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AAA Case Summaries:
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I. JURISDICTIONAL ISSUES: GENERAL

Supreme Court to Rule on Non-Signatory Issue under New York Convention. The Supreme Court will rule on whether a non-signatory can compel arbitration under the New York Convention. In doing so, the Court will review an Eleventh Circuit decision holding that an arbitration agreement must be in writing to be enforceable under the New York Convention. GE Energy sought to arbitrate a dispute it had with a steel mill owner based on an arbitration clause in a contract that the mill owner entered into with a supplier of motors. Subcontractors were expressly made parties to that agreement. GE Energy was a subcontractor to the contractor that made the motors and invoked the arbitration clause in an effort to arbitrate its dispute with the steel mill. The district court granted GE Energy's motion to compel, but the Eleventh Circuit reversed, finding that GE Energy "is undeniably not a signatory" to the applicable agreement. The court based this on its holding that the New York Convention requires that arbitration agreements be signed by the parties. The court also rejected GE Energy's estoppel and third-party beneficiary theories. In doing so, the court noted that GE Energy did not become a subcontractor until after the agreement between the mill and the motor manufacturer had been signed, undercutting any notion that the motor manufacturer was acting as GE Energy's agent. The question presented before the Supreme Court is: "Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards permits a nonsignatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel." *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018), cert. granted sub nom. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC,* 139 S. Ct. 2776 (2019).

FAA Preempts State Law Limiting Arbitration of Sexual Harassment Claims. New York State enacted legislation effective July 2018 barring the arbitration of sexual harassment claims "except where inconsistent with federal law." Plaintiff Latif sued Morgan Stanley under federal, state, and city discrimination laws alleging that he was discriminated against and harassed because of his sexual orientation. Morgan Stanley moved to compel, and the federal district court granted the motion. In doing so, the court held that the FAA preempted New York's prohibition against the arbitration of sexual harassment claims. The court began its analysis by noting that the "FAA's policy favoring the enforcement of arbitration agreements is not easily displaced by state law." Plaintiff's claims here were clearly subject to the arbitration agreement and, in the court's view, application of the New York law "to invalidate the parties' agreement to arbitrate Latif's claims would be inconsistent with the FAA. The FAA sets forth a strong presumption that arbitration agreements are enforceable, and this presumption is not displaced" by the New York's statute. The court rejected plaintiff's argument that since the New York prohibition against arbitrating sexual harassment claims was bundled with other protections against sexual

harassment this "reflects a general intent to protect the victims of sexual harassment and not a specific intent to single out arbitration clauses for singular treatment." Instead, the court found that the bundling of sexual harassment laws was "clearly intended to address sexual harassment; nothing in the bill suggests that the New York legislature intended to create a generally applicable contract defense." The court concluded that since New York's prohibition did not present a generally applicable contract defense, it could not overcome the FAA's mandate that arbitration agreements be enforced according to their terms. *Latif v. Morgan Stanley & Co.*, 2019 WL 2610985 (S.D.N.Y.).

FAA Transportation Exemption Applies to Drivers of Passengers. The Federal Arbitration Act exemption for workers engaged in interstate commerce has long been understood to apply to the transportation of goods in interstate commerce. The question in this case was whether the exemption applies to the transportation of passengers as well. The Third Circuit, overturning the trial court, held that the transportation worker exemption "may extend to a class of transportation workers who transport passengers, so long as they are engaged in interstate commerce or in work so closely related thereto as to be in practical effect part of it." In doing so, the court rejected Uber's argument that its drivers were subject to arbitration because the exemption applies only to the transportation of goods. The court emphasized that the exemption applies to seamen and railroad workers and added "Uber cannot direct us to any contemporary statutes or sources that defined the term 'seaman' and 'railroad employees' to only include those who transport goods." The court noted that if the facts underlying the exemption issue are contested, discovery on the issue may be warranted. If so, the court must "be equipped with a wide variety of sources, including, but not limited to and in no particular order, the contents of the parties' agreement[s], information regarding the industry in which the class of workers is engaged, information regarding the work performed by those workers, and various texts – *i.e.* other laws, dictionaries, and documents – that discuss the parties and the work." *Singh v. Uber Technologies*, 939 F.3d 210 (3d Cir. 2019).

FAA Transportation Exemption Does Not Apply to Doordash Driver. Plaintiff was a Doordash driver delivering food from restaurants to customers using the Doordash app. His deliveries were intrastate. The driver brought a putative Massachusetts wage and hour class action and Doordash moved to compel arbitration. Plaintiff invoked the transportation exemption under the FAA, but the court rejected that argument, finding the deliveries here were intrastate and not in the flow of interstate commerce. The court distinguished other transportation exemption cases where the manufacturer transporting goods, including food, interstate intended the goods to be delivered to its intended recipient. "In contrast, here, although some of the food may be altered by the restaurants . . . Plaintiff makes no allegation of a commercial connection between any interstate food distributor and the customers that receive prepared meals via Plaintiff's delivery." The court noted, for example, that there was no evidence that the manufacturer intended to use restaurants as a means to get their products directly to the customers' homes. "Instead, the final destinations from

the vantage point of the interstate food distributors are the restaurants where Plaintiff picks up orders, and not the customers to whom he makes deliveries." While rejecting application of the transportation worker exemption in this case, the court noted that the results might be different if the driver crossed state lines or delivered groceries for a store that buys goods in interstate commerce. *Austin v. Doordash*, 2019 WL 4804781 (D. Mass.).

State Arbitration Law Applies to Transportation Workers. The Supreme Court in *New Prime v. Oliveira* ruled that the FAA did not apply to transportation workers, including independent contractors, working in interstate commerce. Citing Third Circuit law, a New Jersey appellate court has ruled that the FAA did not preempt the New Jersey Arbitration Act, reasoning that there is no express provision of the FAA that preempts state arbitration laws. In this case, delivery drivers signed independent contractor agreements applying the state law in which the driver resides. Plaintiff resided in New Jersey. The court focused on the fact that the agreement had a "detailed arbitration provision [which] showed they intended to arbitrate disputes." Because the court found that the FAA did not preempt New Jersey law in this regard, "we conclude that even if plaintiffs are exempt under section one of the FAA, they still are required to arbitrate their claims under the NJAA." *Colon v. Strategic Delivery Sols., LLC*, 459 N.J. Super. 349 (App. Div. 2019). Cf. *Arafa v. Health Express Corp.*, 2019 WL 2375387 (N.J. App. Div.) (delivery truck drivers not required to arbitrate wage and hour claims as FAA exemption applied and rendered arbitration agreement unenforceable for lack of mutual consent).

Second Circuit Rules Dodd-Frank Claim Arbitrable. Dodd-Frank amended the whistleblower retaliation provision of Sarbanes-Oxley to bar arbitration but did not include a similar bar to its own anti-retaliation provisions. The plaintiff here brought a variety of claims against Citigroup, including gender bias, Dodd-Frank, and Sarbanes-Oxley claims. Citigroup moved to compel arbitration, and the district court granted the motion except with respects to the Sarbanes-Oxley claim. The Second Circuit affirmed. The court pointed out that there is nothing in the text of Dodd-Frank that supports the view that claims under that statute are non-arbitrable. "Congress's failure to attach an anti-arbitration provision to the Dodd-Frank whistleblower provision . . . while simultaneously amending similar statutory regimes to include the same, is a strong indication of its intent not to preclude Dodd-Frank whistleblower claims from arbitration." The court rejected plaintiff's argument that Sarbanes-Oxley and Dodd-Frank claims cannot be separated because they both arose out of the same act of whistleblowing. "The plaintiff's SOX whistleblower claim cannot save her otherwise arbitrable claims from their fate." The court also dismissed plaintiff's Sarbanes-Oxley claim for failing to exhaust administrative remedies by failing to file a timely complaint with OSHA." *Daly v. Citigroup Inc.*, 939 F.3d 415 (2d Cir. 2019). See also *Dorman v. Charles Schwab Corp.*, 934 F. 3d 1107 (9th Cir. 2019) (Ninth Circuit, reversing prior ruling, concludes that ERISA claims subject to mandatory arbitration).

Arbitration Clause Severed from Arguably Unenforceable Agreement. The purchasers of cars sued the car dealerships which then moved to compel arbitration. The purchasers opposed the motion, arguing that the sales agreements at issue containing the arbitration provisions were not enforceable. The New Jersey Supreme Court ruled that the arbitration provisions were severable and enforceable even if the sales agreements themselves were not. The court emphasized that under the FAA "arbitration agreements are severable from the rest of the contract and that the arbitration agreement may be valid separate and apart from the contract as a whole, provided that a party has not challenged the arbitration agreement itself." Here, plaintiffs did not challenge either the arbitration agreements or the delegation provisions within the agreements and the court concluded that the purchasers were obligated to submit to the arbitrator the question of the overall enforceability of the sales agreement and their statutory and common law claims against the dealerships. *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191, reconsideration denied, 238 N.J. 508 (2019). See also *Williams v. Eaze Solutions,* 2019 WL 5312956 (N.D. Cal.) (arbitration provision severed from contract whose unlawful objective of facilitating marijuana distribution; contract formation issue held to be for arbitrator to decide).

Non-Signatory May Compel Arbitration on Equitable Estoppel Grounds Where Detrimental Reliance Present. The Colorado Supreme Court, in answering a certified question from a federal court, concluded that a non-party may compel arbitration under Colorado's equitable estoppel doctrine on the same grounds as the doctrine is applied in other settings including a showing of detrimental reliance. The elements of an equitable estoppel claim are: (1) the party against whom the estoppel is asserted must know the relevant facts; (2) that party must intend that its conduct is acted upon or must result in the other party believing that the conduct was so intended; (3) the party seeking estoppel must not know the true facts; and (4) the party asserting estoppel must detrimentally rely on the other party's conduct. A Colorado appellate court previously endorsed an arbitration-specific equitable estoppel doctrine relying on the intertwined relationship between the signatory and non-signatory as opposed to the traditional detrimental reliance prong of the test. The Colorado Supreme Court saw no reason to vary from traditional equitable estoppel principles and disavowed the arbitration-specific test. The Court concluded that "non-signatories to a contract containing an arbitration provision might be able to compel arbitration on equitable estoppel grounds, but to do so they would need to prove all four traditionally defined elements of the doctrine, including, but not limited to, the element of detrimental reliance." *Santich v. VCG Holding Corp.*, 443 P. 3d 62 (Colo.). See also *Rossisa Participacoes v. Reynolds & Reynolds Co.*, 2019 WL 4242937 (S.D. Ohio) (U.S. subsidiary ruled a distinct and separate entity and not a successor or signatory and therefore arbitration award in Brazil against subsidiary not subject to confirmation). See also *Steyn v. CRTV, LLC*, 175 A.D.3d 1 (N.Y. App. Div. 2019) (non-signatory talent booker could not invoke equitable estoppel doctrine to confirm award against cable TV company where services

provided by talent broker to signatory on-air personality were not sufficiently intertwined with those performed by on-air personality for cable company).

Discovery in U.S. Under Section 1782 Authorized for International Commercial Arbitrations. 28 U.S.C. Section 1782 enables foreign litigants to obtain discovery in the United States for proceedings before a "foreign or international tribunal." The Sixth Circuit became the first appellate court to rule that Section 1782 applies to international arbitrations. The court reasoned that courts have long understood the word "tribunal" to include private arbitrations. "Here, the text, context, and structure of Section 1782(a) provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties." The Sixth Circuit acknowledged that its ruling was contrary to rulings by the Second and Fifth Circuits on the same question but concluded that those courts' reliance on legislative history could not withstand the textual arguments upon which its ruling was based. The court also rejected various policy arguments offered and concluded that "the word 'tribunal' in Section 1782(a) encompasses private, contracted-for commercial arbitrations of the type at issue here." *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019). See also *In re del Valle Ruiz,* 939 F.3d 520 (2d Cir. 2019) ("Section 1782's requirement that a person or entity 'resides or is found' within the district in which discovery is sought . . . extends Section 1782's reach to the limits of personal jurisdiction consistent with due process" but, in this case the contacts with the federal district are "insufficient to subject it to the district court's personal jurisdiction").

California's *McGill* Rule Not Preempted by FAA. Under the California Supreme Court decision in *McGill v. Citibank*, a contract provision that seeks to waive a party's right to seek public injunctive relief in any forum is unenforceable. The issue here before the Ninth Circuit was whether the FAA preempts the *McGill* rule. The court ruled that it did not as the *McGill* rule did not treat arbitration unfavorably. Rent-A-Center in this case moved to compel a putative class action under various California statutes that authorized public injunctive relief. The Ninth Circuit noted that "the *McGill* rule derives from a general and longstanding prohibition on the private contractual waiver of public rights." The court emphasized that "the *McGill* rule expresses no preference as to whether public injunction claims are litigated or arbitrated, it merely prohibits the waiver of the right to pursue those claims in any forum." As such, the court concluded that the *McGill* rule was a generally applicable contract defense that did not disfavor arbitration and therefore was not preempted. The court added that unlike class action waivers, public injunctive actions did not need to comply with state law class procedures and therefore did not interfere with the bilateral nature of consumer arbitrations. "A state-law rule that preserves the right to pursue a substantively complex claim in arbitration without mandating procedural complexity does not frustrate the FAA's objective." *Blair v. Rent-A-Center*, 928 F. 3d 819 (9th Cir. 2019). Accord: *Delisle v. Speedy Cash*, 2019 WL 2423090 (S.D. Cal.). Cf. *Echevarria v. Aerotek*, 2019 WL 2503377 (N.D. Cal.) (motion to compel PAGA claim denied despite court's

view that the U.S. Supreme Court in *Epic Systems* "may foreshadow a reversal" of Ninth Circuit law in this regard if the issue is presented to that Court).

Arbitration Ordered Despite Contradictory Forum Selection Clauses. A sales manager working in Michigan signed two contracts with his employer – one mandating arbitration in Maryland and the second one requiring litigation in that state. The sales manager sued in Michigan under various whistleblower laws. The employer moved to compel which the district court granted, and the Sixth Circuit affirmed. The appellate court reasoned that the two provisions, one mandating arbitration and the other litigation, can be interpreted to complement each other rather than contradict each other. The court emphasized the broad scope of the arbitration clause. The court found that the forum selection provision designating Maryland courts did not negate the arbitration provision but rather "simply stated that any lawsuits that are filed" may be in Maryland state or federal court and "contains no language specifically precluding arbitration for resolution of disputes." The court found significant that the forum selection clause was non-mandatory while the arbitration provision was mandatory and required that any dispute between the parties be submitted to arbitration. The court concluded that the forum selection clause should be interpreted to apply to actions to compel or enforce arbitration and did not negate the requirement that any dispute be arbitrated. *White v. ACell, Inc.,* 779 F. App'x 359 (6th Cir. 2019).

Case Shorts.

- *Chicago Insurance Co. v. General Reinsurance Corp.,* 2019 WL 5387819 (S.D.N.Y.) (arbitration panel retained jurisdiction two years after award issued where the new issue "flowed" from final award and panel expressly retained jurisdiction).
- *Maloof v. Wireless World*, 2019 WL 3933566 (Cal. App.) (PAGA claim not arbitrable in absence of consent by the state as the state is the real party in interest and not a private party).
- *Rainey v. Citigroup, Inc.,* 779 F. App'x 258 (5th Cir. 2019) (claim by party resisting arbitration that he was not properly served with motion to dismiss and compel arbitration rejected where the motion papers were mailed to the last known address and "notice complied with the Federal Rules of Civil Procedure and were reasonably calculated to apprise him" of the motion).
- *Cvoro v. Carnival Corporation*, 2019 WL 5257962 (11th Cir.) (courts favor enforcement of choice of law provision even where, as here, application of foreign law results in different remedies than available under U.S. law and therefore motion to vacate under New York Convention's public policy defense denied).
- *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126 (3d Cir. 2019) (shares of parent company can be seized under the Foreign Sovereign Immunities Act to enforce an arbitration award where Venezuela was shown to have exerted extensive control over the state-owned company).

- *Arredondo v. SNH Se Ashley River Tenant*, 2019 WL 3814725 (S.C. App.) (durable power of attorney empowered daughter of nursing home resident to waive right to jury trial and enter into arbitration agreement).
- *Matter of Henry*, 2019 WL 5295056 (5th Cir.) (bankruptcy court's refusal to compel arbitration in proceedings seeking enforcement of a discharge injunction upheld).
- *Blanton v. Domino's Pizza,* 2019 WL 5543027 (E.D. Mich.) (franchisor can compel arbitration in response to suit brought by employee of franchisee even though it did not sign agreement where franchisor included in definition of "company" in the arbitration agreement).
- *In Re: Rotavirus Vaccines Antitrust Litigation,* 2019 WL 5543808 (3rd Cir.) (district court's denial of motion to compel without permitting discovery vacated because "arbitrability is not apparent on the face of the Complaint, limited discovery on the issue of arbitrability is appropriate, after which [defendant] may file a renewed motion to compel arbitration.").

II. JURISDICTIONAL CHALLENGES: DELEGATION AND WAIVER ISSUES

Failure to Pay Arbitration Fee Constitutes Waiver. Plaintiff's lawsuit against Smartpay Leasing was stayed when the parties informed the court that the dispute was subject to an arbitration agreement. Smartpay disagreed with JAMS regarding the application of JAMS' Consumer Rules to the case and refused to pay the $950 filing fee assigned to it. JAMS eventually closed its file and plaintiff moved to lift the court's stay. The district court granted the motion, and the Eleventh Circuit affirmed. The court concluded that Smartpay's failure to pay the requisite arbitration filing fee constituted waiver of its right to arbitrate and "prematurely terminated the arbitration and effectively precluded [plaintiff] from seeking relief through the arbitration proceeding." In particular, the arbitration agreement gave plaintiff the choice of either proceeding before JAMS or the AAA and she chose JAMS. By acting inconsistently with its obligation to arbitrate the dispute, the court concluded that Smartpay "waived its right to arbitration by failing to pay arbitration fees." *Freeman v. Smartpay Leasing, LLC*, 771 Fed. App'x 926 (11th Cir. 2019).

Delegation Clause Does Not Apply to Carve-Out for Injunctive Relief. On remand from the Supreme Court, the Fifth Circuit addressed the issue whether the arbitration clause in the agreement between Archer & White Sales and Henry Schein's predecessor delegated the question of arbitrability to the arbitrator. The arbitration agreement incorporated the AAA rules which required arbitrability issues to be submitted to the arbitrator. The Fifth Circuit had previously recognized that under the AAA Rules gateway issues are to be submitted to the arbitrator to determine. Here, however, the arbitration agreement expressly excepted from arbitration "actions seeking injunctive relief" which plaintiff's complaint seeks. The Fifth Circuit concluded that "given that carve-out, we cannot say that the [arbitration agreement] evinces a 'clear and unmistakable' intent to delegate

arbitrability." The court rejected defendant's argument that not enforcing the delegation clause would allow a party to "tack on" a vague requirement for injunctive relief to avoid litigation. "The mere fact that the arbitration clause permits Archer to avoid arbitration by adding a claim for injunctive relief does not change the clause's plain meaning." The court upheld the denial of the motion to compel for these reasons. *Archer & White Sales v. Henry Schein*, 935 F.3d 274 (5th Cir. 2019).

Challenge to Delegation Provision Requires Specificity. Employees alleging employment discrimination and retaliation brought a writ of mandamus seeking reversal of the granting of their employer's motion to compel. The Missouri Supreme Court rejected the employees' challenges to the agreement and to its delegation provision on lack of consideration grounds. In particular, the Missouri Supreme Court ruled that the arbitration agreement was supported by consideration in the form of mutuality of enforcement and continued at-will employment. The Court also held that a challenge to a delegation clause requires a specific, additional basis beyond the challenge to the arbitration agreement as a whole. Relying on Supreme Court precedent, the Court explained "*Rent-A-Center* [561 U.S. 63 (2010)] teaches that a delegation clause must be treated as a separate contract within the larger arbitration contract and must be challenged on an additional ground or basis beyond the fact it is contained in an arbitration contract that the party also contends is invalid." Because the employees failed to raise a specific challenge to the delegation clause, the Court held that the delegation clause was valid, and the order compelling arbitration was upheld. *State ex rel. Newberry v. Jackson*, 575 S.W.3d 471 (Mo. 2019).

Arbitrator to Decide Among Multiple Venue Provisions. A limited liability corporation sued a consulting company relating to the failed effort to go public. Three agreements with arbitration clauses and varying venues were of relevance to the dispute. The Ohio appellate court ruled that because the AAA's Commercial Rules governed the issue of venue, possible consolidation, and the question of which contract applied to which claim, the dispute was for the arbitrator to decide. The court reasoned that although "alternative dispute resolution efficiencies suggest the multiple claims should be merged and heard at the same place and time" it was for the arbitrator and not the court "to dictate the ultimate venue or process under which these claims should proceed." *TN3, LLC v. Jones*, 2019 WL 2578426 (Ohio App.). See also *Local One Security Officers Union v. New York University*, 2019 WL 4254026 (S.D.N.Y.) (question of whether wage and hour lawsuit brought by union member constitutes an arbitrable "labor dispute or difference" for arbitrator to decide).

Case Shorts:

- *Gembarski v. Partssource*, 2019 WL 3806290 (Ohio) (right to demand arbitration not waived by failure to raise it in answer where named plaintiff, unlike putative class members, was not bound to arbitrate claims).

- *Alabama Psychiatric Services v. Lazenby*, 2019 WL 2560096 (Ala.) (arbitrator to decide whether class arbitration is cognizable where arbitrability issues delegated to arbitrator).
- *Ally Align Health v. Signature Advantage*, 574 S.W. 3d 753 (Ky. 2019) (incorporation of AAA's Commercial Rules serves to delegate to arbitrator authority to rule on terms of arbitration agreement even with carve-out for equitable relief).
- *Dickey v. Vital One Health Plans Direct, LLC,* 2019 WL 2545500 (E.D. Cal.) (waiver argument based on litigating for eight months before moving to compel rejected where defendant did not have actual knowledge of arbitration provision (it was in terms and conditions of vendor's agreement) and plaintiff failed to demonstrate any prejudice).
- *Blanton v. Domino's Pizza,* 2019 WL 5543027 (E.D. Mich.) (plaintiff equitably estopped from arguing franchisor not bound by arbitration agreement where plaintiff alleged conspiracy between non-signatory franchisor and signatory franchisee).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Unconscionability Claim Upheld by California Supreme Court. The majority of the California Supreme Court ruled that an automobile dealer's arbitration agreement was the product of oppression and refused to enforce it on unconscionability grounds. Three years after his employment commenced a service technician was presented at his workstation with several documents to sign including an arbitration agreement. The employee, whose first language is Chinese, immediately signed all the documents and handed them to the "porter" who delivered them and who had waited for him to sign the documents. The arbitration clause was contained in a dense, single spaced paragraph in small typeface in one of the documents. The majority ruled that the agreement was both procedurally and substantively unconscionable. The court found the circumstances surrounding the execution of the agreement as demonstrating "significant oppression" and procedural unconscionability as: the arbitration agreement was presented with many other documents and was not explained; termination would have resulted if the technician did not sign the agreement; a low-level porter delivered the documents creating the impression that an explanation was not available, and; the porter waited creating the impression that the technician needed to sign the documents immediately. The majority also found the arbitration provision to be substantively unconscionable. In doing so the court noted that the substantive "terms that, in the abstract, might not support an unconscionability finding take on greater weight when imposed by a procedure that is demonstrably oppressive." To determine substantive fairness, the Court explained that the arbitration provision "must be considered in terms of what [the employee] gave up and what he received in return." Here, the Court found the employer's arbitral process to be so complex that it effectively required employees to hire counsel, making it unenforceable. Overall, the majority concluded that

the arbitration provision was sufficiently one-sided to render it substantively and procedurally unconscionable. *Oto, LLC v. KHO*, 8 Cal. 5th 111 (2019).

Case Shorts:

- *Bowles v. Onemain Financial Group*, 927 F. 3d 878 (5th Cir.) (under Mississippi law claim of procedural unconscionability goes to contract formation and is for the court, not the arbitrator, to decide).
- *Gardner v. Yucaipa Trading Co.*, 2019 WL 2950200 (Cal. App.) (procedural unconscionability claim rejected where both sides were represented by counsel when negotiating the agreement, negotiated modifications were made, and the process was not one-sided).
- *Nicholas v. Wayfare, Inc.*, 2019 WL 5204132 (E.D.N.Y.) (unconscionability arguments properly submitted to arbitrator for resolution where "all disputes" under agreement were deemed arbitrable).
- *Crispin Porter and Bogusky, LLC v. Watson*, 2019 WL 5079916 (S.D.N.Y.) (fee shifting provision in employment agreement not unconscionable where terminated employee raised statutory claims and even if fees were awarded to a prevailing employer the award would be subject to challenge on manifest disregard grounds in absence of finding that claim was frivolous).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Motion to Compel Denied Where Evidence of Agreement to Arbitrate Not Authenticated. Uber moved to compel the arbitration of claims brought under the Telephone Consumer Protection Act alleging that the named plaintiff had registered with it using Uber's mobile app. The court noted that the "existence of an agreement to arbitrate must be supported by admissible evidence." Here, Uber introduced documents purporting to show that the named plaintiff registered for the Uber service and called for and then cancelled a call for a ride. These documents were not authenticated. Rather, the declarations supplied merely reviewed the registration process generally. "Snippets from a database, reproduced without any context, explanation, or supporting testimony, are not properly authenticated evidence." The court found sufficient evidence to create a dispute of material fact based on plaintiff's claim that his cellphone lacked the technology to use Uber's mobile app to register. "Because Uber bears the burden of proving the existence of the agreement to arbitrate, and all inferences must be drawn in [plaintiff's] favor, the Court cannot grant the motion to compel based on the present record." *In re Uber Text Messaging*, 2019 WL 2509337 (N.D. Cal.). See also *Maloof v. Wireless World*, 2019 WL 3933566 (Cal. App.) (human resource manager's testimony of practice and procedure with respect to execution of personnel forms including arbitration agreement not sufficient proof that plaintiffs signed arbitration agreement). Cf. *Epps-Stowers v. Uber Technologies, Inc.*,

2019 WL 3430566 (N.D. Cal.) (arbitration compelled following evidentiary hearing demonstrating that named plaintiffs in class action received a notice of, and consented to, arbitration when they signed up with Uber).

Receipt of E-Mail Sufficient to Constitute Acceptance of Agreement. Plaintiff received an e-mail from his employer, Morgan Stanley, informing him of the firm's mandatory arbitration program and his right to opt out of it. Plaintiff did not respond, and Morgan Stanley interpreted that as acceptance of the arbitration program. When plaintiff sued for discrimination, Morgan Stanley moved to compel arbitration. The district court granted the motion and the Seventh Circuit affirmed. The appellate court applied Illinois law, noting that contract formation is evaluated objectively and did not look to the subjective intent or understanding of the parties. Rather, the objective approach emphasizes "the employee's conduct – receipt of the employer's agreement, and performance consistent with the agreement terms – not the employee's intent." Here, "Morgan Stanley e-mailed the arbitration policy changes to [the plaintiff] personally, granted him 30 days to review the new arbitration agreement, circulated an opt-out form, conspicuously displayed the deadline to opt-out, posted a continual company intranet reminder of the new arbitration policy and opt-out date, and repeatedly informed that it would construe silence as acceptance of mandatory arbitration." The court noted that plaintiff worked with Morgan Stanley for four years and received regular e-mail communications to which replies were expected. The court distinguished situations in which an offeree received an unsolicited offer. Instead, "employment includes the understanding that employees will act with diligence in following an employer's instructions and responding to requests, whether transmitted by e-mail or another reasonable mode of communication." The Seventh Circuit concluded that plaintiff's inaction here was indistinguishable from overt acceptance and affirmed the granting of the motion to compel arbitration. *Gupta v. Morgan Stanley Smith Barney, LLC*, 934 F.3d 705 (7th Cir. 2019).

Acceptance of Arbitration Agreement by a Text Message Enforceable. Plaintiff sought to engage the services of defendant, and defendant forwarded by text message the agreement which included an arbitration provision. Plaintiff responded by texting "Agree". After a dispute arose, defendant sought to compel arbitration and plaintiff opposed the motion, arguing that he did not affirmatively assent to arbitration. The court rejected plaintiff's arguments and compelled arbitration. Defendant submitted a declaration from a custodian confirming receipt of plaintiff's text message "Agree" and other records related to plaintiff's relationship with defendant. The court ruled the declaration to be acceptable as a business record under the Federal Rules of Evidence. The court also distinguished the authority cited by plaintiff as relating to "browsewrap" agreements where "a party seeking to enforce a browsewrap agreement must establish that the other party had actual or constructive knowledge of the agreement." Here, plaintiff affirmatively gave his assent to the agreement when he texted "Agree" after receiving the agreement by text. For these

reasons, the court granted defendant's motion to compel. *Santich v. VCG Holding Corp.*, 443 P. 3d 62 (Colo. 2019).

Antitrust Claims Submitted to Arbitration. Johnson & Johnson and the Rochester Drug Cooperative (RDC) entered into a distribution agreement with a broad arbitration provision. RDC sued J&J raising antitrust claims, and J&J moved to compel arbitration. The district court denied the motion, but the Third Circuit reversed. In doing so, the appellate court addressed in detail the interplay between federal and state law when determining the scope of the arbitration agreement. The Third Circuit recognized that state law governs in the first instance but that "federal law may tip the scales in favor of arbitration where state interpretive principles did not dictate a clear outcome." The court also pointed out that federal law may in fact preempt state laws. Here, RDC's antitrust claims were inextricably intertwined with the distribution agreement. "But we are not swayed by the fact that RDC's antitrust claims could not exist but-for the Agreement; what is dispositive is that they cannot be adjudicated without 'reference to, and reliance upon' it." The court declined to apply New Jersey's rule that requires the waiver of statutory rights to be clearly and unambiguously stated, relying on New Jersey court decisions suggesting that that principle applies only in the employment and consumer context. As RDC's antitrust claims arose out of or relate to the distribution agreement, the court held that those claims were arbitrable. *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515 (3d Cir. 2019).

Unequivocal Acceptance of Arbitration Agreement Lacking. The employer sought to compel arbitration of its employee's FLSA claims based on an arbitration provision contained in the addendum to its employee handbook. The employee was given access to the handbook electronically when she joined the company as she clicked through various new hire documents. Plaintiff did not recall if she actually clicked to open the handbook. The same opportunity presented itself when she engaged in her annual review. The district court rejected the employer's argument that the employee was bound by the arbitration provision and the Eighth Circuit affirmed. The court explained that under Missouri law the parties may choose to delegate to an arbitrator threshold issues relating to the arbitration of future disputes. A delegation clause is to be treated, the court made clear, as an additional antecedent agreement. The court concluded that plaintiff never accepted the delegation clause here. While it is true that plaintiff may have "acknowledged the existence of the delegation provision" that did not satisfy Missouri law's requirement that she "unequivocably accept" those terms if for no other reason than there is no proof that they were accepted. "Even assuming the delegation provision, as presented, constitutes an offer, [plaintiff's] document review, and the subsequent system-generated acknowledgment, does not create an unequivocable acceptance; therefore, no contract was created." As the same fatal flaw is present with respect to the arbitration agreement itself, the Eighth Circuit denied the motion to compel and declined to give effect to the delegation clause. *Shockley v. Primelending*, 929 F.3d 1012 (8th Cir. 2019). Cf. *Coleman v. Mallinckrodt Enterprises*, 2019 WL 3803636 (E.D. Mo.) (acknowledgment of employee handbook signed four days after

employment commenced constitutes assent to all terms in handbook, including arbitration provision, where offer letter conditioned employment on agreeing to handbook terms).

Arbitration Compelled Where Terms of Use Unambiguous. Wayfair moved to compel the arbitration of a complaint brought by a dissatisfied customer. Wayfair's Terms of Use, in which its arbitration clause was contained, was available by hyperlink on all 1300 pages the plaintiff accessed. Various warnings were present when the website was accessed and when making a purchase that continued use of the website constituted acceptance of the Terms of Use. The plaintiff argued that the representation in the arbitration provision that disputes "arising from or relating to the Terms of Use" served to limit arbitration to Wayfair's privacy and rewards programs and its intellectual property. Since some of his claims sounded in tort, plaintiff argued that his claims did not relate to use of the website. The court rejected this reading, finding the arbitration clause "unambiguous." The court reasoned that plaintiff's "reading ignores much of the provision's language – most critically the portion about disputes arising from relationships resulting from the Terms of Use – and, as a result, is contrary to law." In particular, the court found that the "Wayfair Terms of Use include numerous provisions governing the purchase and sale of goods, such as those regarding warranties and product complaints. As a result, the Terms of Use shape the contours of a contractual buyer-seller relationship." For these reasons, the court granted the motion to compel. *Gorny v. Wayfair*, 2019 WL 2409595 (N.D. Ill.). See also *Galvez v. Jetsmarter, Inc.*, 2019 WL 4805431 (S.D.N.Y.) (clickwrap agreement enforced where prospective members must click toggle button next to "I accept terms and conditions of membership" which included arbitration agreement); *Nicholas v. Wayfair, Inc.*, 2019 WL 5204132 (E.D.N.Y.) (on-line purchaser required to arbitrate claim where: notice of terms and conditions was directly below "submit order" button; plaintiff kept the webpage with terms and conditions open for 107 seconds; hyperlink to terms and conditions was on every web page, and; arbitration provision was in clear typeface).

Arbitration Agreement Incorporated by Reference Ruled Enforceable. The Ninth Circuit was clear – "This case tests the outer limits of what constitutes a 'reasonably conspicuous' provision as part of the terms of usage so prevalent in the adhesion contracts of modern internet commerce." The district court compelled arbitration on an individual basis of the claims of the named plaintiff in a putative class action against UPS. Upon limited mandamus review, the Ninth Circuit ruled that because it could not say with "definite and firm conviction" that the district court erred it upheld the lower court's ruling. Here, the plaintiff admitted to agreeing to UPS's service terms, but argues that the arbitration provision was so inconspicuous that no reasonable user would be on notice of its existence. The court acknowledged that "locating the arbitration clause at issue here requires several steps and a fair amount of web-browsing intuition." In short, the user must (a) access the enrollment forms hyperlink, (b) read the service terms and understand that another set of terms and conditions are incorporated by reference, (c) go to UPS's website to find the other set of terms and conditions, (d) select those terms and conditions, (e) locate the link

to the terms and conditions, and (f) read those terms and conditions to find the arbitration provision. The Ninth Circuit noted that the incorporation appears in the first section of the service terms and instructs that those terms can be found on UPS's website. The court made clear that the "rules of consumer online agreements and consumer paper agreements are the same" and that courts have upheld analogous incorporation by reference in the online context. The court concluded that since plaintiff "unequivocally assented to the [UPS service terms] and those terms clearly incorporated the document containing the arbitration clause in question, we are not left with the definite and firm conviction that the district court erred in a manner sufficient to justify mandamus." *In re Randal Holl*, 925 F. 3d 1076 (9th Cir.).

Agreement to Arbitrate Not Evidenced in Hybridwrap Agreement. In a browsewrap agreement, the user of a website is deemed to have accepted its terms of use without affirmatively assenting to them. In a clickwrap agreement, the user is required to click "accept" to the terms of use before being allowed to continue on the site. Courts have recognized a third approach, "hybridwrap" that share the characteristics of both. "Hybridwrap agreements typically prompt the user to manifest assent after 'merely present[ing] the user with a hyperlink to the terms and conditions, rather than displaying the terms themselves.'" The court noted that courts generally give effect to hybridwrap agreements where the button indicating approval is located directly next to the hyperlink leading to the terms of use. Here, the court found the hybridwrap agreement not to be enforceable because there was nothing telling the user that by clicking through the website they were agreeing to the terms of use including the arbitration provision. In this case, the court found that there was no "connection" between the statement that the user agreed to the terms and the continue button apart from them being next to each other. "But the mere proximity of a terms and conditions hyperlink to a button that the user must click to proceed does not equate to an affirmative manifestation of assent to the terms and conditions." As the defendant failed to show that plaintiff's continued navigation through the site constituted acceptance of the terms of use or was otherwise linked to the arbitration provision, the court ruled that plaintiff could not be compelled to arbitrate her claim. *Anand v. Heath*, 2019 WL 2716213 (N.D. Ill.).

Arbitration Clause Properly Incorporated into Employment Agreement. The plaintiff in this action, Rollins, was a 16-year veteran at Goldman Sachs. He was promoted to managing director in 2011 and signed an employment agreement. The employment agreement included an attachment titled Managing Director Agreement ("MDA"), which contained an arbitration clause and provided that it was governed by New York law. In 2013, Rollins accepted a three-year work assignment in London and then permanently transferred to the London office in 2016. He signed a UK Employment Agreement in connection with the permanent transfer. The UK Agreement's cover letter described the agreement and its attachments, which included Rollins' 2011 MDA. Rollins was eventually terminated "for cause" and sued the company in New York federal court. Goldman Sachs moved to compel arbitration and Rollins opposed, arguing that the MDA was not validly

incorporated into the UK Agreement. The court disagreed, finding that the cover letter "unambiguously" incorporated the MDA and that there was "no ambiguity as to the parties' intent to form a valid contract and accept the arbitration terms." Accordingly, the court granted Goldman Sachs' motion to compel arbitration. *Rollins v. Goldman Sachs & Co., Inc.*, 2019 WL 2754635 (S.D.N.Y.).

No Arbitration Agreement Where Consumer Not Put on Inquiry Notice. Subway restaurants allegedly sent unsolicited text messages to consumers who signed up on its website for free items. A class action was brought, and Subway moved to compel arbitration based on the terms and conditions on its website used by the plaintiffs when they responded to a marketing solicitation. The court denied the motion, finding that the plaintiffs did not have proper notice that they were entering into an arbitration agreement. The court noted that the plaintiffs would have been put on "inquiry notice" if the agreement to arbitrate was obvious or was reasonably called to the plaintiffs' or consumer's attention, for example, where the terms were presented in a clear and conspicuous way. Here, the court found that inquiry notice was lacking where: the webpage was cluttered; the link was not conspicuous in size or font, and; the web page did not direct the user to read the relevant terms of use or signal that by using the web site they were subject to additional contractual terms. "Indeed, no text anywhere on the webpage indicated that the user was agreeing to any additional terms and the fact that the link was labeled 'T & Cs' provides little or no notice to the user that he might be bound by additional information contained at that link." The court concluded that merely "placing the links on the same page as the action button is insufficient to provide inquiry notice" and concluded that no agreement to arbitrate had been entered into with the plaintiffs. *Arnaud v. Doctor's Associates*, 2019 WL 4279268 (E.D.N.Y.). See also *Velasquez-Reyes v. Samsung Electronics*, 777 Fed. App'x 241 (9th Cir. 2019) (motion to compel denied where arbitration provision contained in "inaptly titled" booklet whose "vague references to terms and conditions are insufficient to put a reasonable consumer (or a reasonable prudent smartphone user) on notice of the arbitration provision that Samsung seeks to enforce").

Case Shorts.

- *Roberts-Banks v. Family Dollar*, 2019 WL 5075832 (E.D. Tenn.) (fact issue present whether employee signed arbitration agreement where employee alleges training manager clicked confirmation of review of arbitration agreement even though employee did not read it).
- *Jaludi v. Citigroup*, 933 F.3d 246 (3d Cir. 2019) (RICO claim, but not Sarbanes-Oxley claim, subject to arbitration provision in employee handbook).
- *Andre v. Mattress Firm*, 2019 WL 3066321 (S.D.N.Y.) (dyslexic employee who claims he was functionally illiterate still bound by arbitration agreement where he made no reasonable effort to have terms read or explained to him).

- *Ruiz v. New Avon, LLC*, 2019 WL 4601847 (S.D.N.Y.) (subsequent employment agreement which contained a "mandatory forum selection clause" provided that all disputes must be submitted to the jurisdiction of New York courts "supersedes the parties' earlier, conflicting agreement to arbitrate").

V. CHALLENGES TO ARBITRATOR OR FORUM

FINRA Ruled to be Inappropriate Forum for Arbitration. FCStone, a CFTC-registered futures commission merchant, sought to enjoin arbitrations pending before FINRA, claiming it was the wrong arbitral forum. The agreement signed by various defendants when they opened accounts with FCStone provided that "[a]ny controversy o[r] claim arising out of or relating to your accounts shall be settled by arbitration, either (1) under the Code of Arbitration of the National Futures Association, or (2) upon the contract market on which the disputed transaction was executed or could have been executed . . ." Notwithstanding this agreement, defendants took the position that FINRA was a proper forum because FCStone is a FINRA member. FCStone responded by asserting that FINRA regulates only securities and investment banking and since defendants held commodity futures and options accounts regulated by the CFTC they are not "customers" under FINRA Rule 12200. Finding that the commodities/securities distinction is "so distinct that Congress has erected different regulatory regimes and enforcement agencies for the different financial products," the court stated that its decision would turn on whether defendants were "Customers" under the FINRA Rules. The court concluded that the Rules define Customer only by exclusion, i.e., that it shall not include a broker or dealer. "But coupling this definition with the broader structure of the FINRA Rules, the circuit courts to have addressed this issue have concluded that FINRA members submit to FINRA arbitration only with customers of their FINRA-regulated business activities, securities and investment banking." Finding that the accounts at issue involved commodity-related financial products regulated by the CFTC, the court ordered all except two defendants who never signed the arbitration agreement to submit their arbitration to the NFA. *Int'l FCStone Fin., Inc. v. Jacobson*, 2019 WL 2356989 (N.D. Ill.).

Case Shorts:

- *Zoller v. UBS Securities*, 2019 WL 2371724 (N.D. Ill.) (failure to raise challenge to suitability of FINRA to hear and resolve dispute constituted forfeiture of contention and cannot later be invoked).

VI. CLASS & COLLECTIVE ACTIONS

Class Arbitration Gateway Issue for Court. The Fifth Circuit joins the Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits in ruling that class arbitration is a gateway question for courts and not the arbitrator to decide. The Fifth Circuit also agrees with the Third, Fourth, Sixth, and Eighth Circuits that this is the case even where the parties have delegated arbitrability issues to the arbitrator. The arbitration provision here permitted the arbitrator to hear "only individual claims" and barred class or collective action arbitrations. The agreement also provided that the arbitrator was empowered to resolve arbitrability issues. The court rejected application of the delegation provision in the AAA rules, finding that the rules and therefore the arbitration provision under the AAA rules were not applicable "where such rules are inconsistent with this agreement." The court concluded that the express class action waiver trumped the delegation provision. The court concluded that "this class arbitration bar operates not only to bar class arbitrations to the maximum extent permitted by law, but also to foreclose any suggestion that the parties meant to disrupt the presumption that questions of class arbitration are decided by courts rather than arbitrators." *20/20 Communications v. Crawford*, 930 F. 3d 715 (5th Cir. 2019).

VII. HEARING-RELATED ISSUES

Arbitrator Misconduct Claim Rejected. Dr. David Newell's employment agreement with Providence Health & Services and Swedish Health Services (collectively "Swedish") required him to notify Swedish "of the initiation, occurrence, or existence of . . . [a]ny criminal investigation of [Newell]." While employed by Swedish, Newell was arrested and pled guilty to a charge of soliciting prostitution. He did not notify Swedish of his arrest. Shortly thereafter, Swedish terminated Newell allegedly because of the non-disclosure. Newell filed suit and the dispute was sent to arbitration. The arbitrator found in Newell's favor and the award was confirmed. In challenging the award, Swedish alleged that the arbitrator committed several errors including her decision to limit its ability to cross-examine Newell on his conversations with his criminal defense attorney. The court, however, found that the parties' employment agreement limited discovery and the arbitrator's decision to limit testimony on Newell's conversations with his lawyer was proper under the terms of the arbitration agreement. The court found the question to be not whether the arbitrator correctly applied federal law but rather whether the arbitrator's decision amounted to misconduct. The court held that it did not. "[T]he arbitrator was tasked with ensuring that the hearing was fair to all parties while limiting live testimony and cross-examination to the extent possible. Here, the arbitrator did precisely that by determining that the details of a conversation between Newell and his attorney was not a proper subject for cross-examination" as Newell admitted that he never informed Swedish of his arrest, the court concluded that the arbitrator's decision did not create a fundamentally unfair hearing. *Newell v. Providence Health & Servs.*, 2019 WL 2578679 (Wash. App.).

Case Shorts:

- *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.,* 939 F.3d 1145 (11th Cir. 2019) (Section 7 of FAA requires non-party witness to appear physically before arbitrator at hearing and therefore video testimony of a non-party witness may not be compelled by subpoena).
- *Managed Care Advisory Group v. Cigna Healthcare*, 2019 WL 4464301 (11th Cir.) (arbitrators are not authorized to compel pre-hearing discovery from non-parties).
- *Superior Energy Services Columbia S.A.S. v. Premium Petroleum Services*, 2019 WL 2717692 (S.D.N.Y.) (sanctions imposed by tribunal, namely admittance of witness statements without opportunity to cross-exam where witness had been tampered with by adverse party, within discretion of tribunal).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Failure to Disclose Ownership Interest in JAMS Warrants Vacatur. The arbitrator in this case disclosed he had an "economic interest" in JAMS but failed to disclose that he was a co-owner of it. An award was issued in favor of Monster Energy and was confirmed by the district court. The Ninth Circuit reversed, with a majority ruling that the arbitrator's failure to disclose his ownership interest in JAMS supported a finding of evident partiality. The majority observed that JAMS had 97 cases with Monster Energy in the last five years, which raised the specter of "repeat player bias." The court noted that JAMS did not provide details of its ownership structure and the arbitrator's interest in the business which denied the parties constructive notice of the arbitrator's potential non-neutrality. This served to negate any claim of waiver. To support a claim of evident partiality, "the arbitrator's undisclosed interest in an entity must be substantial, *and* that entity's business dealings with a party to the arbitration must be non-trivial." The majority found that as a co-owner the arbitrator was entitled to profits from all JAMS arbitrations which rendered his interest in the business substantial. The court then added that 97 arbitrations with Monster Energy "is hardly trivial, regardless of the exact profit-share that the Arbitrator obtained." The majority concluded "before an arbitrator is officially engaged to perform an arbitration, to ensure the parties' acceptance of the arbitrator is informed, arbitrators must disclose their ownership interests, if any, and the arbitration organizations with whom they are affiliated in connection with the proposed arbitration, and those organizations' nontrivial business dealings with the parties to the arbitration." *Monster Energy Co. v. City Beverages*, 2019 WL 5382062 (9th Cir.).

Award Overturned on Manifest Disregard Grounds Returned to Arbitrator for Clarification. The district court vacated an award on manifest disregard grounds. The Second Circuit, on appeal, rejected the district court's order and instead remanded the matter to the district court with instructions to refer the case back to the arbitrator for clarification. The arbitrator in this case awarded damages to a claimant alleging violations of the Telephone Consumers Protection Act while at the same time recognizing that the

claimant was a class member in a class action that was settled, and which included a general release. "Because the arbitrator neglected to explain these mutually exclusive determinations, we are unable to identify whether the arbitrator abided by applicable substantive law as mandated by the parties' arbitration agreement and, consequently, whether the arbitral award was issued in manifest disregard of the law, as the district court held." Rather than vacate the award as the district court had done, the Second Circuit instead concluded that remand to the arbitrator was warranted. The court went further and directed the district court to instruct the arbitrator "either to interpret and apply the terms of the [settlement] agreement's general release provision or to explain why that provision does not bar" the claims here. "In light of the incoherence of the arbitrator's decision, we hereby vacate the district court's order and remand the case to the district court to remand to the arbitrator with instructions to clarify whether the class notice was or was not sufficient and, if determined to be sufficient, then to construe the general release provision in the first instance and to vacate or modify the arbitral award if necessary." *Weiss v. Sallie Mae*, 939 F. 3d 105 (2d Cir. 2019).

Ambiguous Award Remanded to Arbitrator. The arbitrator awarded damages on a breach of an exclusive dealing claim. In doing so, the arbitrator granted the prevailing party "the economic value today [i.e. December 3, 2018] of 84,000 warrants convertible to [Respondent's] stock exercisable at $2.50 per share as of September 24, 2018." Upon review of the award, the court ruled that the damages awardable in this case was ambiguous in "how those warrants should be valued." The court found three possible interpretations, two resulting in an award of no damages and the third in over three million dollars in damages. Under these circumstances, the court remanded the damages issue to the arbitrator "request[ing]" that the arbitrator limit her clarification to the damages issue only. *Three Brothers Trading v. Generex Biotechnology Corp.*, 2019 WL 3456631 (S.D.N.Y.).

Award Under New Jersey Statute Overturned. New Jersey's Spill Compensation and Control Act provides for arbitration of disputes related to denial of Fund monies. The standard applied by the arbitrators is "arbitrary and capricious." An arbitration was initiated by petitioner after his claim for damages was denied. Two years elapsed after petitioner's request for arbitration was filed before the arbitration commenced. A further delay ensued during discovery and the State did not file its expert's report until just before the hearing began which included altered reasons for the denial of petitioner's claim. The arbitrator upheld the denial of petitioner's claim, relying in part on the State's expert report. The New Jersey Supreme Court, by a 4 to 3 vote, overturned the award. The majority explained that while courts defer to arbitrators' determinations, here the arbitrator was acting in a "quasi-judicial" capacity and his award could be overturned upon a clear showing that it was arbitrary, capricious, or lacked support in the record. The majority concluded that the award was based on the arbitrator's "misperception of the evidence." After analyzing the record and the arbitrator's reasoning, the majority concluded that "the arbitrator's misperception about the [State's] theory constitutes the type of misperception of the facts in this record

that can render an agency decision infirm, as arbitrary and capricious, and that warrants our intervention." In particular, the majority found the fairness of the hearing to have been undercut "because it compromised the adequacy of notice to petitioner of the proofs against it in what was petitioner's only opportunity to challenge the [State's] denial of its claim." The majority further cited the arbitrator's unwillingness to allow petitioner to present "responsive scientific evidence pulled together after receipt of the late-shared expert report" of the State. The majority concluded that it did not "believe the wholesale denial of petitioner's presentation, especially after [the expert's] report introduced a new theory to support the [State's] denial, was in keeping with the fulfillment of the truth-seeking function of adversarial proceedings." On this basis, the Court vacated the award and remanded the dispute for conduct of a new arbitration proceeding. *U.S. Masters Residential Property v. New Jersey Department of Environmental Protection*, 2019 3402917 (N.J.).

Case Shorts:

- *McGee v. Armstrong,* 2019 WL 5556756 (6th Cir.) (arbitrator did not exceed authority by granting summary judgment where AAA rules authorized filing of dispositive motions).
- *Inversiones y Procesadora Tropical Inprotsa v. Delmonte International*, 2019 WL 4200011 (11th Cir.) (attorneys' fees awarded against losing party where it challenged award without "any legal basis for doing so").
- *Al Raha Group for Technical Services v. PKL Services*, 2019 WL 4267765 (N.D. Ga.) (interim emergency award issued by emergency arbitrator not subject to confirmation as it "did not finally and definitely dispose of any independent claim").
- *SRW Equities v. Michael Nussen & Jade USA*, 2019 WL 4237986 (N.Y. Sup. Ct. Kings Cty.) (award issued by Beth Din in real estate dispute under agreement conferring on religious tribunal broad authority to resolve disputes deemed final despite stating that the parties could return to the Beth Din regarding such issues as method of payment, eviction, and "other issues not discussed in the arbitration agreement").
- *Arabian Motors Grp., W.L.L. v. Ford Motor Co.,* 775 F. App'x 216 (6th Cir. 2019) (manifest disregard claim rejected where no existing case law on issue before arbitrator and arbitrator applied traditional statutory interpretation tools).
- *Sabre GLBL, Inc. v. Shan*, 2019 WL 2880999 (3d Cir.) (arbitrator did not exceed his authority by awarding attorneys' fees despite contractual language stating that each side would bear its own fees where ambiguity was present because the same agreement made disputes subject to JAMS Minimum Standards of Procedural Fairness which allowed for award of such fees).
- *Al-Qarqani v. Chevron Corp.*, 2019 WL 4729467 (N.D. Cal.) ($1 billion-dollar foreign arbitration award may not be confirmed where Saudi royal families seeking confirmation were not signatories to arbitration agreement).

- *Heimlich v. Shivji,* 7 Cal.5th 350 (2019) (vacatur not warranted "merely because arbitrators refuse to consider evidence they find legally irrelevant, even if the irrelevance determination rests upon an incorrect foundation").
- *Sayre v. JPMorgan Chase & Co.,* 2019 WL 5457796 (9th Cir.) (award vacated where FINRA panel denied request for postponement resulting from claimant's counsel's medical emergency and proceeded with hearing in his absence "without addressing why it could not have granted a continuance at least for the three days for which the doctor had placed [claimant's] counsel off work").

IX. ADR – GENERAL

Court Enforces Contract Provision Requiring Mediation as Condition Precedent. Plaintiff filed a lawsuit against his former employer alleging breach of the employment agreement. The employer moved for dismissal, arguing that the employee did not comply with a "Mediation Provision" in his agreement. The employee claimed he did comply with the provision because he sent a letter to the employer when he filed his complaint stating that he "would not be opposed to pursuing mediation concurrently with the court proceedings, so long as [he] does not have to incur any portion of the expense related to that process." The circuit court dismissed the action, and on appeal the Virginia Supreme Court affirmed. The court held that the Mediation Provision was a condition precedent to filing suit and the failure to mediate denied the employer "the benefit of its bargain." The court then upheld the lower court's dismissal with prejudice. Finding that the employee had an opportunity to fully litigate his claim in the Initial Action, was aware of the Mediation Provision, and "still failed to request mediation before filing the Current Action," the court held that under the circumstances of this case, the evidence supported a dismissal with prejudice. *Primov v. Serco, Inc.,* 817 S.E.2d 811 (Va. 2018). See also *SOR Technology v. MWR Life, LLC*, 2019 WL 4060350 (S.D. Cal.) (argument that defendant waived the condition precedent by resisting mediation rejected where claim not contained in court complaint and therefore action dismissed for failing to satisfy condition precedent, namely, conducting of mediation).

Case Shorts.

- *Heimlich v. Shivji,* 7 Cal.5th 350 (2019) (pre-hearing settlement offer is inadmissible to prove liability but may be offered by losing respondent whose offer exceeded amount awarded to claimant to prove unrelated matters or damages).

X. COLLECTIVE BARGAINING SETTING

NLRB Rules Arbitration Agreement Unlawful. A retailer's arbitration agreement required the arbitration of "any claim" between the parties. It did not exclude claims that could be filed administratively with the NLRB. The NLRB ruled that the arbitration agreement taken as a whole "plainly makes arbitration the exclusive forum for the resolution of all claims" except for those expressly excluded, namely, workers' compensation and unemployment insurance claims. The agreement did not similarly exclude filing charges with the NLRB. The Board concluded that the agreement will likely "significantly impair employee rights, the free exercise of which is vital to the implementation of the statutory framework established by Congress and the National Labor Relations Act and cannot be legitimately justified." On this basis, the Board issued a cease and desist order barring application of the employer's mandatory arbitration agreement. *Beena Beauty Holding*, 368 NLRB No. 91 (October 8, 2019). See also *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (June 18, 2019) (NLRB rejects arbitration agreement whose broad language subjecting all claims to arbitration where that provision could reasonably be interpreted as barring NLRB filings). Cf. *Briad Wenco LLC d/b/a Wendy's Restaurant and Fast Food Workers Committee,* 368 NLRB No. 72 (September 11, 2019) (arbitration agreement which expressly excludes charges or complaints filed with the NLRB is enforceable).

NLRB Rules Employers Can Impose Arbitration Against Opt-In Collective Action Plaintiffs. Several restaurant employees brought a collective action wage lawsuit against a nonunion employer. The employer responded by requiring that the employees sign an arbitration agreement with a class action waiver. Further, a supervisor threatened to withhold shifts if the employees did not sign the agreement. The NLRB, relying on the Supreme Court decision in *Epic Systems*, concluded that the employer's action did not violate Section 7 of the NLRA. *Epic Systems* held that an agreement requiring employees to resolve employment-related claims in individual arbitrations did not violate the NLRA "because opting in to a collective action is merely a procedural step required in order to participate as a plaintiff in a collective action, it follows that an arbitration agreement that prohibits employees from opting in to a collective action does not restrict the exercise of Section 7 rights and, accordingly, does not violate the Act." The Board acknowledged that an employer may violate the NLRA when it promulgates a lawful rule to restrict Section 7 rights. Here, however, the employer's imposition of a class action waiver in response to employees' filing of a wage and hour lawsuit was in support of a lawful rule, the requirement that claims be arbitrated on an individual basis. The Board further found that the supervisor's remarks did not violate the NLRA. "Rather, his statements amounted to an explanation of the lawful consequences of failing to sign the agreement and an expression of the view that would be preferable not to be removed from the schedule." *Cordua Restaurants*, 368 NLRB No. 43 (August 14, 2019). Accord: *Tarlton and Son, Inc., and Robert*

Munoz, 368 NLRB No. 101 (October 30, 2019) (arbitration program instituted in response to wage and hour suit does not violate Section 7 of the NLRA and is enforceable).

Union Members Required to Arbitrate FLSA Claims. A home care worker subject to a collective bargaining agreement brought a collective and class action in federal court asserting claims under the FLSA and the New York Labor Law. The district court denied the employer's motion to compel, finding that the union did not clearly and unmistakably agree to arbitrate claims on behalf of its members. The Second Circuit reversed. The appellate court ruled that the district court misapplied the applicable standard. The clear and unmistakable standard, the court reasoned, "is applicable only to the question whether a union has waived its members' right to bring statutory claims in court, not to the initial question whether an arbitration agreement exists at all." Here, the collective bargaining agreement specifically provided that wage and hour claims under the FLSA and New York Labor Law were arbitrable. "On its face, this language simply does not allow an employee to choose to proceed in a judicial forum." On this basis, the Second Circuit ordered plaintiff to arbitrate her statutory wage and hour claims. *Abdullayeva v. Attending Home Care Services*, 928 F. 3d 218 (2d Cir. 2019).

Obligation to Arbitrate Survived Expiration of Collective Bargaining Agreement. The union and management agreed to extend an expiring collective bargaining agreement by means of a memorandum of agreement. However, the parties could not agree with respect to two key terms and a new CBA was not entered into. The union declined to arbitrate a dispute, arguing that there was no meeting of the minds on the new CBA and therefore it was not obligated to arbitrate the dispute. The Second Circuit disagreed. The court noted that the standard in this context is less strict and focused on the parties' intentions over form when determining the continuing obligation to arbitrate disputes. The court noted that by entering into the memorandum of agreement the parties intended to continue to arbitrate disputes as evidenced by the arbitrations conducted after the memorandum was entered into and before talks broke down on the new agreement. The NLRB found that the union had not engaged in an unfair labor practice by not signing the agreement. The court emphasized that there was no dispute about the obligation to arbitrate and the parties "participated in arbitration following expiration of the original CBA on the assumption that the CBA was still in effect." On this basis, the Second Circuit affirmed the lower court's ordering of the dispute to arbitration. *International Brotherhood of Electrical Workers v. Charter Communications*, 2019 WL 5092466 (2d Cir.).

Case Shorts:

- *Johns Manville v. International Brotherhood of Teamsters*, 2019 WL 4180802 (6th Cir.) (award reducing termination of an intoxicated employee to suspension upheld as arbitrator weighed evidence and there was no indication he was employing his own brand of industrial justice).

- *Miller v. Southwest Airlines*, 926 F. 3d 898 (7th Cir.) (lawfulness under Illinois law of employer's use of biometric fingerprint system for Board of Adjustment to decide under the terms of collective bargaining agreement).

XI. NEWS AND DEVELOPMENTS

Pennsylvania Adopts Revised Uniform Arbitration Act. Pennsylvania has adopted the Revised Uniform Arbitration Act ("RUAA") promulgated by the Uniform Law Commission ("ULC"). In doing so, it joined 20 other states and the District of Columbia in modernizing their laws governing voluntary arbitration agreements. The PA RUAA applies apply to all arbitration agreements subject to Pennsylvania law executed on or after July 1, 2019, although parties to arbitration agreements entered into before July 1, 2019 may elect to be governed by the new law. The revisions eliminated, among other things, Pennsylvania's so-called "common law" arbitration, which was subject to minimal statutory and judicial oversight. Also, arbitrators are now expressly required to disclose known financial or personal interests including any existing or past relationships with any party, their counsel or representatives, a witness, or another arbitrator. This obligation is ongoing and, if not disclosed, may be used to establish "evident partiality," which is grounds for vacating an arbitration award.

California Criminalizes Mandatory Arbitration as Condition of Employment. California enacted a new law which makes it a misdemeanor for an employer to require any applicant or employee, as a condition of employment, to agree to arbitration of any claim under the California Fair Employment and Housing Act or Labor Code. The law also protects an employee's right to notify state regulators and law enforcement authorities of any alleged unlawful conduct.

California Employers Penalized for Failing to Timely Pay Arbitration Fees. Under a new California law, employers face harsh consequences if they fail to pay arbitration fees on time. Under the new law, if an employer fails to pay fees required for the initiation or continuation of an arbitration proceeding within 30 days of the due date, the employer will be deemed to be in material breach of the arbitration agreement. The claimant will then have the unilateral option to: move the case to court and recover attorneys' fees incurred; compel the employer to pay the fees and recover attorneys' fees incurred; if the arbitration already commenced, continue the proceeding with the employer in default, or; if the arbitration has already commenced, pay the fees and seek reimbursement by the employer as part of the arbitration award.

New York State Court Announces "Presumptive" ADR Program. The New York State Unified Court System has instituted a new "presumptive" ADR program applicable to a broad range of civil cases, from personal injury and matrimonial cases to estate matters and commercial disputes. Uniform rules and local protocols, guidelines and best practices will

be issued. Comprehensive data will be collected to help evaluate the progress of court-sponsored ADR programs and allow for changes to improve the performance of programs going forward.

Illinois Excludes Harassment and Discrimination from Arbitration Agreements. Illinois enacted the Workplace Transparency Act which is designed, among other things, to prevent sexual harassment and discrimination in the workplace and imposes significant obligations on employers, including a limitation on the enforceability of arbitration agreements. Under the new law, agreements to arbitrate will be unenforceable unless they expressly exclude discrimination and harassment claims.

New York Prohibits Mandatory Arbitration for Certain Workplace Disputes. In 2018, New York law was amended to prohibit workplace contracts which mandated arbitration of sexual harassment claims. In August 2019, as part of sweeping new reforms to the New York State Human Rights Law, the prohibition against mandatory arbitration agreements was extended to any type of discrimination. But see *Latif v. Morgan Stanley & Co.*, 2019 WL 2610985 (S.D.N.Y.) (New York law barring arbitration of sexual harassment claims ruled preempted by the FAA).

Kentucky Law Restores Employers' Right to Require Mandatory Arbitration Agreements. Kentucky has restored the rights of employers to require employees to arbitrate claims as a condition of employment. The new law was a direct response to a 2018 decision issued by the Supreme Court of Kentucky in *Northern Kentucky Area Development District v. Snyder* which held that the FAA did not preempt a Kentucky statute prohibiting employers from requiring employees to sign arbitration agreements as a condition of employment. The law now retroactively permits employers to require arbitration agreements as a condition of employment or continued employment. It also allows the parties to contractually limit the time period in which employees must file employment-related claims, allows an employer to require, as a condition of employment, a background check, and establishes certain procedural requirements for arbitration between the parties to safeguard their legal rights.

Virginia Bans Mandatory Arbitration in Investment Advisor Agreements. Virginia's State Corporation Commission issued a new regulation, titled the "SCC Anti-Arbitration Agreement," 21-VAC5-80-200(F), that prohibits investment advisors from including mandatory arbitration provisions in their advisory agreements. The new regulation appears to be the first state regulation banning investment advisors from requiring mandatory arbitration. Some commentators have questioned its enforceability, citing the FAA's preemptive effect.

Centers for Medicaid And Medicare Repeals Prohibition on Mandatory Arbitration. The Centers for Medicare & Medicaid (CMS) issued a final rule repealing its prohibition on long-term care facilities using mandatory arbitration agreements as a condition of

admission. Long-term care facilities may now include arbitration agreements so long as they comply with certain disclosure and transparency requirements, including: the agreement is explained to the resident and his or her representative, and is specifically acknowledged by the resident; the agreement expressly provides that it is not required as a condition of admission to the facility; the agreement does not contain any language preventing the resident or anyone else from communicating with federal, state, or local officials, and representatives of the Office of the State Long-Term Care Ombudsman, and; the resident is permitted 30 calendar days to rescind the agreement.

House Passes Bill Invalidating Mandatory Arbitration Clauses. In September 2019, the U.S. House of Representatives passed a bill that would forbid the enforcement of contract clauses related to employment, consumer, antitrust and civil rights that require disputes go to arbitration rather than the courts. The legislation, called the Forced Arbitration Injustice Act, carves out an exception for union-negotiated contracts.

XII. TABLE OF CASES

Cases