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Felio Case Summaries:
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I. JURISDICTIONAL ISSUES: GENERAL

All Claims Attached to Sex Harassment Demand for Court Review under EFAA. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (“EFAA”) amended the FAA to preclude the arbitration of a “sexual harassment dispute.” What showing is required to qualify as a cognizable sexual harassment dispute? Must a claimant arbitrate claims that do not fall into the category of sexual harassment disputes if part of the same case? In rulings of first impression, Judge Engelmayer of the Southern District of New York answered both questions in a pair of related cases. First, the judge ruled in *Yost v. Everyrealm* that for EFAA to apply a plaintiff must state a plausible sexual harassment claim that is capable of surviving a motion to dismiss. The court reasoned that “requiring a sexual harassment claim to be capable of surviving dismissal at the threshold of a litigation fully vindicates the purposes of the EFAA. The stated purpose of the EFAA is to empower sexual harassment claimants to pursue their claims in a judicial, rather than arbitral, forum.” The court explained that to rule otherwise would be an “affront” to the FAA. “After the dismissal of all sexual harassment claim(s) for failure to meet the plausibility standard, however, that purpose is not served by requiring the remaining (that is, non-sexual harassment) claims in the case to be litigated in court, in the face of a binding arbitration agreement.” In the second case, *Johnson v. Everyrealm*, the court also determined that Congress intended that all claims brought within a plausibly stated sexual harassment claim be excluded from arbitration as well. The court focused on Congress’s use of the word “case”, namely, making invalid pre-dispute arbitration agreements where a “case” raising a sexual harassment dispute is involved. The court found the text of EFAA to be clear and unambiguous on this point. “It keys the scope of the invalidation of the arbitration clause to the entire ‘case’ relating to the sexual harassment dispute. It thus does not limit the invalidation to the claim or claims in which that dispute plays a part.” The court found further support for this view in Congress’s use of the term “claim” when addressing the effective date of the statute, in particular, applying EFAA only to “claims” that arise after the statute was enacted. Having interpreted the statute, the court reached different results with respect to the two cases. In *Johnson*, the court found that plaintiff had plainly stated his sexual harassment claim and concluded that all claims raised would remain in court. In contrast, the court found in the *Yost* matter that plaintiff had not stated a plausible sexual harassment claim under governing law. As a result, *Yost*’s claims were submitted to arbitration as the court concluded that it “would not advance the interests embodied in the EFAA of vindicating the rights of sexual harassment claimants to litigate in court, because *Yost* has failed to plead facts plausibly placing her in that category of persons, and her lawsuit no longer concerns sexual harassment even in part and it would invite mischief by incenting future litigants bound by arbitration agreements to append bogus, implausible claims of sexual harassment to their viable claims, in the hope of end-running these agreements.” *Johnson v. Everyrealm, Inc.*, 2023 WL 2216173 (S.D.N.Y.); *Yost v. Everyrealm, Inc.*, 2023 WL 2224450 (S.D.N.Y.). See

also *Rourke v. Herr Foods, Inc.*, 2022 WL 14688690 (N.J. App.), cert. denied, 2023 WL 1990675 (N.J.) (amendments to FAA barring forced arbitration of sexual harassment claims may not be applied retroactively); *Zuluaga v. Altice USA*, 2022 WL 17256726 (N.J. App.) (the End Forced Arbitration Act did not have retroactive effect and therefore plaintiff's sexual harassment claim which occurred before effective date of the Act is subject to arbitration).

FAA Preempts California's Statute Criminalizing Mandatory Arbitration. California enacted the statute known as AB 51 which made it a criminal offense for employers to require employees or job applicants to consent to arbitration of employment disputes. The Ninth Circuit in 2022 declined to enjoin enforcement of AB 51, but reversed course following the Supreme Court's decision last term in *Viking River Cruises v. Moriana*. A divided Ninth Circuit panel now has enjoined enforcement of AB 51, ruling that the FAA preempts the statute because "A.B. 51's deterrence of an employer's willingness to enter into an arbitration agreement is antithetical to the FAA's 'liberal federal policy favoring arbitration agreements.'" The court reasoned that the penalty imposed on employers who seek to impose arbitration evidences hostility towards arbitration even though AB 51 does not preclude enforcement of such arbitration agreements. The court reasoned that the legislature's scheme disfavors the formation of arbitration agreements and prevents employers from entering into these agreements. *Chamber of Commerce v. Bonta*, 2023 WL 2013326 (9th Cir.).

Remand to Arbitrator Did Not Violate *Functus Officio* Doctrine. The district court remanded this matter back to the arbitrator, finding that the arbitrator failed to provide reasoning for his award as required by the parties. The arbitrator reissued his award with reasoning. The question for the Second Circuit was whether the remand violated the *functus officio* doctrine. The Second Circuit ruled that it did not. The court explained that the purpose of the *functus officio* doctrine "is to prevent arbitrators from changing their rulings after issuance due to outside influence by an interested party." Here, the remand was designed to produce a reasoned award as mandated by the parties. The court explained that the district court's remand "for a properly conformed order is a permissible choice. It simply makes no sense to redo an entire arbitration proceeding over an error in the form of the award issued after the hearing." The court rejected the argument that the award should have been vacated, explaining that a failure to issue a reasoned award more appropriately fell under Section 11 of the FAA, which allows for modification of awards where they were issued imperfectly, instead of Section 10 which addresses grounds for vacatur. The court concluded that "remand for the arbitrator to produce an award in a form consistent with the parties' agreement both 'effect[s] the intent' of the parties and 'promote[s] justice' between them, consistent with Section 11." *Smarter Tools, Inc. v. Chongqing SENCI Import and Export Trade Co.*, 57 F.4th 372 (2d Cir. 2023).

Bakery Workers Not Covered by FAA Transportation Exemption. Plaintiffs were independent contractors who delivered baked goods by truck to stores and restaurants within Connecticut. They sued their employer for wage and hour violations, and the employer moved to compel arbitration. The district court granted the motion, and a majority of a Second Circuit panel affirmed. The majority explained that to be entitled to the exemption the plaintiffs must work in the “transportation industry.” The majority concluded that “those who work in the bakery industry are not transportation workers, even those who drive a truck from which they sell and deliver the breads and cakes.” The majority reasoned “that an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry’s predominant source of commercial revenue is generated by that movement.” The court acknowledged, as pointed out by the dissent, that the plaintiffs spent significant time moving baked goods from place to place. “The decisive fact is that the stores and restaurants are not buying the movement of the baked goods, so long as they arrive. Customers pay for the baked goods themselves; the movement of those goods is at most a component of total price.” The majority therefore concluded that the plaintiffs did not work in the transportation industry and the motion to compel was properly granted. *Bissonnette v. LePage Bakeries Park Street, LLC*, 49 F.4th 655 (2d Cir. 2022). See also *Carmona v. Domino’s Pizza, LLC*, 143 S. Ct. 361 (Oct. 17, 2022) (Supreme Court vacates and remands to Ninth Circuit ruling that the FAA’s transportation worker exemption applied to drivers who transport items from a distribution center to customers in the same state in light of its ruling in *Southwest Airlines v. Saxon*).

Local Postmates Couriers Did Not Qualify for FAA Transportation Worker Exemption. Postmates couriers who deliver meals prepared at local restaurants and goods sold by local retailers brought a class action alleging wage and hour violations. Postmates moved to compel arbitration. The district court granted the motion, rejecting the drivers’ claim that they were engaged in interstate commerce for purposes of the FAA’s transportation worker exemption. The First Circuit affirmed. The court explained that to qualify for the exemption the couriers must be actively engaged in moving goods across borders via the channels of interstate commerce. To qualify for the exemption, the local drivers’ work “must be a constituent part of that movement, as opposed to a part of an independent and contingent intrastate transaction.” Here, the court reasoned that the goods were “part of separate intrastate transactions that are not themselves within interstate commerce.” In the court’s view, the interstate journey ended when the goods arrived at the local restaurant or store “and the record is luminously clear that those new and separate transactions are intrastate in nature as almost all deliveries made by the couriers as a class are completed within the state in which the order is placed. In a nutshell, couriers making deliveries from local businesses are transporting goods as part of local intrastate commerce.” *Immediato v. Postmates*, 54 F.4th 67 (1st Cir. 2022). See also *Levine v. Grubhub Holdings*, 2022 WL

17369402 (1st Cir.) (same); *Whitaker v. Enbridge (U.S.), Inc.*, 2022 WL 17405833 (S.D. Tex.) (pipeline inspector did not have “direct role in the free flow of goods across borders” and therefore did not qualify for the FAA Transportation Exemption).

Failure to Pay Arbitrator’s Fees Under California Law Bars Arbitration. California law requires a business that imposes arbitration to pay the required arbitration fees within 30 days of billing. A failure to do so constitutes a material breach of the arbitration agreement. Juanita Foods and Aerotek were co-defendants in this employment dispute. A motion to compel arbitration was granted and the case preceded before JAMS which billed the two respondents. Aerotek paid its invoice in a timely manner; Juanita Foods did not despite several reminders issued by JAMS. Based on counsel’s representation over 60 days after the invoice was sent that payment would be made “in the immediate future” JAMS was ready to proceed with the arbitration but changed course when a motion to vacate the order compelling arbitration was received. Payment was made by Juanita Foods days later. Nonetheless, the trial court granted the motion to vacate and stayed the court action against Juanita Foods in favor of the arbitration versus Aerotek. The appellate court affirmed. The court rejected Juanita Foods’ argument that the trial court’s “hyper-technical reading” of the statute should be rejected in favor of consideration of the extent of the delay and the presence of prejudice. Instead, the court found that “the statute’s language establishes a simple bright-line rule that a drafting party’s failure to pay outstanding arbitration fees within 30 days after the due date results in its material breach of the arbitration agreement.” The court also rejected Juanita Foods’ contention that the failure of the statute to list factors allowed for public policy considerations to be considered. The court reasoned that the fact that the statute “says nothing regarding a trial court’s discretion to consider these additional factors reinforces our conclusion that the statute’s thirty-day deadline establishes a clear-cut rule for determining if a drafting party is in material breach of an arbitration agreement.” The court concluded that the statute was clear on its face and defeated a company’s “perverse incentive” to impose arbitration and then delay or fail to pay the resulting arbitration costs. *De Leon Capitol v. Juanita Foods*, 85 Cal. App.5th 740 (2022). See also *Williams v. West Coast Hospitals*, 86 Cal. App.5th 1054 (2022), review filed (Feb. 7, 2023) (consumer need not obtain approval from arbitrator before electing to proceed in court where party mandating arbitration fails to pay requisite fees in a timely fashion under applicable California law); *Espinoza v. Superior Court of Los Angeles County*, 83 Cal. App.5th 761 (2022) (California statute setting strict deadline for payment of required arbitration fees not preempted by the FAA, as it “does not prohibit or discourage the formation or enforcement of arbitration agreements, either by barring certain claims from arbitration or imposing obstacles that make it difficult to enter into arbitration agreements”).

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- *Rourke v. Herr Foods, Inc.*, 2022 WL 14688690 (N.J. App.), cert. denied, 2023 WL 1990675 (N.J.) (amendments to FAA barring forced arbitration of sexual harassment claims may not be applied retroactively).
- *Fritzco, LLC v. Verizon Communications, Inc.*, 2022 WL 4592900 (S.D.N.Y.) (court stays action of party not subject to arbitration in favor of two related parties who are bound to arbitrate but will allow application to “vacate the stay if arbitration is not completed within one year after” the court’s decision).
- *Matter of Amberson v. McAllen*, 54 F. 4th 240 (5th Cir. 2022), pet. for rehearing denied, 57 F.4th 205 (5th Cir. 2023) (choice of law provision providing that Texas law governs did not displace FAA, but parties can agree, as here, that the Texas Arbitration Act in fact should govern).
- *Paradies Shops v. Brothers Petroleum*, 2022 WL 3134224 (5th Cir.) (case remanded to district court to determine whether enforceable arbitration agreement existed; determination made on a preliminary injunction motion before arbitration commenced ruled insufficient to determine issue as only limited evidence was considered which “fell short of the trial contemplated by the FAA after a party puts the making of an arbitration agreement in issue”).
- *Richter v. Oracle America, Inc.*, 2023 WL 1420722 (N.D. Cal.) (federal court gives preclusive, or collateral estoppel, effect to state court ruling compelling arbitration even if state court decision was not appealed).
- *Roddey v. Infosys Technologies Ltd.*, 2022 WL 16700270 (S.D.N.Y.) (court may not review or overrule arbitration decisions during pendency of the arbitration based on argument by claimant has “no confidence” that arbitrator can be impartial).
- *Rock Hemp Corp. v. Dunn*, 51 F. 4th 693 (7th Cir. 2022) (fraudulent inducement claim against contract containing arbitration provision must be arbitrated where claim goes to agreement as a whole and not arbitration provision specifically).
- *Lewis v. Simplified Labor Staffing Solutions*, 85 Cal. App.5th 983 (2022) (rule requiring State consent to employee’s agreement to arbitrate PAGA claim “prevents enforcement of pre-dispute arbitration agreements in contravention of the FAA’s guarantee that parties may agree to settle future disputes by arbitration” is preempted and cannot be enforced).
- *Roddey v. Infosys Technologies Ltd.*, 2022 WL 16700270 (S.D.N.Y.) (preliminary injunction seeking to stay first arbitration in Georgia in favor of later arbitration filed in New York denied as no irreparable harm found since the AAA consolidated the two arbitrations in Georgia and there was no New York arbitration to stay).
- *In re Alpepe Ltd.*, 2022 WL 15497008 (E.D.N.Y.) (World Bank’s International Center for the Settlement of Investor Disputes not sufficiently imbued with governmental

authority under the Supreme Court's analysis in *Alix Partnership* decision to qualify for production of discovery under Section 1782).

- *In re Webuild*, 2022 WL 17807321 (S.D.N.Y.) (ad hoc panel convened in Panama under a bilateral investment treaty before the International Centre for the Settlement of Investment Disputes did not constitute foreign tribunal for Section 1782 purposes and therefore discovery subpoena may not be enforced in the United States).
- *Villareal L v. LAD-T, LLC*, 84 Cal. App. 5th 446 (2022), as modified (Nov. 2, 2022) (FAA did not preempt state statute barring contractual actions in the name of an unregistered fictitious business and therefore defendant's motion to compel denied).
- *Hursh v. DST Systems*, 54 F.4th 561 (8th Cir. 2022) (under the *Badgerow* decision awards resolving claims under ERISA plan cannot be confirmed by federal court where dispute was framed in arbitration demand as breach of contract and fiduciary duty and arbitration agreement expressly excluded ERISA claims).
- *Veerji Exports v. Carlos St. Mary, Inc.*, 2022 WL 17417277 (S.D.N.Y.) (court decides question of arbitrability where applicable ICC Rules did not provide for arbitrator to rule on such claims and arbitration provision is limited in scope).
- *Coles v. Sugarleaf Labs, Inc.*, 880 S.E.2d 394 (N.C. App. 2022) (order compelling arbitration is a non-appealable interlocutory order and trial court's dismissal of action improper as being contrary to North Carolina Revised Uniform Arbitration Act).
- *Access Funding, LLC v Linton*, 2022 WL 17348369 (Md. App.) (question whether arbitration agreement exists is for court to decide where appellants allege that they suffer from "cognitive deficits and other brain impairments" and that appellees interfered with their ability to get independent professional advice to assist them in understanding arbitration terms).
- *GCIU-Employer Retirement Fund v. MNG Enterprises*, 51 F. 4th 1092 (9th Cir. 2022) (court deference to arbitrator's determinations are "notably less deferential" under the Multiemployer Pension Plan Amendments Act than under FAA including *de novo* review of conclusions of law).
- *JPV I.L.P. v. Koetting*, 2023 WL 1791966 (Cal. App.) (issue preclusion applied to arbitrator's findings in prior proceeding where the "issues were actually litigated and necessarily decided in the former proceeding; indeed, they were central to the arbitrator's liability findings and damages award").
- *Jiangsu Beier Decoration Materials v. Angle World, LLC*, 52 F. 4th 554 (3d Cir. 2022) (U.S. court not required to defer to Chinese court's ruling finding an enforceable arbitration agreement under Chinese law where Chinese court did not rule on whether the exchange of letters by the parties constituted an enforceable "writing" for purposes of the New York Convention).

- *Vaughn v. Tesla, Inc.*, 87 Cal. App. 5th 208 (Cal. App. 2023), review filed (Feb. 14, 2023) (injunction sought under California’s Fair Employment and Housing Act is properly viewed as a “public injunction” under California law which cannot be waived).
- *Bachman Sunny Hill Fruit Farms v. Producers Agricultural Insurance Co.*, 57 F.4th 536 (6th Cir. 2023) (while the Federal Crop Insurance Corporation may nullify an arbitration award where the arbitrator fails to seek requisite policy interpretation from the FCIC, a court may not vacate an award on that ground under the FAA).

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

Plaintiff Did Not Substantially Invoke the Judicial Process. The “hurdle” to demonstrate waiver of the right to arbitration by litigation conduct is a “high one” and “merely taking part in litigation is not enough.” Here, Microsoft alleged that plaintiff waived the right to arbitrate by participating in litigation and delaying the initiation of arbitration proceedings but a Texas appellate court disagreed. The court found that in the eight months that lapsed from the time plaintiff filed suit to the time it initiated arbitration proceedings, the only activity was plaintiff’s request for preliminary injunctive relief relating to certain IP claims, which the FAA permits parties to do. Plaintiff also propounded nine requests for production and the deposition of Microsoft’s corporate representative but the requests were narrowly tailored and directed at its request for an injunction. “Importantly, [plaintiff] did not seek a judicial ruling on the merits of its claims for affirmative relief, and the trial court did not make an adverse ruling on [plaintiff’s] claims before [plaintiff] initiated arbitration proceedings.” Accordingly, “under these facts, [Microsoft] did not meet its burden to establish [plaintiff] substantially invoked the litigation process and waived its arbitration rights.” The trial court order granting Microsoft’s anti-arbitration injunction was therefore reversed. *Turnbull Legal Group, PLLC, v. Microsoft Corp.*, 2022 WL 14980287 (Tex. App.). See also *Banq, Inc. v. Purcell*, 2023 WL 205759 (D. Nev.) (seeking additional time to answer court complaint and conferring with opposing counsel regarding initial discovery did not constitute waiver of the right to arbitrate but rather constituted effort to protect legal position).

Waiver of Arbitration Right Found. While residential care facility’s delay in moving to compel arbitration was “comparatively minor,” a California court found it was nevertheless inconsistent with its right to arbitrate because the delay was “unreasonable, manifest and prejudicial given the unique circumstances” presented. A California appellate court affirmed, observing the facility “never indicated it would be filing a petition to compel arbitration and instead requested a jury trial.” Indeed, by the time the motion was filed, the lower court had already granted plaintiff’s motion for a trial preference, set the motion, discovery, and expert exchange deadlines and the dates for the trial and trial readiness conference. Noting the plaintiff’s advanced age and limited life expectancy, the appellate

court held that substantial evidence supported the lower court's denial of the motion to compel. *Leger v. R.A.C. Rolling Hills L.P.*, 84 Cal. App.5th 240 (2022). See also *Davis v. Shiekh Shoes, LLC*, 84 Cal. App.5th 956 (2022) (employer waived right to arbitrate by waiting over one-and-a-half-years before moving to compel arbitration and, during that time, taking actions inconsistent with the right to arbitrate, such as acquiescing to the trial and discovery schedule, requesting trial, and actively participating in discovery and court appearances). *Desert Regional Medical Center v. Miller*, 87 Cal. App.5th 295 (2022) (hospital waived right to arbitrate state wage and hour claims when it only filed a motion to compel after Labor Commissioner held hearing and awarded damages to plaintiff nurses); *County of Passaic v. Horizon Healthcare Services*, 2023 WL 1807031 (N.J. App.) (express waiver in arbitration agreement of the right to seek judicial remedy which is required in the consumer and related contexts is not necessary where the parties are sophisticated, possess equal bargaining powers, and were both represented by counsel); *Carollo v. United Capital Corp.*, 2022 WL 9987380 (N.D.N.Y.) (delay of eight months before filing motion to compel sufficient to constitute waiver of right to arbitrate, particularly where extensive discovery was obtained that would not have been available in arbitration).

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- *Suski v. Coinbase, Inc.*, 55 F.4th 1227 (9th Cir. 2022) (court must decide whether arbitration clause in user agreement which has delegation clause is superseded by rules of sweepstakes which user opted into as the question is whether contractual obligation to arbitrate existed)
- *Matter of Dentons v. Zhang*, 211 A.D.3d 631 (N.Y. App. Div. 2022) (issue whether law firm partner was "employee" subject to arbitration under the law firm's partnership agreement is for arbitrator to decide where clear and unambiguous delegation clause present).
- *Zhang v. Superior Court of Los Angeles County*, 85 Cal. App.5th 167 (2022), reh'd denied (Nov. 18, 2022) (whether law partner was employee for purposes of California law barring employee from adjudicating claims outside of California is a question of arbitrability clearly delegated to arbitrator in the applicable law firm partnership agreement).
- *Tiffany Hill v. Xerox Business Services*, 59 F.4th 457 (9th Cir. 2023) (claim that it would be futile to assert arbitration rights until class was certified rejected as "waiver does not require a court to have jurisdiction over beneficiaries of the waiver; it does not even require a lawsuit to have been filed").
- *Global Tech Industries Group v. Go Fun Group Holdings*, 2022 WL 16949863 (S.D.N.Y.) (dispute under settlement agreement containing arbitration clause is for arbitrator to address where a challenge is based on alleged failure to comply with condition

precedent for payment and challenges the agreement as a whole and not specifically the arbitration provision).

- *EPL Oil and Gas v. Trimont Energy*, 2022 WL 16837054 (E.D. Tex.) (reservation of right to seek temporary injunctive relief did not defeat clear and unmistakable evidence that arbitrability questions are delegated to arbitrator to decide where parties incorporated the AAA's Commercial Rules).
- *Banq, Inc. v. Purcell*, 2023 WL 205759 (D. Nev.) (motion to dismiss on jurisdictional grounds did not constitute waiver of right to arbitrate as motion did not seek a decision on the merits).
- *Cornet v. Twitter, Inc.*, 2023 WL 187498 (N.D. Cal.) (incorporation of JAMS Rules which delegates to arbitrator gateway issues is a sufficiently clear and unambiguous delegation to the arbitrator and therefore unconscionability issue is for the arbitrator to decide).
- *Moreno v. T-Mobile, USA*, 2023 WL 401913 (W.D. Wash.) (substantive unconscionability claim for arbitrator to decide as incorporation of AAA Rules constitutes clear and unambiguous delegation of arbitrability question to arbitrator and unconscionability challenge is to the contract in full and not specifically to its delegation clause).
- *Wu v. Uber Technologies*, 2022 WL 17826816 (N.Y. Sup. Bx. Cty.) (claim here that plaintiff never agreed to arbitrate claim is for court to decide despite broad delegation term in contrast to claim that the agreement is invalid or unenforceable for reasons of fraud or unconscionability which would be for the arbitrator to decide).
- *Peni v. Daily Harvest, Inc.*, 2022 WL 16849451 (S.D.N.Y.) (carve outs for small claims court filings and right to seek injunctive relief "constitute minor carve outs from an otherwise broad arbitration clause" and do not defeat a finding of clear and unmistakable evidence supporting delegation of arbitrability issues to arbitrator).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

GE's Dispute Resolution Process Rules Unconscionable. GE employees, when hired, are required to agree to the firm's dispute resolution process called Solutions and are provided on-line with a 29 page manual. Plaintiff here brought a sexual harassment and retaliation case against GE, and GE moved to compel arbitration. The trial court granted the motion but the appellate court reversed and ruled that the Solutions program was procedurally and substantively unconscionable. The court found the program to be procedurally unconscionable because of its "higher degree of oppressiveness" even for agreements of adhesion because plaintiff was given a short period of time "to click boxes on her computer and electronically sign forms acknowledging she received multiple lengthy documents." The court also accused GE of having a large "secrecy problem" because it did not clearly

disclose the agency administering the arbitration, which was the AAA, and did not provide a copy of that agency's rules or to designate a location for the arbitration. The court also noted that there was "uncertainty and confusion created by GE's decision to incorporate its own set of arbitration rules, in addition to incorporating the hidden [administering agency's] rules, while at the same time authorizing the arbitrators to expand or limit GE's set of rules." The court concluded that the "agreement's unclear, incomplete, and contradictory language would fail to inform any reasonable person of the contract's consequences." The court also found the Solutions program to be substantively unconscionable because it limited the discovery available to a plaintiff, for example, to three depositions. The court agreed with plaintiff that the "typical 'me too' evidence will require multiple nonparty depositions and extensive law and motion" practice. The court also agreed with plaintiff that her ten complex causes of action required extensive discovery. The court compared unfavorably GE's rules to the AAA's rules which, according to the court, conferred "broad discretion to arbitrators to afford the parties a full and fair hearing on the dispute." The court also found unconscionable both the presumption that the hearing would be limited to two 8-hour days and the exclusion from arbitration of claims of interest to GE, for example intellectual property claims, which only it would likely assert. Finally, the court ruled unconscionable GE's requirement that its employees keep the arbitration awards confidential as "future employees cannot take advantage of findings in past arbitrations or prove a pattern of discrimination and/or retaliation." For all these reasons, the appellate court declined to compel arbitration of plaintiff's action. *Murrey v. Superior Court of Orange County*, 87 Cal. App.5th 1223 (2022). See also *Lipsett v. Banco Popular N.A.*, 2022 WL 175447444 (S.D.N.Y.) ("loser pays" provision in bank account agreement ruled unreasonably favorable to the bank and substantively unconscionable).

Severance of Unconscionability Terms Not Feasible Where They Permeate the

Agreement. The employer's arbitration agreement here provided that it would pay the arbitration fees, other than a \$250 filing fee, but required fees caused by a postponement to be paid by the party seeking that postponement and provided that fees were awardable to a prevailing party. The arbitration agreement made allowance for an appeal to a panel of three arbitrators but required the party seeking that appeal to pay the appellate arbitration costs. The trial court found these terms to be unconscionable but declined to sever them. The appellate court affirmed. The court reasoned that the "appeal provisions in the arbitration agreement would deter an employee from appealing an arbitration award (or filing a cross-appeal) by requiring the employee to pay the fees and expenses of three arbitrators, the most expensive form of an appeal, and upon a successful result, the employee would need to share the costs of a second hearing." This, the court concluded, unreasonably favored the employer even if the employee was later able to reverse those costs if the appeal succeeded. The court ruled that the prevailing party provision was similarly unconscionable because an employee could be required to pay the employer's fees

if his or her claim was found to be factually groundless. Other unconscionable terms found by the court were limits on discovery and the barring of tolling of the statute of limitations based on the filing of a civil action. The court reasoned that “where, as here, an arbitration agreement has numerous unconscionable provisions, those provisions taint the agreement with illegality such that even if each unlawful provision could be surgically removed from the agreement, the one-sided agreement is not enforceable.” The court added that to enforce the arbitration agreement by severing the unconscionable terms “would incentivize employers to impose multiple unlawful arbitration provisions on employees, who would likely forgo bringing suit for fear they would be forced to bear the costs and burdens of the one-sided arbitration agreement.” *Mills v. Facility Solutions Group*, 84 Cal. App.5th 1035 (2022).

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- *Lipsett v. Banco Popular N.A.*, 2022 WL 175447444 (S.D.N.Y.) (arbitration agreement ruled unconscionable where amendments in 2008 and 2020 to 2002 agreement added arbitration provision and only allowed customer to opt-out 45 days after opening the account which here occurred years before).
- *Sullivan v. Feldman*, 2022 WL 17822451 (S.D. Tex.) (rulings by four separate arbitrators in related cases that four-month deadline for issuance of award was unconscionable and violated due process upheld, particularly where the issues were complex and the pandemic and a flood interfered with defendants’ engagement).
- *Jenny Houtchens v. Google, LLC*, 2023 WL 122393 (N.D. Cal.) (procedural unconscionability claim rejected where consumer was provided with opportunity to opt out of arbitration).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

On-Line Account Provided Inquiry Notice to User. Plaintiff brought a product liability action against an on-line meal subscription service, which moved to compel arbitration. The court granted the motion, holding that plaintiff was put on “inquiry” notice of the terms of service when she opened her on-line account with defendant and manifested her assent by registering for the account. The court described the signup pages as “uncluttered” with proper notice that by clicking through the registration plaintiff was agreeing to the terms of service. “The dark text presenting the warning is set off from the light background and is written in a font roughly the same size as that of the primary text of the page. The relevant terms are accessible through underlined hyperlinks, and the user does not need to scroll beyond the main text of the screen to locate the hyperlinks.” The warning and hyperlinks to the terms of service, the court noted, were directly below the registration button. The court further ruled that plaintiff evidenced her acceptance of the terms of service by accessing

defendant's registration page. For these reasons, the court granted plaintiff's motion and compelled arbitration of plaintiff's claims. *Peni v. Daily Harvest, Inc.*, 2022 WL 16849451 (S.D.N.Y.). See also *Eubanks v. Gasbuddy*, 2022 WL 16963807 (D. Mass.) (clickwrap agreement on mobile app containing arbitration provision enforced as testimony and exhibits demonstrate that customer checked the box accepting terms and conditions when he signed into the app); *Jenny Houtchens v. Google, LLC*, 2023 WL 122393 (N.D. Cal.) (notice of arbitration sufficiently conspicuous where hyperlinks to terms of service "are presented in blue text in a sentence that otherwise uses gray text; they are next to the box a user must select to accept the terms; and the screens on which they appear are uncluttered"); *Wu v. Uber Technologies*, 2022 WL 17826816 (N.Y. Sup. Bx. Cty.) (Uber rider's continued use of service after receiving modified arbitration notice bound her to the modified terms).

Non-Signatories Cannot Enforce Arbitration Agreement. Fertility clinic patients brought action against the manufacturer and seller of an allegedly defective cryogenic storage tank that failed to preserve their eggs and embryos. Patients signed arbitration agreements with the clinic but not with defendants. Nevertheless, defendants filed motions to compel arbitration seeking to enforce the arbitration agreement between plaintiffs and the clinic on equitable estoppel grounds. The trial court denied the motions. On appeal, the California appellate court outlined the two circumstances in which equitable estoppel applies in the context of arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims; and (2) when the claims against the non-signatory are founded on and inextricably bound up with the obligations imposed by the agreement containing the arbitration clause. The court examined each circumstance separately and held that neither applied here. With regard to "intertwined claims," the court found that the claims asserted against defendants were based on an alleged defect in the tank and "are not premised on, nor did they arise out of, the plaintiffs' fertility services agreements with the clinic." Therefore, "the legal duties allegedly breached by [defendants] did not arise from the agreements containing the arbitration clause" and the claims are not intertwined. Turning to the "interdependent and concerted misconduct" requirement, the court noted that "allegations of substantially interdependent and concerted misconduct by signatories and non-signatories, standing alone, are not enough: the allegations of interdependent misconduct must be founded in or [be] intimately connected with the obligations of the underlying agreement." The court found that the claims asserted against the clinic were "fundamentally different" from those asserted against defendants and concluded that plaintiffs "are not seeking to enforce the terms of their agreements with [the clinic] to determine liability as to [defendants]. To the contrary, plaintiffs' claims against [defendants] are viable without reliance on the terms of the fertility services agreements with [the clinic]." The lower court's order denying the motions to compel arbitration was therefore affirmed. *Pacific Fertility Cases*, 85 Cal. App.5th 887 (2022). Cf. *Banq, Inc. v. Purcell*, 2023 WL 205759 (D. Nev.) (non-signatories can move to

compel where plaintiff “has alleged substantially interdependent and concerted misconduct by the individual defendant signatories and the non-signatory corporate defendants”); *Randall v. Cescaphe Ltd.*, 2022 WL 17583639 (E.D. Pa.) (non-signatories to letter agreement containing arbitration provision equitably estopped from resisting arbitration where they are seeking relief based on the terms of the same agreement); *Taylor Morrison of Texas v. Michelle HA*, 2023 WL 443891 (Tex.) (non-signatory wife and children bound to arbitrate construction defect suit under direct benefit estoppel doctrine based on arbitration provision in residential purchase agreement signed by husband and father as the wife and children lived in the house at issue); *Matter of Amberson v. McAllen*, 54 F. 4th 240 (5th Cir. 2022), pet. for rehearing denied, 57 F.4th 205 (5th Cir. 2023) (lawyer was bound on alter ego grounds by arbitration provision which bound law firm where lawyer, although not a signatory, was the firm’s sole decision maker and caused firm to perpetuate fraud).

Inaction Does Not Constitute Consent to Arbitration. Prisoners leaving prison in the State of Washington are given activated pre-paid debit cards with funds equal to the amount confiscated from them when they were first incarcerated. The back of the card had language indicating that by accepting the card and using it the prisoner was agreeing to the Account Agreement containing an arbitration provision. A class action was brought against the card issuer who then moved to compel arbitration. The district court denied the motion, and the Ninth Circuit affirmed. The court concluded that mere receipt of the card, or inaction, did not constitute consent to the Account Agreement under Washington law. The court also found no duty to act on the plaintiff’s part where he did not request the pre-paid debit card and had no prior dealings with the card’s issuer. The court also rejected the card issuer’s argument that plaintiff’s use of the card constituted acceptance of the Account Agreement. In doing so, the court noted that the funds on the card were plaintiff’s own and plaintiff had no other way to obtain use of his own funds. Finally, the Ninth Circuit emphasized that plaintiff had no reasonable basis to reject the alleged benefit here, access to his own money by means he did not seek. The court concluded that because plaintiff “did not assent to the Agreement through either his receipt or his use of the release card, no contract was formed.” *Reichert v. Rapid Investments*, 56 F.4th 1220 (9th Cir. 2022).

Lack of Enforceable Arbitration Agreement. On appeal of the denial of its motion to compel arbitration, Road Runner Sports conceded that plaintiff did not have actual or constructive notice of the arbitration provision. Nevertheless, Road Runner claimed he “manifested his assent to be bound by the arbitration provision by failing to cancel his membership” after joining the lawsuit when “he purportedly gained imputed knowledge of the arbitration provision through his attorneys.” Flatly rejecting Road Runner’s argument, the California appellate court noted a complete absence of authority applying “the general agency principle to impute an attorney’s knowledge of an arbitration provision to a client for the purpose of compelling arbitration.” In any event, the court explained, an attorney’s

knowledge could not be imputed to a client before the attorney-client relationship was formed, which is what happened here. Accordingly, the court held that Road Runner failed to establish plaintiff's assent to be bound and no valid arbitration agreement existed. The order denying Road Runner's motion to compel was affirmed. *Costa v. Road Runner Sports, Inc.*, 84 Cal. App. 5th 224 (2022).

Arbitration Provision Does Not Survive Termination of ERISA Plan. Defendants were former executives who participated in their company's ERISA plan which allowed them to defer the payment of a portion of their compensation until retirement. Upon a participating employee's retirement, plaintiff, the plan administrator, would distribute annual payments to the employee based on the amount he or she deferred. Sometime after defendants retired, plaintiff elected to terminate the plan in accordance with its terms and paid defendants the balance of the deferred compensation to which they were entitled. Defendants claimed, however, that they were entitled to deferred compensation after termination of the plan and also that their respective beneficiaries are entitled to a payment upon defendants' deaths. The primary issue for the Michigan district court to resolve was whether the arbitration provision survived the termination of the ERISA plan. The Sixth Circuit noted where, as here, the agreement did not contain a survival clause the presumption of arbitrability will apply "only when the dispute meets one of three conditions: (1) it involves facts and occurrences that mostly arose before expiration; (2) an action taken after expiration infringes a right that accrued or vested under the agreement; or (3) under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." The court found that none of these conditions were satisfied. To begin with, the majority of the material facts occurred after termination of the plan. With regard to the vesting of rights, the court explained "the intent to vest must be found in the plan documents and must be stated in clear and express language." Here, "the plan's payment of a death benefit is contingent upon a Participant's death . . . but none of the Defendants died while the plan was operative, so the death benefit did not vest." Finally, the court concluded that the disputed right did not survive the plan's termination under normal principles of contract. Failing to meet any of the necessary conditions, the court held that the dispute was not arbitrable. *Howmet Aerospace, Inc., v. Corrigan*, 2022 WL 17592322 (W.D. Mich.).

Case Shorts

- *Doe v. Massage Envy Franchising*, 87 Cal. App.5th 23 (2022) (massage customer not put on notice of franchisor's terms of service which included arbitration provision where "the entire check-in experience made it appear that by clicking that button and then signing her name plaintiff was agreeing" with the local retail operation's registration terms and not with franchisor's terms of service).

- *Sitzman v. EK Real Estate Services of New York*, 2022 WL 17853214 (N.D. Tex.) (entity to which mortgage payments were made not subject to arbitration agreement between seller and purchaser of property under Texas's intertwined estoppel doctrine as a sufficiently close relationship between and among the parties not found to exist).
- *Salgado v. NYC Medical Practice*, 2022 WL 17974915 (S.D.N.Y.) (arbitration provision in cosmetic surgery agreement did not cover dispute regarding unauthorized use of plaintiff's image which did not arise out of the surgery but rather out of the entity's efforts to market its services).
- *Monk v. Goldman Sachs*, 2023 WL 22618 (S.D.N.Y.) (arbitration agreement in security industry Form U-4 applied to claim brought by former employee alleging defamation and tortious interference with subsequent employment).
- *Johnson v. Wal-Mart*, 57 F.4th 677 (9th Cir. 2023) (terms of use on Wal-Mart's on-line site used to purchase tires which included an arbitration provision not interrelated with lifetime tire service agreement signed at Wal-Mart Auto Care Center and claims against Auto Center are therefore not subject to arbitration as the two agreements are separate independent contracts).
- *Iyere v. Wise Auto Group*, 87 Cal. App.5th 747 (2023) (failure to read arbitration agreement, while not denying that his signature was authentic, fails to defeat motion to compel).
- *Johnson v. Mitek Systems*, 55 F.4th 1122 (7th Cir. 2022) (identity verification service may not invoke arbitration provision in customer's agreement against suit brought by customer's own customer based on equitable estoppel or beneficiary grounds).
- *Johnson v. Houston KP*, 2022 WL 4543193 (S.D. Tex.) (clear and convincing parole evidence was not produced sufficient to enforce lost arbitration agreement, particularly where specific terms are not ascertainable).
- *Total Quality Logistics v. Traffic Tech*, 2023 WL 1777387 (6th Cir.) (former employee's defense to TRO action brought in court against him not sufficient to invoke arbitration agreement which encompassed "legal claims" but not defenses to legal claims).
- *Vaughn v. Tesla, Inc.*, 87 Cal. App.5th 208 (2023), reh'g denied (Jan. 20, 2023), review filed (Feb. 14, 2023) (claims that arose while plaintiffs were employed by staffing agencies not subject to arbitration under agreement signed once they became employees of the client of staffing agencies).
- *Upper Room Bible Church v. Sedgwick Delegated Authority*, 2022 WL 17735546 (E.D. La.) (clause in insurance agreement providing that underwriters subjected themselves to suit if claimed payment under policy is not made did not negate arbitration provision, but rather is read to be complementary by providing a judicial forum for compelling or enforcing arbitration).

- *Giron v. Subaru of America*, 2022 WL 17130869 (N.D. Ill.) (car manufacturer cannot invoke equitable estoppel doctrine to benefit from arbitration provision in purchaser's agreement between car dealership and car purchaser where it cannot show any detrimental alliance on representation made by parties to the purchase agreement).
- *Giron v. Subaru of America*, 2022 WL 17130869 (N.D. Ill.) (car manufacturer not party to purchase agreement not entitled to invoke arbitration provision in that agreement which defined parties as purchaser and car dealership).

V. CHALLENGES TO ARBITRATOR OR FORUM

ICDR Determination Rejecting Conflict of Interest Claim Ruled "Conclusive"

Defendant DTH selected an arbitrator as its party-appointed arbitrator. It later learned that that same arbitrator was selected in an unrelated arbitration by a party adverse to it. DTH claimed that this created "justifiable doubt" about the arbitrator's impartiality. The ICDR reported to the parties that the arbitrator "has not and will not be appointed as party-appointed arbitrator" in that second matter. That same arbitrator joined a new firm and disclosed that her new firm had represented Goldman Sachs, the parent company of one of the parties adverse to DTH. Again, DTH objected to their party-appointed arbitrator's continued service, and again the ICDR rejected the challenge following review by its Administrative Review Council. After the award was issued, DTH moved to vacate the award against it on evident partiality grounds. The court denied the motion. In doing so, the court principally relied on Rule 18(c) of the applicable AAA Commercial Arbitration Rules which provides that decisions by the ICDR "shall be conclusive." "This alone is sufficient to reject Respondents' arguments regarding the partiality of their handpicked arbitrator." Beyond that, the court explained that even if it were to conduct a de novo review of DTH's challenge to its own appointed arbitrator, the challenge would fail. "Neither her affiliation with [her new firm] nor her mere nomination – without actual appointment – as an arbitrator by an unrelated party in an unrelated proceeding is sufficient to establish evident partiality by the Respondent-appointed arbitrator." The court concluded that DTH had failed to establish objective facts supporting a finding of impartiality. *Telecom Business Solution, LLC v. Terra Towers Corp.*, 2023 WL 257915 (S.D.N.Y.).

Case Shorts

- *Huzhou Chuangtai Rongyuan Investment Management Partnership v. Qin*, 2022 WL 4485277 (S.D.N.Y.) (due process not denied under New York Convention where CIETAC appointed an arbitration panel due to party's failure to submit consensus arbitrators in timely fashion).

- *Sprint Corp. v. Shichinin, LLC*, 2022 WL 4360872 (N.D. Tex.) (fact that Sprint and its lawyers Alston & Byrd were “repeat-players” and frequently appeared before JAMS not sufficient to demonstrate that arbitration panel of JAMS arbitrators were partial, as “multiple appearances alone” does not demonstrate lack of impartiality).
- *Huzhou Chuangtai Rongyuan Investment Management Partnership v. Qin*, 2022 WL 4485277 (S.D.N.Y.) (public policy violation claim under New York Convention rejected where alleged biased arbitrator resigned one-month after selection and did not participate in the hearing or in deciding the dispute).

VI. CLASS, COLLECTIVE, AND MASS FILINGS

Stipulation of Fairness Not Sufficient for FLSA Settlement. The parties settled a Fair Labor Standards Act dispute and asked the mediator to attest to the fairness of the settlement in an effort to satisfy the court review requirement under prevailing Second Circuit law. The parties asked the court to endorse the mediator’s stipulation; the court refused. The court acknowledged that courts “have expended substantial resources” in satisfying the requisite judicial fairness review. The court noted that “district courts within the Circuit have split on the issue of whether [review of FLSA settlements] is necessary when a settlement is reached during an arbitration, although the majority appear to answer that question affirmatively.” But the court rejected the notion that it defer to a mediator’s representation of fairness if for no other reason than “the Court has no way to evaluate whether his conclusion is correct. What the parties are asking me to do is just rubber stamp a settlement about which I know nothing. That reflexive approval of a mediator’s determination” is not consistent with Second Circuit law. The court pointed out that not even a magistrate judge has the authority to do what the mediator purported to do here, namely, attest to the fairness of the settlement without providing any details. Any such effort to attest to the fairness of the settlement in this manner, the court noted, would prompt the same results. “It cannot be that the decision of [the mediator] is entitled to greater deference than that of a federal judicial officer.” *Latture v. 101-109 Café, Inc.*, 2022 WL 17577865 (E.D.N.Y.).

Case Shorts

- *Buzzfeed, Inc. v. Anderson*, 2022 WL 17093209 (Del. Chanc. Ct.) (mass filings before the AAA brought by employees based on arbitration provisions in employment contracts raising security law claims enjoined as court ruled the claims as asserted were not employment-related but rather were “quintessential stockholder claims”).
- *Tiffany Hill v. Xerox Business Services*, 59 F.4th 457 (9th Cir. 2023) (employer waived right to arbitrate class claims where it invoked litigation process and acted inconsistently with its arbitration rights by actively seeking judicial resolution of class

claims, including those subject to arbitration and by embarking “on a six-year appellate journey aimed at traditionally resolving the merits” of the class claims).

- *Randall v. Cescaphe Ltd.*, 2022 WL 17583639 (E.D. Pa.) (class arbitration not tenable due to “the complete absence of any reference to class-wide arbitration or class actions”).

VII. HEARING-RELATED ISSUES

Vacatur Based on Denial of Adjournment Request Rejected. A FINRA hearing was scheduled. Claimant’s request for an adjournment to review documents was granted. When offered a six-week window for new hearing dates, Claimant stated he was unavailable. The panel twice proposed new dates, but the panel and the parties could not find acceptable dates. Claimant also sought a postponement based on a motion to vacate the panel’s earlier order denying certain claims. The panel denied the request and scheduled the hearing. Twenty-five days before the hearing, claimant’s counsel confirmed that he was ready to proceed. After an award was issued denying claimant’s claims, and granting respondent’s counterclaims, claimant moved to vacate arguing that he was materially prejudiced because his counsel had scheduling conflicts and only had approximately three weeks to prepare for the hearing. “Given the age of the case and his attorney’s having represented him since the case’s outset, [claimant] does not explain how he was even at a disadvantage under the circumstances, and even ‘mere disadvantage, without more, does not equate to prejudice.’” The court also noted that the proceeding was already 20 weeks old when the hearing was held and that the “panel could reasonably have decided to deny [claimant’s] requested continuance to help ensure that the arbitration served its intended purpose as ‘a speedy and informal alternative to litigation.’” For these reasons, the court denied claimant’s motion to vacate and confirmed the award. *Merrill Lynch v. Palombo*, 2022 WL 4751258 (S.D. Tex.).

Panel’s Order Dismissing Case with Prejudice Ruled Final. During a FINRA proceeding with multiple claimants, counsel for Moster, one of the claimants, agreed to a walk-away agreement, namely, providing that both sides would withdraw their claims. This was evidenced by Moster’s counsel’s e-mail response “fine” to respondent’s counsel’s request for confirmation that a draft order of dismissal (the “Order”) was acceptable. After submission of the Order to FINRA, Moster reneged. The Panel requested and received submissions from the parties on the enforceability of the walk-away agreement and conducted a hearing that lasted over two hours. The Panel issued an order dismissing Moster’s claim of prejudice. Ten months later, Moster moved before the Panel to reconsider its determination, but this request was denied. The Panel later issued a final award on the remaining claims, and Moster moved to vacate over two years after the Order was issued. The court denied the motion as untimely, finding that the Order was “final” and subject to

review as it resolved all issues submitted to arbitration by Moster. The court rejected Moster's argument that the Order was interim, noting that it contained no conditional language and dismissed the claim with prejudice. The court acknowledged that the issue of attorneys' fees was addressed in the later-issued final award but ruled that it "is well-settled law that unresolved attorneys' fees do not affect finality." The court also rejected Moster's contention that the Order was not styled as an "award." In the court's view, this "approach misses the forest for the trees. . . . In this instance, the Panel issued an order that rendered a final and reviewable determination Thus, no specific form or additional language was required." The court concluded that the Order was final and subject to judicial review. *Moster v. Credit Suisse Securities (USA)*, 2022 WL 4467626 (S.D.N.Y.).

Case Shorts

- *Querette v. Chromalloy Gas Turbine, LLC*, 2023 WL 145014 (S.D.N.Y.) (putative class action asserting statutory wage claims subject to arbitration under CBA, as it "would be inappropriate to interpret a carefully negotiated instrument such as the CBA to allow Union members, such as Plaintiffs, to sidestep the grievance process entirely for claims related to the payment of wages simply by retaining private counsel as permitted for a limited and specified number of claims set forth in the CBA").

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Arbitrator Exceeds Authority by Awarding Fees Earlier Denied. The arbitrator here ruled in favor of the employer in a wrongful discharge case and denied an award of fees to both parties. The employer then moved for fees and the arbitrator ultimately awarded the employer over \$73,000 in fees and costs. The trial court affirmed the award on the merits, but vacated that portion of the subsequent award granting fees and costs to the employer. The court of appeals affirmed. The appellate court concluded that the arbitrator's initial award was final under California law as it resolved "the questions related to attorney fees and costs; and it included determinations on all the issues submitted in the arbitration." The court rejected the employer's argument that the fees application required the factual findings and legal conclusions made in the final award. The court also rejected the employer's argument that the initial award was binding as it was not titled "final" by noting that an arbitrator's labeling is not dispositive but rather a court looks "to the actual substance of the award to determine whether, under [California law], it meets the requirements of a final award." *Taska v. The Real Real, Inc.*, 85 Cal. App.5th 1 (2022). *Cf. Azod v. Robinson*, C.D. Cal. 2022 WL 18143882 (C.D. Cal.) (arbitrator did not violate parties' due process rights when he found one respondent liable in final award, contrary to a no liability finding in an interim award, where interim award clearly stated it was not final and parties fully briefed issues).

Claims of Misconduct by Panel Rejected. Co-owners had a dispute regarding the forced sale provision of their Shareholders' Agreement. An arbitration was initiated, and the panel granted the petitioners' request for an expedited, phased proceeding and a partial final award was issued granting specific performance of the forced sale provision of the Shareholders' Agreement. The panel also issued two interim orders providing emergency relief to petitioners. Respondents moved to vacate, arguing that the proceedings were fundamentally unfair and that the panel was guilty of misconduct by proceeding in a phased manner. The court reasoned that the "Panel provided Respondents with ample opportunity to be heard on the propriety of the phased approach, and the implementation of that procedure was well-founded." The court also rejected Respondents' argument that the Panel did not order all requested discovery, ruling that the Panel's "decision to deny Respondents' discovery requests during Phase 1 was within the Panel's discretion to vary procedure and deny discovery." The court also denied Respondents' claim that the Panel's order of specific performance was in manifest disregard of the law. The court reasoned that both the parties' Shareholder Agreement and the AAA's Rules provided ample remedial powers to the Panel which the Panel employed in keeping with applicable law. For these reasons, Respondents' motion to vacate was denied. *Telecom Business Solution, LLC v. Terra Towers Corp.*, 2023 WL 257915 (S.D.N.Y.). See also *Scott v. Youth Villages*, 2022 WL 17742619 (S.D. Miss.) (arbitrator not guilty of misconduct for failing to give credence to terminated employee's factual basis for wrongful discharge claim where arbitrator correctly found employee was employed on at-will basis and was terminable with or without reason).

Case Shorts

- *Conmed Corp. v. First Choice Prosthetic*, 2023 WL 157957 (N.D.N.Y.) (arbitrator did not exceed authority by ruling on choice of law issue submitted for resolution by the parties and where ruling fell within the arbitrator's "interpretive authority").
- *Communications Unlimited Contracting Services v. Clanton*, 2022 WL 17729214 (Ala.) (motion to clarify arbitration award only appropriate where award is so ambiguous as to be unenforceable and not, as in this case, where the award is clear and unambiguous and motion was merely seeking to modify award that that party disagreed with).
- *Sprint Corp. v. Shichinin, LLC*, 2022 WL 4360872 (N.D. Tex.) (disclosure by JAMS' arbitrator that each JAMS arbitrator has an economic interest in success of the firm but not that JAMS is a for-profit entity did not rise to evident partiality).
- *Azod v. Robinson*, C.D. Cal. 2022 WL 18143882 (C.D. Cal.) (arbitrator's ruling that non-signatory which invoked asset purchase agreement and sought attorneys' fees under it could be held liable for an award of attorneys' fees against it based on equitable estoppel grounds was not irrational or in manifest disregard of prevailing law).

- *Sprint Corp. v. Shichinin, LLC*, 2022 WL 4360872 (N.D. Tex.) (fact that attorneys contributed to arbitrator's judicial campaign in 2006 before they joined law firm that was appearing before the arbitrator over a decade later ruled too remote to demonstrate lack of impartiality).
- *Howard Center v. AFSCME Local 1674*, 2023 WL 1461639 (Vt.) (arbitrator did not violate manifest disregard standard, even if the Vermont Supreme Court were to recognize it as a basis for vacatur, as arbitrator's refusal to uphold employer's discipline was consistent with established just cause principles).
- *Mountain Business Center v. Fork Road*, 520 P.3d 538 (Wyo. 2022) (arbitrator did not commit manifest error of fact or law by not awarding fees to purported prevailing party where arbitrator found "that neither party improved its position through litigation because 'both parties expended far more on the case than they recovered' and awarding fees would create an inequitable windfall.").
- *Compania de Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua*, 58 F.4th 429 (10th Cir. 2023) (order confirming award under the New York Convention that had been annulled by a Bolivian court affirmed where enforcement of the annulment order would offend U.S. public policy and in recognition of the policy protecting the finality of arbitration awards).
- *Hayday Farms v. FedEx Holdings*, 55 F.4th 1232 (9th Cir. 2022) ("seemingly unfair damages award" not subject to vacatur even though panel was briefed on applicable law as "there is no sign that the tribunal recognized that [the referenced statute] applied to the set of facts before it – such that it 'intentionally disregarded' [the statute]").
- *Shafer v. Scarborough*, 982 N.W.2d 864 (N. Dak. 2022) (North Dakota Supreme Court declines to expand review of arbitration awards under that state's adoption of the Uniform Arbitration Act to include manifest disregard of the law as a basis for vacatur).
- *M.O. v. Geico General Insurance Co.*, 657 S.W.3d 215 (Mo. 2023) (award vacated where Geico was denied opportunity to intervene before trial court confirmed arbitration award and where arbitration proceeded without notice to Geico and arbitrator awarded damages against Geico and not the wrongdoer).
- *Honchariw v. FJM Private Mortgage Fund*, 83 Cal. App. 5th 893 (2022), reh'g denied (October 26, 2022), review denied (December 21, 2022) (award vacated where arbitrator upheld a 9.99% default interest charge imposed on remaining principal based on single late monthly payment which court found to be a liquidated damages provision unreasonably related to the injury incurred and therefore contrary to California public policy).
- *Commodities & Minerals Enterprise v. CVG Ferrominera Orinoco*, 2022 WL 4661845 (2d Cir.), cert. denied, 2023 WL 2123812 (U.S. Feb. 21, 2023) (claim that ship charter

was procured by fraud is argument going to the merits of the claim before arbitration panel and is not basis for vacatur under New York Convention which requires public policy violation claims to go to the award itself, rather than the reasoning underlying the award, and must create an explicit conflict with an identifiable public policy which is not the case here).

- *Lewis v. Simplified Labor Staffing Solutions*, 85 Cal. App.5th 983 (2022) (PAGA claim alleging Labor Law violation must be arbitrated where “employee agrees to arbitrate future disputes with her employer and she later brings such a dispute as a PAGA action”).
- *Huzhou Chuangtai Rongyuan Investment Management Partnership v. Qin*, 2022 WL 4485277 (S.D.N.Y.) (challenge to award issued in China based on panel’s failure to consider fraud claim rejected where panel concluded fraud claim was outside of scope of contract issue submitted to panel).

IX. ADR – GENERAL

AAA Commercial Rules Preclude Claims Against AAA. Rule 52(d) of the AAA’s Commercial Arbitration Rules provides that “neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.” Schorr, the claimant in the arbitration, brought an action against the AAA for wrongful termination of the arbitration and sought the appointment of a non-AAA arbitrator. The AAA here terminated the arbitration based on respondent’s abusive and threatening behavior but refused to refund to Schorr the fees she paid or advanced on behalf of respondent who failed to pay his arbitration fees as incurred. The court ruled that Rule 52(d) governed and foreclosed Schorr’s action against the AAA. In doing so, the court rejected the AAA’s arbitral immunity argument, noting that the AAA’s “decision to pretermite the arbitration in response to [respondent’s] vexatious conduct will leave Schorr to shoulder all party costs, paradoxically benefiting [respondent] and, then, shielding that decision from judicial review.” The court reasoned that the AAA’s decision to terminate the arbitration sounded “in commercial rather than adjudicative considerations.” The court explained that arbitral immunity applies to “administrative decisions related to arbitrator selection, communication with parties, case management decisions, and billings” which permit the “orderly management and completion of arbitration proceedings.” The court noted that the AAA’s immunity argument would have been stronger if it was posited as a “justified sanction for an advocate or party’s improper conduct – that is, an action akin to the imposition of sanctions under Rule 11 by a court”. Nonetheless, the court dismissed the action based on the enforceability of Rule 52(d) of the AAA’s Commercial Rules. *Schorr v. American Arbitration Association*, 2022 WL 17965413 (S.D.N.Y.).

Case Shorts

- *Stage Directors and Choreographers Society v. Paradise Square Broadway Limited Partnership*, 2022 WL 17249460 (S.D.N.Y.) (attorneys' fees awarded to party confirming arbitration award where defendant failed to make payments required by joint stipulation of parties).
- *Wu v. Uber Technologies*, 2022 WL 17826816 (N.Y. Sup. Bx. Cty.) (receipt by litigant against Uber of mass notice of change to its terms of service sent by Uber's operations team and not its in-house counsel did not serve as unethical *ex parte* communication).

X. COLLECTIVE BARGAINING SETTING

No Presumption of Arbitration of Individual Claims Based on Collective Bargaining Agreement.

The union employee in this case brought claims of negligence against his employer based on an injury he suffered operating machinery on the job. The employer moved to compel arbitration based on the arbitration provision in the parties' collective bargaining agreement to which the employee was subject. The Ohio Supreme Court, upholding the decisions of the lower courts, denied the motion. The Court made clear that the waiver of the judicial forum must be clear and unmistakable. The collective bargaining agreement here made clear that claims under a long list of statutes, without limitation, were subject to the union grievance procedures. Intentional torts were not included in that list. "The CBA in this instance is silent as to intentional torts by the employer, and we cannot infer that the parties intended to include such claims in a general 'without limitation' clause." The Court made clear that the arbitration provision need not cover every possible "federal and state law claim in order for the language to constitute a clear and unmistakable waiver." It did conclude, however, that "for a waiver to be clear and unmistakable, it must identify the claim either by statute or cause of action. Having no reference whatsoever to intentional-tort claims, the CBA here cannot be used to compel [the employee] to arbitrate such claims." *Sinley v. Safety Controls Technology*, 2022 WL 17170294 (Ohio). See also *Ivory v. All Metro Health Care*, 2022 WL 17585075 (N.Y. Sup. N.Y.Cty.) (waiver of statutory claims in collective bargaining agreement must be explicit and lack of specific reference to statutory wage and hour claims precludes arbitration of wage and hour class action).

Side Agreement Subject to CBA's Arbitration Provision. Defendant NRG and plaintiff union entered into a Memorandum of Understanding (MOU) in 2003, while negotiating a collective bargaining agreement, relating to retiree life insurance benefits. The MOU did not contain an arbitration provision. In the 2019 CBA between the same parties, it was determined that the retiree life insurance benefit would be \$10,000 but a dispute arose regarding to which class of retirees this provision applied. NRG refused to arbitrate the dispute, and the union moved to compel arbitration. The district court denied the motion

but the Second Circuit reversed. The court emphasized that the CBA contained a broad arbitration provision. This, coupled with the presumption of arbitrability, permits the union “to arbitrate whenever the union *merely claims* there is a dispute or difference over any provision of the CBA.” The court rebuked the district court for reaching the merits of the dispute by finding that the retirees were not covered by the CBA. “Whether [the union] has a meritorious claim for relief or not is irrelevant, here all that matters is whether [the union] claims a dispute has arisen between the parties relating to a provision of the CBA.” The Second Circuit also ruled that the dispute was arbitrable even though the side agreement at issue did not contain an arbitration provision. The court noted that “the 2003 MOA was executed in connection with the parties’ negotiation of what eventually became the 2003-2007 CBA, and, therefore, the 2003 MOA is an arbitrable side agreement.” For these reasons, the court determined that the union’s claims were arbitrable. *Local Union 97 v. NRG Energy*, 2022 WL 16842239 (2d Cir.).

Limits to Presumption of Arbitration under CBA. The union here represented Kroger grocery employees for a number of years. The union filed a grievance on behalf of Kroger warehouse employees, but Kroger refused to process the union’s grievance for itself or the Kroger Company claiming that the warehouse is part of The Kroger Company’s “supply chain network.” In particular, Kroger argued that the warehouse was independent from retail stores and is not a “store covered by the CBA.” The union pursued arbitration under its CBA, which governs grievances concerning “the interpretation or application of this [CBA].” The union moved to compel Kroger and its parent company to arbitrate the grievance. The district court determined that the union’s claim was arbitrable under the CBA and granted the motion to compel arbitration as to Kroger but denied it as to its parent company because it was not a party to the CBA. On appeal, the Sixth Circuit affirmed stating that “the Union’s grievance clearly falls within the scope of the arbitration agreement because it concerns the ‘interpretation or application of this [CBA].’” As such, the court noted, “the presumption of arbitrability, which is particularly applicable in the case of a broad arbitration like the one here,” will be applied. The court reasoned that to rebut the presumption of arbitrability, Kroger must have cited to an express CBA provision excluding the grievance from arbitration or other “forceful evidence of a purpose to exclude the claim from arbitration.” After examining Kroger’s contentions to rebut the presumption of arbitrability, the court held they fell far short of meeting the standard. The district court’s order granting the Union’s motion to compel arbitration was therefore affirmed. *United Food & Commercial Workers, Local 1995 v. Kroger Co.*, 51 F.4th 197 (6th Cir. 2022), reh’d denied, 2022 WL 18431457 (Dec. 19, 2022).

Case Shorts

- *United Natural Foods v. Teamsters Local 414*, 58 F.4th 927 (7th Cir. 2023) (arbitration provision in CBA is final step for employee grievances but may not be invoked by

management to compel arbitration of grievances related to strikes conducted by union members).

- *Querette v. Chromalloy Gas Turbine, LLC*, 2023 WL 145014 (S.D.N.Y.) (delegation to arbitrator rejected where the collective bargaining agreement broadly permitted grievant to be represented by private counsel “in a forum” other than arbitration thereby negating any clear and unambiguous delegation to the arbitrator).

XI. NEWS AND DEVELOPMENTS

Supreme Court to Decide Whether Litigation is Stayed Pending Appeal. Should a litigation be stayed pending the appeal of a denial of a motion to compel arbitration? The circuit courts are divided, and the Supreme Court has agreed to decide the issue this term. In the two consolidated cases, the California courts declined to stay the litigation and the Ninth Circuit affirmed. Plaintiffs here argue that they are prejudiced by what could be a long delay before their claim can be heard in court, and defendants argue that they face steep costs appealing the denial of the motion to compel while simultaneously litigating the underlying dispute. *Coinbase, Inc. v. Bielski*, 143 S. Ct. 521 (December 9, 2022).

Supreme Court to Rule on Use of RICO to Enforce Award. The Supreme Court agreed to determine whether the RICO statute could be used to help enforce an arbitration award issued by a London tribunal and confirmed in California. Vitaly Smagin prevailed in the arbitration and sought for years to enforce the award in California where respondent resides. The Ninth Circuit ruled that Smagin could use the RICO statute to seek to enforce the award. This contrasts with the Seventh Circuit which has ruled that an injury suffered by a foreign plaintiff from alleged interference with its U.S. court judgment occurs where that foreign party resides overseas. *Yegiazaryan v. Smagin*, 143 S. Ct. 645 (January 13, 2023).

U.S. Appointed Arbitrator in Ukrainian Money Laundering Scheme Disqualified. Michael Chertoff, the U.S. appointed arbitrator in an arbitration administered by the International Centre for Settlement of Investment Disputes, was found to have a conflict of interest and was removed from the panel. The arbitration involved an alleged money laundering scheme orchestrated by two Ukrainian bank owners. Chertoff accepted an appointment to the U.S. Homeland Security Advisory Council after joining the arbitration panel. The Chair of the Centre’s Administrative Council concluded that Chertoff’s role as adviser to the Council created an “appearance that he lacks impartiality and independence”, adding that Chertoff’s failure to notify the Centre and the parties of his appointment in a timely fashion breached his duty of disclosure.

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