-related claims. The court found to be "outlandish" the suggestion that a federal court order is without effect while a related proceeding is pending before the NLRB. Rather than request a stay of the

court's order, Claimants "simply disregarded this court's order because it required them to do something they did not want to do. That is not 'reasonable behavior.'" The court concluded that the circumstances support the inference that the Claimants acted willfully and knowingly and that "no lesser sanction" than dismissal of their claims was warranted. The court also rejected the argument that the delay in commencing the arbitration was for the arbitrator to decide, as it was claimants' failure to comply with the court order that was at issue. *Hopson v. Murphy Oil USA*, 2015 WL 4111661 (N.D. Ala.). See also *International Alliance of Theatrical Stage Employee and Moving Picture Technicians v. InSYNC Show Productions*, 801 F.3d 1033 (9th Cir. 2015) (appellate jurisdiction existed despite the district court's stay of court action where motion to compel arbitration, whether interpreted under the LMRA or FAA, was only relief sought and was provided).

II. JURISDICTIONAL CHALLENGES: DELEGATION ISSUES

Delegation Clause Rejected on Vagueness Grounds. The West Virginia Supreme Court refused to compel arbitration based on a delegation clause which referred "all issues regarding arbitrability" to the arbitrator. The Court reasoned that the term "arbitrability" is vague and did not clearly and unmistakably confer authority on the arbitrator to decide gateway issues. The Court, applying United States Supreme Court precedent, ruled that when "an arbitration agreement contains a delegation provision, the trial court may only consider a challenge that is directed at the validity, revocability or enforceability of the delegation provision itself." The Court concluded that under applicable Supreme Court authority on the doctrine of severability (while recognizing "that this rule seems absurd") "the delegation provision does not reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration clause to the arbitrator." *Schumacher Homes of Circleville v. Spencer*, 235 W.Va. 335 (2015).

Formation of Contract Question for Court. The parties disputed whether a contract with an arbitration provision in fact existed. In ruling on a motion to compel, a Tennessee appellate court found that under the FAA a court is required to decide two types of disputes involving an arbitration agreement. First, a court must decide a challenge to the validity of the arbitration clause and, second, a challenge to the formation of the agreement which includes an arbitration clause. As reasoned by the court, "compelling a party to arbitrate a dispute is 'hopelessly circular'". The court held that the issue of formation of the agreement was in dispute in this case, and that question was for it rather than an arbitrator to decide. The appellate court also rejected the lower court's finding that the right to arbitrate had been waived. The court concluded that finding waiver before ruling on whether the agreement had been formed was problematic for if "an agreement to arbitrate

did exist, the delegation provision places the issue of waiver with the arbitrator rather than the court." *Clayton v. Davidson Contractors*, 2015 WL 1880973 (Tenn. App.).

Delegation Provision Ruled Enforceable. Red Lobster's arbitration provision provides that the arbitrator "shall resolve any dispute arising out of or relating to the interpretation or application" of its arbitration rules. A dispute arose between a Red Lobster restaurant and an employee as to whether the employee and the restaurant complied with the preliminary steps for arbitration. The court ruled that the question as to whether the parties complied with the arbitration program's requirements was for the arbitrator to decide. The court rejected the argument that the delegation provision was somehow inadequate. The court concluded that the applicable language would "plainly encompass" the challenge to the adherence of the dispute resolution process brought here. *Philippe v. Red Lobster Restaurants*, 2015 WL 4617247 (S.D.N.Y.). See also *Dodson v. Dillard's*, 2015 WL 4623997 (Mo. App.) (clear and unmistakable delegation to arbitrator to rule on questions of arbitrability found despite absence of express exclusion of court from such inquiry); *American United Life Insurance Co. v. The Travelers Indemnity Co.*, 2015 WL 4936595 (D. Conn.) (the procedural question whether the dispute was for an arbitration panel or for actuaries to decide is for the arbitration panel and not the court to determine).

Timeliness Issue for Arbitrator to Decide. An employee asserted discrimination claims against her employer in federal court. The district court ruled the claim to be untimely as it was not filed within six months of her termination as required in the arbitration agreement. The Seventh Circuit reversed, finding the district court to have made a "misstep". The appellate court reasoned that the "district court improperly ruled on a matter that is presumptively reserved for the arbitrator." Therefore, the matter should have been compelled to arbitration and the court action dismissed without prejudice. *Johnson v. Western and Southern Life Insurance Company*, 598 Fed.Appx. 454 (7th Cir. 2015).

Preclusive Effect of Earlier Arbitration Award for Arbitrator to Decide. Claimant here raised various claims relating to his termination before a FINRA panel which denied each claim. Claimant filed a second arbitration, raising essentially the same claims but against individual supervisors. The district court ruled that the issue of the preclusive effect of the first arbitration award was for the arbitrator to decide. The court rejected the employer's request that the matter be referred to the initial arbitration panel, finding no authority for it to do so. The court also rejected the employer's argument that confirmation of the earlier award created federal jurisdiction under the All Writs Act which, under the employer's theory, would have allowed the court to enjoin the second arbitration. *Citigroup Global Markets v. Preis*, 2015 WL 1782135 (S.D.N.Y.).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILTY

Limits to Jurisdiction of Arbitration Appeal Panel Not Unconscionable. The terms of a retail contract required arbitration and allowed for an appeal to a tri-partite panel of arbitrators if the original award was either $0 or over $100,000. The consumer challenged the arbitration agreement on unconscionability grounds. The California Supreme Court ruled that the appeal provision was not unconscionable. The Court noted that the right to appeal the $0 award favors the consumer while the ability to appeal an award over $100,000 favors the seller. "But nothing in the record indicates that the latter provision is substantially more likely to be invoked than the former. We cannot say that the risks imposed on the parties are one-sided, much less unreasonably so." The Court also refused to find the requirement that the party appealing the award advance the costs of the appeal to be per se unconscionable under California's "ability to pay" rule, particularly in this case where the consumer was the purchaser of a Mercedes Benz. *Sanchez v. Valencia Holding Co.*, 61 Cal.4th 899 (Cal. 2015).

Motion to Compel Denied on Unconscionability Grounds. The arbitration agreement required, among other things, that California delivery drivers proceed to arbitration in Texas and included various other oppressive terms, according to a federal district court judge in California. For example, it required drivers to pay half the cost of the arbitration and potentially the fees of the employer if the arbitration was lost. The court also found the agreement to the procedurally unconscionable as the former agreement was in English and the plaintiff here was Spanish-speaking and spoke little English, had no opportunity to renegotiate the agreement, and the arbitration provision was not highlighted in the agreement. The court also noted that the AAA rules under which the arbitration was to proceed were not provided. These "oppressive" provisions combined with the requirement that the driver be required to arbitrate his case 1,000 miles away from his home rendered the arbitration agreement unconscionable. *Saravia v. Dynamex*, 2015 WL 5821423 (N.D. Cal.).

Arbitration Agreement Ruled Unconscionable. Condominium owners sued the developer and management company of the condominium, who in turn sought to compel arbitration. The arbitration agreement was not contained in the condominium owner's purchase agreement but on pages 34 and 35 of a 36 page condominium declaration mailed to the owners. The Hawaii Supreme Court ruled that the arbitration agreement was procedurally and substantively unconscionable. The Court ruled that the arbitration agreement was a contract of adhesion and was "buried in an auxiliary document and was ambiguous when read in conjunction with the purchase agreements." The Court also found it to be substantively unconscionable. While acknowledging that reasonable limitations on discovery are appropriate in arbitration, the Court ruled such provisions unconscionable as

they disproportionately disadvantage the condominium owners. The Court was troubled that "the arbitrator does not have the ability to order additional discovery, even on a showing of need." For example, the arbitrator was limited to only ordering the production of "non-rebuttable exhibits" and was limited to ordering depositions only upon consent of both parties. "Where an arbitration clause contains severe limitations on discovery alongside a confidentiality provision, the plaintiff may be deprived of the ability to adequately discover material information about his or her claim." Finally, the Hawaii Supreme Court ruled that the restriction on punitive and consequential damages, which was contained in this contract of adhesion, was unenforceable under prevailing Hawaii law. *Narayan v. The Ritz Carlton Development Company*, 135 Hawaii 327 (2015).

Arbitration Agreement Ruled Unconscionable Based on Offensive Choice of Law Provision. The Neiman Marcus arbitration agreement required the application of Texas law. A class action lawsuit was brought alleging violations of California's Labor Code. The California Court of Appeal, overturning the trial court's granting of the motion to compel, found the arbitration clause to be unconscionable. The court noted that the arbitration agreement required the application of Texas law and prohibited the arbitrator from varying from the terms of the agreement. The court reasoned that this precluded the application of California's unconscionability standards on enforcement issues which in turn was substantively unconscionable. In so ruling, the court emphasized that the arbitration agreement was a contract of adhesion and procedurally unconscionable. The appellate court concluded that the elimination of the employees' "ability to contend that the [Neiman Marcus] Arbitration Agreement as a whole is unconscionable under California Law renders the delegation clause substantively unconscionable." *Panella v. Neiman Marcus Group*, 238 Cal. App. 4th 227 (1st Dist. 2015).

Arbitration Clause Buried in Agreement Unconscionable. The Kentucky Supreme Court refused to compel arbitration where the arbitration clause in a student enrollment agreement was on the bottom of the second page where signature was required only on the front page. The court noted that the students were expected to sign at least 12 pages of documents and the students claimed they were not permitted to ask questions or to read all the documents. The court ruled the arbitration agreement to be both procedurally and substantively unconscionable. The court found the language of the arbitration provision to not be clear enough to warrant arbitration and found that the language was insufficient to show assent to arbitration as well as to arbitrability. *Brittany Dixon v. Daymar Colleges Group*, 2015 WL 1544450 (Ky. 2015). Cf. *Ashbey v. Archstone Property Management*, 785 F.3d 1320 (9th Cir. 2015) (dispute resolution policy enforced where arbitration requirement was sufficiently clear and was knowingly acknowledged and accepted).

Arbitration In Adhesion Contract Survives Challenge. The Tennessee Supreme Court ruled that an arbitration provision in an adhesion agreement was not unconscionable and was enforceable under Tennessee common law. In this case, the arbitration provision in an installment contract required arbitration unless the claim was very small or related to enforcement of a security interest or the seeking of preliminary relief. Claimant argued that this was inequitable and unenforceable under the Supreme Court decision in *Concepcion*. The Court noted that Tennessee law applied the doctrine of unconscionability "in a nuanced manner, weighing the degree of one-sidedness in the arbitration provision as an important factor, but not the only factor." The Court concluded that the arbitration agreement was not one-sided and reasonable business justification was presented for any exceptions to mutuality. *Berent v. CMH Homes, Inc,* 2015 WL 35269984 (Tenn.).

IV. CHALLENGES TO ARBITRATOR OR FORUM

Third Circuit Applies Constructive Knowledge Standard to Failure to Disclose Claim. The parties were notified after the first day of hearing that one of the arbitrators on the panel had been charged with the unauthorized practice of law on another matter. Neither party objected to that arbitrator's continued participation. After the award was issued, the losing side performed some additional due diligence and discovered further accusations against that same arbitrator that had not been disclosed. A motion to vacate was filed, alleging a failure to disclose in violation of the parties' agreement and the FINRA rules, and the trial court granted the motion. The Third Circuit reversed. The court applied a "constructive knowledge" approach, holding that "if a party could have reasonably discovered that any type of malfeasance, ranging from conflicts-of-interest to non-disclosures such as those at issue here, was afoot during the hearings, it should be precluded from challenging the subsequent award on those grounds." The court reasoned that the initial disclosure provided sufficient notice to compel the parties to conduct further research. *Goldman, Sachs & Co. v Athena Venture Partners,* 80 F.3d 144 (3rd Cir. 2015).

Court May Appoint Arbitration Umpire. The parties disagreed regarding various terms of the applicable arbitration agreements, resulting in a deadlock over which candidates are qualified to serve as arbitrator. One party refused to proceed with the umpire selection process. An application was made to the court to appoint an arbitrator and the court declined the opportunity. The Second Circuit reversed. The court found that the district court was mistaken in believing it lacked statutory authority under the FAA to resolve the parties' deadlock over the appointment of the arbitrator. The court noted that Section 5 of the FAA provides the authority to a court to appoint an arbitrator if the parties fail to do so. The court concluded that the trial court "not only had the authority but the obligation to appoint an umpire to correct a breakdown in the umpire selection process." *Odyssey Reinsurance Co. v. Certain Underwriters at Lloyd's London*, 615 Fed. Appx. 22 (2d Cir. 2015).

V. CLASS & COLLECTIVE ACTIONS

Class Action Waiver Enforced. The California Consumers Legal Remedies Act permits class actions by consumers seeking to challenge unlawful actions. The California Supreme Court ruled that, under the Supreme Court's decision in *Concepcion*, class action rights must give way to class action waivers in sales agreements. The Court concluded that the statute's "anti-waiver provision is preempted insofar as it bars class waivers in arbitration agreements covered by the FAA." The Court relied on the Supreme Court's conclusion that a state rule invalidating class waivers interferes with the fundamental attributes of speed and efficiency in arbitration. *Sanchez v. Valencia Holding Co.*, 61 Cal.4th 899 (Cal. 2015).

Ninth Circuit Precludes Waiver of PAGA Claims. The California Supreme Court ruled in the recent *Iskanian* decision that PAGA claims are not subject to waver. The question here for the Ninth Circuit was whether the Federal Arbitration Act preempted the *Iskanian* ruling. A divided Ninth Circuit ruled that it did not, reasoning that both "the PAGA statute and the *Iskanian* rule reflected California's judgment about how best to enforce its labor laws." At the heart of the Court's ruling was its conclusion that the *Iskanian* ruling "leaves parties free to adopt the kinds of informal procedures normally available in arbitration. It only prohibits them from opting out of the central feature of the PAGA's private enforcement scheme – the right to act as a private attorney general to recover the full measure of penalties the state could recover." *Sakkab v. Luxottica Retail N.A.*, 803 F.3d 425 (9th Cir. 2015). See also *Miranda v. Anderson Enterprises*, 241 Cal. App.4th 196 (2015) (trial court order that PAGA claim, brought on a representative basis, is subject to arbitration on an individual basis falls under the "death knell" doctrine which provides grounds for immediate appeal of an order denying class action status).

FINRA Does Not Preclude Waiver of Class and Collective Actions. Rule 13204 of the FINRA Arbitration Code bars arbitration of claims imbedded in class actions. Financial advisors brought a FLSA class and collective action in court, and the employer moved to compel arbitration. Plaintiffs argued that the FINRA rules preclude class claims in a FINRA arbitration to which they were subject. The Second Circuit enforced the waiver of class and collective claims, subjecting plaintiffs' claims to individual arbitration before FINRA. The court found that the FINRA arbitration code makes "the FINRA arbitration forum unavailable for class and collective action claims; but [the employer] does not seek to compel class or collective arbitration" of the plaintiffs' claims. Rather, the employer was seeking FINRA arbitration in lieu of the federal litigation. The court noted that the employees "conflate an agreement to arbitrate with a waiver of the right to assert claims in class or collective form." The court noted that there was nothing in the FINRA rules that precluded the enforcement of class action waivers. Instead, the FINRA rules seek to enforce a promise to have a dispute heard in arbitration and does not address the waiver of a

promise to forgo court proceedings which a class action waiver addresses. *Cohen v. UBS Financial Services*, 799 F.3d 174 (2d Cir. 2015).

VI. HEARING-RELATED ISSUES

Failure to Pay Arbitration Fees Results in Lifting of Court Stay. Cahill successfully moved to compel arbitration and then failed to pay his share of the AAA's fees. The arbitrator here first suspended and then terminated the proceeding based on Cahill's failure to pay. The opposing party's motion to lift the court stay and to proceed with the court action was granted by the trial court. The Tenth Circuit affirmed, finding that Cahill's failure to pay constituted a default under the FAA allowing for the lifting of the stay. "Our holding is consistent with decisions of other courts that have determined a party's failure to pay its share of arbitration fees breaches the arbitration agreement and precludes any subsequent attempt by the party to enforce that agreement." *Pre-Paid Legal Services v. Cahill*, 786 F.3d 1287 (10th Cir.), cert. denied, 136 S. Ct. 373 (2015).

Court May Not Disqualify Arbitrator Mid-Hearing. The district court disqualified an arbitrator mid-hearing, finding that this was one of those "extreme cases" in which such extraordinary relief was warranted. The district court reasoned that the arbitrator's failure to disclose his side business financing litigation made it likely that a motion to vacate would be granted at the end of the proceeding on evident partiality grounds. The Ninth Circuit reversed, ruling that the district court exceeded its authority under the FAA. "As we have interpreted the Act, a district court's authority is generally limited to decisions that bookend the arbitration itself." The circuit court also rejected the district court's finding of evident partiality which it explained "involved direct financial connections between a party and an arbitrator or its law firm, or a concrete possibility of such connections." In a nondisclosure case such as this one, the court required that the undisclosed fact reasonably support bias or favoritism, not merely a matter of interest to a party. "[T]he undisclosed facts regarding [the arbitrator's] modest efforts to start a company to attract investors for litigation financing do not give rise to a reasonable impression that [the arbitrator] would be partial toward either party." The Ninth Circuit concluded that the claim of potential partiality was too attenuated and speculative to violate the FAA. Finally, it rejected the district court's equitable concerns that undue delay and expense would result if the arbitration proceeding to completion. "[E]ven assuming that a mid-arbitration intervention could be permissible under some extreme circumstances, cost and delay alone do not constitute the sort of 'severe irreparable injury' or 'manifest injustice' that could justify such a step." *In re Mary Ann Sussex*, 781 F.3rd 1065 (9th Cir. 2015).

VII. CHALLENGES TO AWARD

Arbitrator's Reversal of Own Award Improper. A labor arbitrator ruled that two employees were denied contractual bumping rights. The union wrote to the arbitrator seeking to have the award extended to two additional employees and management wrote to the arbitrator arguing that he did not have authority to rule in the way that he did. The arbitrator agreed with management and overturned his own award within weeks of the initial award. The district court vacated the award, and the Eleventh Circuit upheld vacatur. The Eleventh Circuit noted that federal policy favors finality of arbitration awards. The court reasoned that it was up to the arbitrator to decide what issues were before him, and the initial award resolved the grievance before him. "There is no evidence suggesting that he did not deal completely with a grievance as it was submitted to him, or that the original award was intended to be anything other than final." While noting that the doctrine of *functus officio* has been criticized, the court concluded that it did not have to address the continued vitality of the doctrine "because it is codified in Rule 40 of the AAA Labor Arbitration Rules, which was incorporated into the CBA by virtue of the parties' agreement to submit to AAA arbitration." Finally, the court rejected the employer's argument that by raising questions about the initial award the door was opened to the arbitrator revisiting his decision. The court noted that the union's inquiry was narrow and did not ask the arbitrator to revisit the reasoning of his award but only to extend its logic as opposed to the employer's effort to have the arbitrator reconsider his entire award. *International Brotherhood of Electrical Workers v. Verizon Florida*, 803 F.3d 1241 (11th Cir. 2015).

Arbitrator Authorized to Reverse Earlier Finding. The dispute here was governed by the National Plan for the Settlement of Jurisdictional Disputes in the Construction Industry which allows the arbitrator to issue an initial decision identifying who prevailed and then to follow it up with a reasoned award within 30 days of the hearing. The arbitrator issued an initial determination for one party and then found for the other party in the reasoned award. The Second Circuit concluded that under the applicable arbitration agreement this was permitted. The court observed "while the ultimate result was perhaps a bit unusual, it was not a declaration of the arbitrator's 'own brand of justice in contradiction of the clearly expressed language of the agreement'". The court reasoned that the sequencing of the award was for the arbitrator to determine and rejected the notion that this constituted a gateway issue for the court to decide. The court also rejected the argument that the doctrine of *functus officio* applied because the final award had not been issued determining the submitted issues. *United Brotherhood v. Tappan Zee Constructors*, 804 F.3d 270 (2d Cir.).

Arbitrator Exceeded His Authority by Failing to Issue a Reasoned Award. The parties in this commercial dispute agreed to binding arbitration in accordance with the rules of the American Arbitration Association. After 17 days of testimony, the arbitrator issued a two

page final award granting close to seven million dollars to one party and $366,000 to the second party. The arbitrator provided no rationale for the award. When asked to issue an award in accordance with the requirement for a reasoned award, the arbitrator responded by asserting that his award was indeed a reasoned one. One party moved to confirm the award and the other to vacate. Upon review, the court found that a reasoned award was required under the applicable AAA Complex Construction Cases Rules and vacated the award. In doing so, the court addressed the issue of what constitutes a reasoned award. The court cited to a Fifth Circuit decision which found as reasoned an award which laid out the facts, described the contention of the parties, and decided which proposals should prevail. The court ruled that an improper award constitutes an arbitrator exceeding his authority. The court emphasized that the arbitrator's award failed to comply with the parties' agreement and therefore the authority granted to the arbitrator was exceeded. The court returned the matter to the arbitrator and, in doing so, the court found that an exception to the *functus officio* doctrine applied as the arbitrator here failed to provide a clear and unambiguous award. "*Functus officio* is not applicable because the duty charged to the arbitrator has not been completed and remand 'serves to give the parties what they bargained for'". *Tully Construction Company v. Canam Steel Corporation*, 2015 WL 906128 (S.D.N.Y.).

Vacatur Warranted Where Arbitrator Applied Incorrect Rules. A dispute arose between the company, the consultant who set up its insurance program, and the reinsurer. The arbitration agreement between the company and the consultant called for the application of the Commercial Rules of the AAA and the agreement between the company and the reinsurer required an arbitration before the International Chamber of Commerce in Anguilla with the arbitrator selected by the Director of Insurance in Anguilla. An arbitrator was selected who applied the AAA's rules and denied various applications objecting to the arbitration made by their reinsurer. An award was issued on behalf of the consultant and reinsurer and the district court granted the company's motion to vacate. On appeal, the Fifth Circuit affirmed. The appellate court ruled that the proper forum was not involved for the resolution of any dispute with the reinsurer, namely the International Chamber of Commerce, and the AAA's rules were improperly applied to the reinsurance dispute. The Fifth Circuit ruled that the district court appropriately vacated the entire award rather than only the objectionable parts of it. The court reasoned that "a district court does not *have* to vacate in part and confirm in part just because it *may* do so." *Poolre Insurance Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256 (5th Cir. 2015).

Legal Error Not Sufficient for Vacatur. A district court vacated a FINRA arbitration panel's award of back pay, finding that the arbitrators lacked authority to grant the remedy provided because no claims were brought under the applicable state law. The First Circuit reversed. In doing so, the court acknowledged that the arbitrators incorrectly applied

applicable law. Nonetheless, the court determined that even the panel's "serious error" was not sufficient to invalidate the award. The court reasoned that "the question before us is not whether the arbitrators made the *correct* decision when they gave [claimant] a remedy under Florida law, but whether their decision was authorized by the parties' agreement." The court noted that the arbitrators applied the substantive law that the parties agreed would govern their conduct and therefore the arbitrators' judgments, even if erroneous, were enforceable. *Raymond James Financial Services vs. Fenyk*, 780 F.3rd 59 (1st Cir. 2015). See also *Ballabon v. Straight Path IP Group, Inc.*, 2015 WL 6965162 (S.D.N.Y.) (arbitrator's adverse evidentiary rulings not proper basis for claim of partiality and, consequently, motion to vacate denied).

Award Reinstating Harasser Overturned. A bus driver who was also a union official was charged with sexual harassment. While an internal investigation was conducted, the driver was placed on union paid release time. Following a finding of reasonable cause the driver was terminated. An arbitrator reinstated him, finding that the Transit Authority violated the collective bargaining agreement by imposing discipline while the driver was on union paid release time. The appeals court, while recognizing that the Transit Authority bore a very heavy burden in seeking to overturn a labor award, nonetheless ruled that public policy required the vacatur of the award. The court explained that there are two public policy grounds for overturning awards in New York. First, an award may be overturned if it intrudes on disputes reserved for others to resolve. Second, an award may be overturned when the award on its face, without the court engaging in any fact finding, violated public policy. The court noted that the sexual harassment alleged here was unchallenged and that the public policy against sexual harassment is well recognized. The court reasoned that it could not turn a "blind eye" to the fact that the arbitrator's interpretation of the collective bargaining agreement conflicts with public policy against sexual harassment. "If forced to honor the arbitration award, the Transit Authority will not be complying with Title VII and the New York State and New York City Human Rights Law, each of which requires that an employer impose appropriate discipline for proven cases of sexual harassment in order to ensure a safe working environment free of sexual harassment." The court went on to say that to allow the award to stand would send the wrong message to Transit Authority employees who also performed union activities allowing them to believe they were free to create a sexually charged atmosphere. It would also render victims of sexual harassment hesitant to come forward with their complaints "thereby undermining the Transit Authority's ability to promptly remedy such behavior." The court concluded that in overturning the award it was not exceeding its narrow power to review arbitrators' findings and was not ruling on the underlying merits of the allegations but was merely vacating the award of public policy grounds. *In re: Phillips v. Manhattan and Bronx Surface Transit Operating Authority*, 132 A.D.3d 149 (N.Y. 1st Dep't 2015).

Public Policy Challenge to Award Rejected. A schoolteacher was arrested for possession of heroin and his arrest received widespread negative publicity. The school brought disciplinary charges and an arbitrator sustained dismissal of the teacher. The trial court vacated the award and the New York appellate court reversed. The court noted that an award may only be overturned if it violates a strong public policy, is irrational, or otherwise exceeds specific limitations on the arbitrator's power. The court concluded that "it cannot be said that it was irrational, against public policy, or ultra vires for the arbitrator to determine that petitioner's public possession of heroin warranted the penalty of dismissal." The court also found that the penalty of termination was not so disproportionate to be shocking to the conscience. *Esteban v. Department of Education*, 131 A.D.3d 880 (N.Y. 1st Dep't 2015). See also *Global Liberty Insurance v. Professional Chiropractic Care*, 48 Misc. 3d. 1202(A) (Sup. Ct. Bx. Cty. 2015) (award may not be overturned under New York law based on alleged error of law).

Award Ruled Sufficiently Definite and Confirmed. The arbitrator in this case issued a final award including injunctive relief. The injunction required a former employee to return all of his former employer's documents, to certify that he had done so, and commit to refraining from utilizing such documents in the future. The employee moved to vacate on the ground that the arbitrator imperfectly executed her powers by issuing an indefinite injunction. The court rejected the argument that the injunction was indefinite and ruled that, read in context, the limitation on using documents in the future was restricted to information about products and services the employee took with him when he left the company. "The absence of a time limit or a definition of "utilize" do not make the injunction indefinite." *McVay v. Halliburton Energy Services*, 608 Fed.Appx. 222 (5th Cir. 2015). See also *Civil Service Employees Association v. Board of Education of Syracuse,* 2015 WL 7305744 (N.Y. 4th Dep't).

Manifest Disregard Claim Rejected. A homeowner, who was unhappy with a contractor, created a web site with the help of his company's IT professionals. The website defamed the contractor. The arbitrator rejected both sides' breaches of contract claims, but found for the contractor on his defamation claim and awarded general damages and punitive damages (equal to his attorneys' fees and costs) on that claim. An appeals court in Connecticut upheld the award. The court found sufficient evidence in the arbitration award to support the granting of punitive damages. The court, having found that the record did not demonstrate "an egregious or patently irrational rejection of clearly controlling legal principles" rejected the manifest disregard of the law claim. The court also rejected the claim that the arbitrator's failure to detail his findings of actual malice in his reasoned award constituted manifest disregard of the law. Noting that the arbitrator here was an attorney with extensive experience in construction law the court noted that "imposing on all such arbitrators the stringent drafting standard that the defendants'

argument entails would be unduly restrictive on those arbitrators who, although expert in the field of construction, probably would not possess the acumen in opinion drafting that would be required under that standard." The court concluded that the wiser policy was to "permit the reviewing court to examine the entire record for factual and evidentiary support of the award." *SBD Kitchens v. Jefferson*, 118 A.3d 550 (Conn. App.), cert. denied, 319 Conn. 903 (2015). See also *Renard v. Ameriprise Financial Services, Inc.*, 778 F.3rd 563 (7th Cir. 2015) (manifest disregard claim rejected where the arbitrators considered state law "and its relation to other laws and then conclude[d] that the law does not apply in the specific factual situation at issue."); *Jones v. Dacel*, 792 F.3d 395 (4th Cir. 2015) (the court rejected a manifest disregard claim based on the arbitrator's failure to award attorney's fees, reasoning that while "it may be debatable whether the arbitrator performed [the] task 'well,' the record in this case shows that the arbitrator undertook a careful analysis of the applicable legal principles and reached a decision supported by his interpretation of our precedent.").

Motion to Vacate Fails to Raise Federal Question. The FAA is an anomaly in that it does not create federal question jurisdiction. To confer jurisdiction, a party seeking to vacate an award "must prove that their right to relief necessarily depends on resolution of a substantial question of federal law." The district court here ruled that it lacked jurisdiction to rule on a motion to vacate a FINRA award. The court acknowledged that the moving party may very well have raised substantial federal issues in the arbitration but it did not do so in its motion to vacate as Section 10 of the FAA "only permits a district court to review the arbitration process." The court also rejected the argument that a challenge on manifest disregard grounds raised a federal question. The underlying issue in this case involved a margin call and the moving party argued that the arbitration panel erred in its factual determination but did not contest "the existence, applicability, or construction of the statutes and regulations." Finally, the court ruled that the motion to vacate did not raise "systemic concerns about the organization and operation of financial markets" and therefore did not confer federal jurisdiction over the motion. *Goldman v. Citigroup Global Markets*, 2015 WL 2377962 (E.D. Pa.).

Award on Equitable Grounds Upheld. Ace Insurance insured a 13 year old boat and when it sank declined coverage based on a "wear and tear" provision in the agreement. The arbitration clause authorized the arbitrator to resolve "any controversy or claim based on any legal or equitable theory." The arbitrator found for the boat owners, reasoning that if Ace could insure a 13 year old boat and then decline coverage based on the age of the boat the company could, as summarized by the court, "comfortably insure boats beyond a certain age without an expectation of ever having to pay." The arbitrator found that this would border on fraud and violated Massachusetts Law on deceptive business practices. The district court refused to vacate the award, finding that the arbitrator was entitled to

rule based on equitable principles as called for by the arbitration clause. *Ace American Insurance v. Puccio*, 2015 WL 3540838 (D. Mass.).

"Honorable Engagement" Provision in Arbitration Agreement Permitted Equitable Remedies. A party sought to vacate a contract interpretation award arguing that the arbitrators exceeded the scope of their powers and rewrote the terms of the parties' agreements. The arbitration clause here included an "honorable engagement rather than merely a legal obligation" provision that relieved the arbitrators of complying with judicial formalities. The First Circuit ruled that this provision empowered the arbitrators to grant various forms of relief, including equitable remedies not expressly provided for in the parties' agreement. The court commented that "this is a huge advantage: the prospects for successful arbitration are measurably enhanced if the arbitrators have flexibility to custom-tailor remedies to fit particular circumstances. An honorable engagement provision ensures that flexibility." *First State Insurance Co. v. National Casualty Company*, 718 F.3d 7 (1st Cir.).

VIII. ADR – GENERAL

California Governor Vetoes Ban on Employee Arbitration Agreements. Governor Jerry Brown vetoed a statute that would have banned the mandatory arbitration of employment disputes in that state. The governor acknowledged his concern about the fairness of mandating arbitration of employment disputes, but noted that such statutes banning mandatory arbitration have been struck down in other states as violating the FAA. The governor concluded that he was not willing to incur the costs of litigating this dispute which was not likely to succeed.

Delaware's Rapid Arbitration Act Enacted. Delaware has enacted a Rapid Arbitration Act which provides an option for businesses formed in Delaware to resolve business disputes through voluntary arbitration conducted by arbitrators. The arbitrations must be completed within 120 days with only one 60 day extension possible if the parties and arbitrator agree. The Rapid Arbitration Act will not apply where an arbitration agreement has not been agreed to or between business entities and consumers of their goods and services. (10 Del. C. §5801 et seq.).

AAA Issues Revised Construction Rules. The AAA revised its construction rules effective July 1, 2015 with the goal of streamlining the arbitration process. Notably, the rules now add a provision for mediation of disputes. Under the new Rule 10, parties to a dispute are required to mediate such disputes covered by the rules if any claim exceeds $100,000 during the pendency of the arbitration. The rules also provide for emergency relief where a party believes it will be subject to immediate and irreparable loss or damage. A new Rule 60 allows a party to request that an arbitrator impose sanctions on a non-compliant party.

With respect to discovery, the arbitrator may on his or her own initiative now require the exchange of information that will be relied upon in the hearing. Finally, the new Rule 34 expressly allows an arbitrator to rule on dispositive motions.

Specific Terms of Med-Arb Award Resolving Wage and Hour Dispute Kept Confidential. The parties agreed to "binding mediation" of a wage and hour class action. The mediator issued his "Award" resolving this wage and hour dispute. The award was submitted to the court for approval as required by the FLSA. The court refused the party's request to keep the award completely confidential. The court reasoned that the award was indisputably a document relevant to the performance of its judicial function. The court found the award to be a fair and reasonable resolution of the dispute and approved its terms. The court held, however, that the specific terms of the confidentiality agreement between the parties could be enforced and specific economic terms could be kept confidential. The court noted that some judges have held the enforceability of confidentiality provisions in FLSA claims to violate public policy. The court distinguished arbitration, however, and declined to apply that precedent. "Except to the extent that the public's right of access requires that the Award be publicly docketed, the parties should be held to the confidentiality obligations to which they stipulated." *Galantowicz v. Rhino Room Inc.*, 2015 WL 3604672 (W.D.N.Y.).

California Mandatory Mediation Statute Violates California Constitution. California's Labor Code provides for the mandatory mediation of farm labor disputes. If the mediation does not succeed within 30 days, the mediator must file a report resolving the issue between the parties and submit a report to the state's Agricultural Labor Relations Board. The mediator's report must include "the basis for the mediator's determination." Any party may seek review of the mediator's report with the board. The appellate court ruled that the statute violated the Equal Protection Clause of the California Constitution. The court reasoned that the board is legislative or regulatory in character and is subject to the State Constitution. The court found that the process does not provide sufficient procedural safeguards to protect against arbitrariness and unfairness and violates the Equal Protection Provision of the California Constitution. The court relied on the fact that the statutory factors to be considered by the mediator in preparing his or her report "are broad and varied enough to permit a mediator to select from among a wide range of potential CBA terms that he or she may think best" and that the risk that the result is based on subjective leanings is simply too great to pass constitutional muster. *Gerawan Farming Inc. v. Agricultural Labor Relations Board*, 236 Cal. App. 1024 (2015).

Mediation Term Sheet Enforced. The parties successfully mediated their dispute and negotiated and signed a document entitled "Essential Terms Agreement" (the "ETA"). The court was so notified. When it came time to finalize a full settlement agreement, one side

injected new or different terms. When agreement on a full settlement agreement could not be reached, a motion was made to enforce the ETA as a binding contract and the trial court granted the motion, which was upheld on appeal. In doing so, the Court found no indication that the ETA was conditional or merely an agreement to agree. "Ultimately, after reviewing the ETA, the trial court concluded that the language used by the party manifests a clear intent to be bound to the terms outlined in the ETA." The Court rejected claims that the absence of terms regarding the timing and manner of payment rendered the ETA unenforceable. In concluding that the agreement was enforceable, the court reasoned "subsequent attempts to reopen terms already addressed by the ETA, or in some cases directly contradicted by the ETA, does not defeat the contractual validity of the ETA." *McCarthy v. Hampton*, 2015 WL 4068220 (N. Car.).

IX. COLLECTIVE BARGAINING SETTING

NLRB's *D. R. Horton* Decision Again Rejected. The Fifth Circuit again rejected the NLRB's determination in *D. R. Horton* that an employer violates the NLRA when it makes a condition of employment the signing of a class action waiver. The Fifth Circuit had previously rejected the NLRB's position and did so again this case. The court stated that "the Board will not be surprised that we adhere, as we must, to our prior ruling" and once again set aside the finding that the employer violated the NLRA. *Murphy Oil USA*, 2015 WL 6457613 (5th Cir. 2015). But see *Smith v. Citigroup, Inc.*, Case No. 12-CA-130742 (NLRB rules, 2-1, that Citigroup's arbitration agreement violates the NLRA).

Discrimination and Wage Claims Subject to Arbitration under CBA. What constitutes clear and unmistakable evidence in a collective bargaining agreement that statutory discrimination and wage and hour claims are to be arbitrated? The district court here found such intent in the collective bargaining agreement where it contained both a broad mandatory arbitration clause and a no discrimination provision which listed various protected categories (but did not name the related statutes). The court found crucial in this case that the no discrimination clause specifies that such claims are subject to the arbitration provision which is described as the exclusive method for resolving such disputes. *Lawrence v. Sol G. Atlas Realty Company*, 2015 WL 5076957 (E.D.N.Y.).

Timeliness Issue for Arbitrator to Decide. A grievant failed to complete the four step grievance procedure prior to the time set in the collective bargaining agreement for exhausting remedies. The city employer refused to arbitrate and the union sued to compel arbitration. The Montana Supreme Court ultimately ruled that the question whether the grievant's claims were time barred was a "classic question of procedural arbitrability that is for arbitrator and not for a Court to decide." *Montana Public Employees Association v. City of Bozeman*, 378 Mont. 337 (Mont. 2015).

Question Whether CBA Expired for Arbitrator to Decide. The collective bargaining agreement here had an evergreen provision and the parties disagreed as to whether the CBA had expired. The union sought arbitration and when the employer refuse to arbitrate the disputed claims that the CBA had expired, the union moved to compel arbitration. The Ninth Circuit affirmed the district court's granting of the motion to compel. The Ninth Circuit reasoned that once a CBA was found to exist, as was the case here, the question of whether the CBA was terminated or extended is for the arbitrator to decide under a broad arbitration clause as was present in this case. *International Alliance of Theatrical Stage Employee and Moving Picture Technicians v. InSYNC Show Productions*, 801 F.3d 1033 (9th Cir. 2015).

X. STATE LAW ISSUES

FAA Does Not Preempt New York Venue Statute. New York law renders void construction agreements that require adjudication of construction disputes where they require the proceeding to occur in another state. The agreement here required arbitration in Ohio and the question was whether the FAA preempted the applicable New York statute. The New York court ruled against preemption, noting that the project was in New York, all work was performed in the state, and the contractor only had offices in New York. The court reasoned that while the arbitration agreement was enforceable and arbitration was warranted, "the appropriate remedy is to sever the improper provision of the arbitration agreement and proceed with arbitration in New York rather than in another state." *HVS v. Fortney & Weygandt*, 17 N.Y.S.3d 285 (N.Y. Sup. Ct. 2015).

NFL Commissioner's Ruling Overturned. Quarterback Tom Brady was suspended for four games by the NFL Commissioner acting as arbitrator under the collective bargaining agreement with the players. The district court vacated the award finding that the Commissioner provided inadequate notice to Brady of the potential discipline for his alleged misconduct and failed to provide Brady with the opportunity to gain access to investigatory files and witnesses. The court rejected the comparison to the steroid use policy employed by the NFL and found that prior notice of possible discipline had not been provided to Brady and the players. This constitutes, the court found, a violation of the "law of the shop" which required prior notice of prohibited conduct. "NFL arbitral precedent confirms that because Brady did not have notice of the [applicable policy], that Policy could not serve as the basis for disciplinary action against him." *NFL Management Council v. NFL Players Assoc.*, 2015 WL 5148739 (S.D.N.Y.).

Whether Arbitration Agreement was Revoked is for Arbitrator to Decide. The arbitration agreement between the transit authority and the conductor allowed parties to revoke the agreement under certain circumstances. The conductor revoked the arbitration agreement

as provided for in the agreement. The trial court ruled that the revocation clause was ambiguous and ruled that the conductor properly revoked the agreement. The Pennsylvania appellate court reversed, finding that the question whether the arbitration agreement under Pennsylvania law was properly revoked was for the arbitrator to decide. The court noted that the parties agreed that the arbitration agreement was valid. Once a valid arbitration contract is found to exist, the question whether the contract "was properly revoked requires an interpretation of the arbitration agreement, and such questions are for the arbitrator, not the courts, to resolve." *Hammond v. Southeastern Pennsylvania Transportation Authority*, 115 A.3d 405 (Pa. Comm. Ct. 2015).

Procedural Arbitrability for Arbitrator to Decide. The Wisconsin Supreme Court ruled that under state law issues of procedural arbitrability are to be decided by the arbitrator. In an action to compel arbitration, the Court reasoned that a court's a role is limited to determining whether an arbitration agreement "could" cover the dispute, not whether it actually does. The Court concluded that the "the presumption associated with procedural arbitrability is consistent with Wisconsin's public policy favoring arbitration, the arbitration agreement at issue, the Realtors Association's arbitration procedure, and the limited role of our state courts in actions" under Wisconsin law. *First Weber Group, Inc., v. Synergy Real Estate Group,* 361 Wisc.2d 496 (2015). Accord: *Montana Public Employees Association v. City of Bozeman*, 378 Mont. 337 (Mont. 2015).

Timeliness Issue for Arbitrator to Decide. A developer sued the insurance brokers who allowed an insurance policy to expire before a hurricane hit the developer's condominiums. The developer added the general contractor to the lawsuit and the contractor moved to compel arbitration. The developer argued that the demand was untimely and the Texas Court of Appeals agreed. The Texas Supreme Court reversed, however, finding that "courts must defer to the arbitrators to determine the meaning and effect of the contractual deadline." *G. T. Leach Builders v. Sapphire V. P.*, 458 S.W.3d 502 (Tex. 2015). See also *First Weber Group, Inc., v. Synergy Real Estate Group,* 361 Wisc.2d 496 (2015) ("timeliness and estoppel defenses against arbitration are to be determined in the arbitration proceedings, not by a court").

XI. TABLE OF CASES