FELIU NEUTRAL SERVICES LLC
Alfred G. Feliu
afeliu@feliuadr.com
212-763-6801

Feliu Case Summaries:

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Contents

I. JURISDICTIONAL ISSUES: GENERAL

New York Convention Does Not Authorize Vacatur of Foreign Award. Can a court in the United States vacate a foreign award under the New York Convention? The Second Circuit concluded that it could not. The court explained that while the FAA provides subject matter jurisdiction over a proceeding falling under the New York Convention, the New York Convention "primarily concerns the recognition and enforcement of arbitral awards in countries other than that which an award was made." The only exception under the New York Convention for vacatur is challenges in the primary jurisdiction and the ability to stay recognition proceedings pending a vacatur action in the primary jurisdiction. The agreement here designates New York courts as having exclusive jurisdiction over matters concerning the arbitration. The court, however, rejected the notion that the parties could designate a jurisdiction for vacatur purposes. The court explained that the principal purpose of adopting the New York Convention was to encourage recognition of commercial arbitration agreements. "The Convention was not intended to provide a vehicle for the second-guessing and invalidation by one jurisdiction of arbitral awards generated in another; it was designed to enhance the portability of awards by streamlining the process by which they could be recognized and enforced abroad." The court also rejected the notion that the Convention's silence allowed domestic law to fill the gap on questions of vacatur. "We do not think that the Convention's general silence on vacatur is a gap to be filled by domestic law or private contract, but a clear indication that vacatur is not among the mechanisms that the Convention is designed to regulate." The court declined to decide, however, whether "parties to an international arbitration may, consistent with the New York Convention, designate by contract one country as the arbitral seat and another as the venue for vacatur proceedings." *Molecular Dynamics v. Spectrum Dynamics Medical Ltd.*, 143 F.4th 70 (2d Cir. 2025). See also *Caplan v. Bogota Savings Bank*, 2025 WL 1554781 (E.D. Tex.), Report and Recommendation adopted, 2025 WL 1699668 (E.D. Tex.) (New York Convention did not confer jurisdiction for a motion to vacate an award under the FAA where the award is between citizens of the United States). See also *Ma v. Fang*, 2025 WL 1982304 (C.D. Cal.) (court declines to vacate foreign arbitration award and opine on its merits where moving party "let his opportunity to challenge the award in the primary jurisdiction lapse").

Scope of Sexual Harassment for Purposes of EFAA Explained. The Ending Forced Arbitration Act prohibits the arbitration of disputes involving conduct that constitutes sexual harassment. But what if the statute at issue does not define sexual harassment? That is the case with the very liberal New York City Human Rights Law, which makes it unlawful to discriminate based on gender. The court here rejected the argument that EFAA therefore barred arbitration of any gender-based discrimination claim brought under the Human Rights Law. Instead, the court reasoned that sexual harassment was a separate subset of gender-based claims under the Human Rights Law. The court held that "under the NYCHRL, conduct that constituted sexual harassment is unwelcome verbal or physical behavior based

on a person's gender, regardless of whether that behavior is lewd or sexual in nature." As the plaintiff here alleged that she was subject to unwelcome verbal behavior and was denigrated in front of subordinates, which was motivated by gender, the court concluded that the plaintiff had plausibly stated a claim for sexual harassment under the Human Rights Law. As a result, EFAA applied to her claim and defendant's motion to compel was denied. *Owens v. PriceWaterhouseCoopers, LLC*, 786 F. Supp.3d 831 (S.D.N.Y. 2025). See also *Doe v. Celebrity Cruises, Inc.*, 2025 WL 20469642 (S.D. Fla.) (Ending Forced Arbitration Act bars arbitration of sex assault claim whether or not "a plaintiff labels her claims as sexual assault claims or brings them under a particular statute"); *Stephens v. DFW LINQ Transport, Inc.*, 2025 WL 1697537 (N.D. Tex.) (Ending Forced Arbitration Act does not bar arbitration as plaintiff's claim that manager became frustrated with the amount of work time lost making doctor visits did not constitute sex harassment); *Smith v. Boehringer Ingelheim Pharmaceuticals, LLC*, 2025 WL 2403042 (D. Conn.) (Ending Forced Arbitration Act did not bar arbitration of gender-based discrimination claims that did not include sexually harassing or unwelcome sexual advances or activities); *Smith v. Meta Platforms*, 2025 WL 2782484 (S.D.N.Y.) (motion to compel claim granted as plaintiff's retaliation claim based on discriminatory treatment of female colleagues not barred by Ending Forced Arbitration Act as offensive actions were not sexual in nature); *Rix v. Polsinelli, P.C.*, 2025 WL 2674767 (D.D.C.) (motion to compel denied as the Ending Forced Arbitration Act applies to entire case and not just sexual harassment claim and, in any event, remaining claims including retaliation, are intertwined with the sexual harassment claims); *Montanus v. Columbia Management Investment Advisers*, 2025 WL 2503326 (S.D.N.Y.) (Ending Forced Arbitration Act's bar on arbitration of sexual harassment claims did not apply in continuing violation context where plausibly stated sexual harassment claim occurring before EFAA enacted and later post-EFAA acts were in nature of discrimination and retaliation).

California Forfeiture of Arbitration Right Statute Limited to Willful Nonpayment. Drafters of arbitration agreements waive their right under California law to arbitration if they fail to pay the arbitrators' invoices within 30 days of receipt. Many California courts have strictly applied the statute and ruled that the arbitration right had been waived without inquiring as to the reason for the nonpayment. The California Supreme Court addressed the question of whether the FAA preempted this provision of the California Arbitration Act. The Court ruled that it did not, but, in doing so, articulated the proper application of the provision going forward. The Court rejected the rigid application of the statute as interpreted by some lower courts. Instead, it concluded that "the statute does not abrogate the longstanding principle, established by statute and common law, that one party's non-performance of an obligation automatically extinguishes the other party's contractual duties only when non-performance is willful, grossly negligent, or fraudulent." As so interpreted, the Court explained that "the Legislature sought to deter companies and employers from engaging in *strategic* nonpayment of arbitration fees; we find no indication that it intended

to strip companies and employers of their contractual right to arbitration where nonpayment of fees results from a good faith mistake, inadvertence, or other excusable neglect." The Court reasoned that, properly viewed, this provision of California's Arbitration Act makes arbitration agreements enforceable on the same grounds as other contracts. The Court concluded that when "a party breaches its contractual obligations willfully, fraudulently, or with gross negligence, it cannot escape the consequences by pointing to a lack of harm to the other party. But short of wrongful conduct, a breaching party may be relieved from forfeiting its right to enforce an arbitration agreement based on the circumstances, as provided by longstanding legal principles." *Hohenshelt v. Superior Court of Los Angeles County*, 18 Cal.5th 310 (2025). See also *Wilson v. TAP Worldwide*, 2025 WL 2802617 (Cal. App.) (employer's payment of arbitration fee one business day late, which was caused by bank processing delay, was not willful or grossly negligent and did not constitute forfeiture of arbitration right under California law).

Federal Circuit Lacks Jurisdiction Over Petition to Modify Arbitral Award Relating to Patent Royalties. The Federal Circuit has jurisdiction over appeals from a final decision of a district court in any civil action arising under federal patent law. An action "arises under federal patent law" where "federal patent law creates the cause of action" or in "extremely rare" circumstances where "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law." Jurisdiction is assessed by examining the case-initiating document. Here, that was Acorda's petition to confirm the award in which Acorda contended that the arbitration tribunal "manifestly disregarded" the law by denying Acorda's request for recoupment of unprotested royalty payments. A New York district court confirmed the award in full, including the remedies, finding that the tribunal did not act in manifest disregard of the law. Acorda appealed to the Federal Circuit, which was "obligated to address [its] own jurisdiction" before reaching the merits. Observing that it was "plain and undisputed that there is no patent-law cause of action applicable to this case," the court determined that its jurisdiction would turn on whether Acorda's petition, on its face, falls into the narrow category of cases that are deemed to arise under federal patent law when no patent-law causes of action are present. To qualify for this exception, the court explained, Acorda's petition must "involve a federal patent-law issue that was (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Acorda's petition set forth two alternative grounds for establishing the tribunal's manifest disregard of the law—one based on federal patent law and the other on state contract law. As such, the court concluded that Acorda "presented a way for the district court to rule in its favor on the requested recoupment remedy without agreeing with Acorda's assertion that federal patent law entitled it to that remedy." As such, the court concluded that Acorda's petition "did not meet the 'necessarily raised' requirement for our jurisdiction." With jurisdiction lacking in

the Federal Circuit, the appeal was transferred to the Second Circuit. *Acorda Therapeutics, Inc. v. Alkermes PLC*, 145 F.4th 1299 (Fed. Cir. 2025).

Case Shorts

- *Herman v. Katten Muchin Rosenman, LLP*, 2025 WL 2462725 (S.D.N.Y.) (a federal court lacks authority to compel arbitration outside of its own district).
- *Getzels v. State Bar of California*, 112 Cal. App. 5th 388 (2025), as modified on denial of reh'g (July 24, 2025), review denied (Sept. 17, 2025) (state bar rule barring inactive attorneys from serving as private arbitrators and mediators did not violate the equal protection clauses of the U.S. and California constitutions).
- *Wheatfall v. HEB Grocery Co.*, 2025 WL 1703637 (5th Cir.) (claims of arbitrator partiality in manifest disregard of the law did not establish federal question jurisdiction to permit the federal court to rule on motion to vacate).
- *Lovett v. Beneteau Group America, Inc.*, 2025 WL 1554280 (Del. Super. Ct.) (Magnuson-Moss Warranty Act precludes arbitration of consumer claims brought under that statute).
- *Ziboukh v. Whaleco, Inc.*, 2025 WL 2355905 (E.D.N.Y.) (collateral estoppel not applied to bar enforcement of arbitration agreement with delegation provision despite finding by three other courts that this precise arbitration provision was unenforceable where a fourth court compelled arbitration under the same provision, as to do so would be unfair).
- *Rubio-Leon v. Fresh Harvest, Inc.*, 2025 WL 2653640 (N.D. Cal.) (seasonal truck drivers who transport agricultural products from fields to a cooling facility did not qualify for the FAA transportation worker exemption because no evidence was provided that the products then entered interstate commerce).
- *Telecom Business Solution, LLC v. Terra Towers Corp.*, 2025 WL 2256683 (S.D.N.Y.) (party not denied notice and opportunity to be heard under New York Convention where panel awarded relief not requested as AAA Rules afforded panel authority to grant any just and equitable remedy).
- *Coefficient Group Holding Ltd. v. Solana Labs, Inc.*, 2025 WL 1510934 (Cal. App.), reh'g denied (June 20, 2025) (discovery not warranted in context of motion to compel on "tangential" issues and where parties' factual accounts are not starkly different).
- *North Point Rx v. Key Therapeutics, LLC*, 2025 WL 1439447 (S.D. Miss.) (equitable tolling principles under New York law do not serve as a basis for extending the FAA's strict deadline for filing motions to vacate).
- *Virgin Islands Housing Finance Authority v. FEMA*, 151 F.4th 409 (D.C. Cir. 2025) (motion to vacate award filed one day after FAA's three-month deadline renders motion untimely).

- *Guardian Flight, LLC v. Etna Life Insurance Co.*, 2025 WL 1399145 (D. Conn.) (Independent Dispute Resolution awards under the No Surprises Act are, with limited exceptions, immediately enforceable and final and do not require judicial confirmation).
- *Aadi Bioscience, Inc. v. EOC Pharma (Hong Kong), Ltd.*, 2025 WL 2051061 (S.D.N.Y.) (arbitrations conducted within the United States, which are subject to the New York Convention, are bound by the FAA and the limited grounds for vacatur therein).
- *Amaplat Mauritius, Ltd. v. Zimbabwe Mining Development Co.*, 143 F.4th 496 (D.D. Cir. 2025) (the Foreign Sovereigns Immunities Act only waives sovereign immunity concerning enforcement of arbitration awards and not with respect to foreign court judgments, and therefore, the federal court lacked subject matter jurisdiction to enforce confirmation of the award by a foreign court).
- *PT Rahajasa Media Internet v. Center for Provision and Management Telecommunications*, 2025 WL 1928082 (S.D.N.Y.), reconsideration denied, 2025 WL 2402288 (S.D.N.Y.) (court lacks subject matter jurisdiction under Foreign Sovereign Immunities Act's commercial activity exception where the "dispute between an Indonesian company and the Republic of Indonesia concerning commercial activity that took place in Indonesia.").
- *Hulley Enterprises v. Russian Federation*, 149 F.4th 682 (D. C. Cir. 2025) (district court erred by concluding it had jurisdiction under the Foreign Sovereign Immunities Act based on arbitration panel's ruling; instead, upon remand, the district court must determine independent of the panel's ruling whether the arbitration exception to the FSIA applies).
- *Deutsche Telekom v. Republic of India*, 2025 WL 2810722 (D.C.) (arbitration award issued in Switzerland in favor of German telecommunications company and against the government of India falls within the scope of the Foreign Sovereign Immunities Act, as claim that a treaty covered no investor constituted a merits defense subject to the New York Convention).
- *Schnatter v. 247 Group, LLC*, 2025 WL 2612017 (6th Cir.) (appellate court has jurisdiction under the FAA to review decision that prevented the district court from granting motion to compel, but did not have jurisdiction over contract formation questions).
- *Odom Industries v. Sipcam Agro Solutions, LLC*, 2025 WL 1576800 (5th Cir.) (motion to compel arbitration must be decided before motion to remand case to state court as district court had subject matter jurisdiction and must address motion to compel before non-jurisdictional motion).
- *Gugliuzza v. Morgan & Morgan*, 2025 WL 2306191 (S.D. Ga.) (FAA preempts Georgia statute requiring arbitration agreement to be initialed by all parties and therefore

legal malpractice action, based on electronic signature in law firm engagement letter, is subject to arbitration).

- *Alaska Plumbing and Pipefitting Industry Pension Fund v. Honeywell International, Inc.*, 2025 WL 2347941 (W.D. Wash.) (court stays ERISA action to allow threshold issue regarding receipt of notice of arbitration where to do so "will not cause any damage, nor any hardship or inequity to either party, and will promote the orderly course of justice and preserve the parties' and the court's resources").
- *Tecnotubi S.P.A. v. Tex-Isle Supply, Inc.*, 2025 WL 2197148 (S.D.N.Y.) (challenge to panel's authority to rule on jurisdictional question waived where parties jointly agreed to submit question to a panel for resolution and, once decided, proceeded to a hearing in which an award was issued).
- *Wells Fargo Clearing Services v. Satter*, 2025 WL 1582253 (S.D. Ohio) (former attorney employed by Wells Fargo Bank can compel arbitration even though the Bank was not a FINRA member because he advised and conducted business on behalf of Wells Fargo Advisory, which is a member of FINRA).

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

Second Circuit Articulates Post-Morgan Waiver Test. In *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), the Supreme Court removed the prejudice requirement from the analysis used to determine whether a party had waived its right to arbitration. This appeal from an order denying UBS's motion to compel arbitration presented the Second Circuit with the opportunity to articulate a "precedential opinion" on the application of *Morgan.* The court noted that before the *Morgan* decision, courts in the Second Circuit "evaluated every aspect of the movants' conduct through the lens of prejudice" and prejudice was "inextricably embedded within the remaining pre-*Morgan* factors." Therefore, the court noted, "it is not as simple as merely erasing the word 'prejudice' from [the circuit's] previous test." Nevertheless, it was also not necessary to create a new test because the Supreme Court "offer[ed] a new test". *Morgan* "suggested that courts may evaluate waiver by focusing on the following question: Did the moving party knowingly relinquish the right to arbitrate by acting inconsistently with that right?" In answering that question, the Second Circuit reasoned that it "may consider all aspects of the moving party's conduct – including those factors that were significant under our pre-Morgan test – as long as we do not do so through the lens of prejudice." Applying *Morgan*, the court focused, as the Supreme Court directed, on UBS's conduct. The court then concluded that by first filing a motion to dismiss seeking any affirmative resolution in the district court, "the UBS Defendants acted inconsistently with the right to arbitrate." As such, the district court's order denying the motion to compel was affirmed. *Doyle v. UBS Fin. Servs., Inc.*, 144 F.4th 122 (2d Cir. 2025).

Waiver of Arbitration Where Judicial Process Substantially Invoked. Defendants moved to compel arbitration of a former employee's putative class action five months after she filed the action. The motion was referred to a Magistrate Judge who recommended that the motion be denied, "reasoning that [defendants] engaged in several overt acts demonstrating a desire to resolve the arbitrable dispute through litigation, including filing an answer and defending this litigation for almost five months, participating in discovery, attending mediation, and expressly representing to the Court in the parties' Joint Report that [they] did not intend to pursue arbitration of [plaintiff's] claims." The district court adopted the Magistrate's recommendation and denied the motion. On appeal, the Fifth Circuit began its analysis by addressing the "sea change in the law governing arbitration waiver following *Morgan v. Sundance*" in which the Supreme Court excised the prejudice prong from the waiver test. Acknowledging that the Circuit "has long embraced an arbitration waiver test rooted in prejudice" where waiver occurs when "[(1)] the party seeking arbitration substantially invokes the judicial process [(2)] to the detriment or prejudice of the other party." Noting that simply excising the prejudice prong from this test would result in too narrow of an inquiry, the court determined "we now ask whether the party 'knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right.'" The newly-framed inquiry, while now in line with *Morgan v. Sundance,* did not overhaul the circuit's jurisprudence with respect to waiver of the right to arbitrate. "Instead, substantial invocation of the judicial process is merely one way of demonstrating that a party waived its right; after all, substantial invocation of the judicial process is an intentional abandonment of a known right." The court found that the defendant's active participation in the court action, along with its representation that it did not intend to pursue arbitration, was sufficient to establish that the defendant knowingly relinquished its right to arbitrate. As such, the District Court's denial of defendant's motion to compel was affirmed. *Garcia v. Fuentes Restaurant Management Services*, 141 F. 4th 671 (5th Cir. 2025). See also *Mundle v. Doxo, Inc.*, 2025 WL 2256658 (W.D. Wash.) (defendants waived arbitration right where they "filed two motions to dismiss Plaintiffs' complaints, both of which sought full dismissal, Defendants stipulated to extend [various] briefing deadlines for [its] motion to dismiss, extended the deadline to file . . . their amended complaint, and extended the deadline for initial disclosures" under the Federal Rules); *Monarch Heating and Cooling, LLC v. Petra, Inc.*, 573 P.3d 1217 (Mont. 2025) (contractor waived arbitration right by agreeing to set aside by stipulation its own default in litigation, answering complaint without asserting arbitration right, and then several months later moving to compel); *Jones v. CBS Health Corp.*, 2025 WL 2147363 (E.D. Pa.) ("Defendant, as a major corporation that is embroiled in major and continuous litigation of the type involved in this case, clearly displayed a desire to win this case on the merits" and waived its arbitration rights when it "filed a fifty-four-page brief arguing that the court should dismiss" plaintiffs' claims). Cf. *To v. Direct Tou, LLC*, 2025 WL 1676858 (N.D. Cal.) (defendants did not waive right to arbitrate

by attempting to negotiate settlement and where they did not seek to litigate the merits of the dispute); *Hyman v. Cummings-Ramone*, 2025 WL 2549981 (E.D.N.Y.) (defendant did not waive arbitration right by filing state litigation involving same shareholder agreement as litigation raised separate claims seeking different relief).

Case Shorts

- *Cerna v. Pearland Urban Air*, 714 S.W.3d 585 (Tex. 2025) (issue of whether indemnification agreement, which contained an arbitration clause, from prior visit to trampoline park bound mother of minor child who was injured three months later was a claim going to the scope of the arbitration clause and thus for the arbitrator to decide under the agreement's delegation clause).
- *Herman v. Katten Muchin Rosenman, LLP*, 2025 WL 2462725 (S.D.N.Y.) (waiver claims based on employer's actions before litigation was initiated, rather than based on its litigation activities, are for arbitrator to decide).
- *In re Chrysler Pacifica Fire Recall Products Liability Litigation*, 143 F.4th 718 (6th Cir. 2025) (waiver may only be found when party knew or should have known that the arbitration right existed before making motion to dismiss).
- *Financialright Claims GMBH v. Burford German Funding*, 2025 WL 2306958 (D. Del.) (claim that party was fraudulently induced to enter into arbitration agreement must be heard by arbitrator as challenge was to the arbitration agreement itself and not specifically directed at the enforceability of the delegation provision).
- *Gomez v. T-Mobile USA, Inc.*, 2025 WL 1642280 (W.D. Wash.) (question whether arbitration agreement is enforceable is for arbitrator to decide where challenges went to the arbitration agreement as a whole and not specifically to the delegation provision in the agreement).
- *Shah v. CrowdStreet, Inc.*, 2025 WL 2318942 (W.D. Tex.), Report and Recommendation adopted, 2025 WL 2312318 (W.D. Tex.) (broad delegation clause conferring on arbitrator authority to rule on whether "a dispute is arbitrable" requires arbitrator, not court, to determine whether investor class action is subject to arbitration).
- *Jones v. Landry's, Inc.*, 2025 WL 1527307 (S.D.N.Y.) (claims of unconscionability are for arbitrator to decide where a valid delegation provision is present).
- *Goudarzi v. JP Morgan Chase Bank, N.A.*, 2025 WL 1953121 (W.D. Wash.) (incorporation of AAA rules not sufficient evidence of delegation of gateway issues to arbitrator where party is unsophisticated).
- *Garcia v. Fuentes Restaurant Management Services*, 141 F. 4th 671 (5th Cir. 2025) (waiver found where defendants litigated for three months after declaring their intent

not to arbitrate, participated in discovery and mediation, and did not assert arbitration defense in their answer);

- *In re Chrysler Pacifica Fire Recall Products Liability Litigation*, 143 F.4th 718 (6th Cir. 2025) (waiver issue for court to decide, even where arbitration agreement refers arbitrability and enforcement issues to the arbitrator, as courts are in the best position to resolve "waiver through inconsistent conduct" claims which usually "turn on whether a plaintiff abused the litigation or pre-litigation process" and courts are most adept at policing process-abusing conduct).
- *Pemberton v. Restaurant Brands International*, 2025 WL 2578211 (N.D. Cal.) (plaintiff did not waive his challenge to application of arbitration agreement to dispute by filing arbitration demand seeking determination by arbitrator that he did not assent to arbitration and that the arbitration agreement was unenforceable).
- *Carbon Fiber Recycling v. Sbahn*, 2025 WL 2806423 (Tenn.) (arbitrability question for arbitrator to decide under Tennessee law where arbitration agreement incorporated JAMS Rules).
- *In re Chrysler Pacifica Fire Recall Products Liability Litigation*, 143 f.4th 718 (6th Cir. 2025) (court's action in raising waiver issue *sua sponte* violated the "principle of party presentation" and is reversed as a miscarriage of justice would occur, requiring the court to ignore a "core principle of our adversarial system").
- *Geske v. American Wagering, Inc.*, 2025 WL 2532722 (N.D. Ill.) (defendant's inadequate investigation of its website's acceptance process, which resulted in reversal of the court's initial denial of motion to compel in light of the new evidence, did not constitute waiver of the right to arbitrate).
- *Roper v. Oliphant Financial, LLC*, 2025 WL 2058806 (4th Cir.) (law firm and debt collector waived right to arbitrate class action claims where they previously sued, asserting collection actions against debtor plaintiffs).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

NFL Arbitration Procedure Ruled Unconscionable. NFL coach Jon Gruden resigned as coach of the Las Vegas Raiders based on an unauthorized disclosure of Gruden's inappropriate emails sent before his tenure as the Raiders coach. He sued the NFL and its Commissioner, alleging that the emails were leaked to pressure him into stepping down as the Raiders' coach. Defendants moved to compel arbitration under the NFL Constitution, which empowered the Commissioner to exercise jurisdiction over disputes between a coach and the NFL. The Nevada Supreme Court affirmed the lower court's denial of the motion to compel. The Court ruled that the NFL process was both procedurally and substantively unconscionable. The Court noted that the NFL Constitution was incorporated by reference into Gruden's agreement, and he could not negotiate the Constitution's terms. Further, the

Court ruled that the arbitration process was substantively unconscionable as the "ability of the stronger party to select a biased arbitrator is unconscionable, even if the stronger party may ultimately choose a neutral arbitrator." Further, the Court cited the NFL's unilateral ability to amend the Constitution without notice. The Court declined to sever the offensive arbitration provision. The Court also rejected the NFL's equitable estoppel claim, noting that Gruden's claims relate to actions outside his coaching agreement, and as "the claims themselves do not arise out of any contractual relationship between Gruden and the Raiders," equitable estoppel does not apply. For these reasons, the Court affirmed the denial of the NFL's motion to compel. *National Football League v. Gruden*, 2025 WL 573 P.3d 1240 (Nev. 2025).

One-Sided Agreement Ruled Substantive Unconscionability. A former employee filed a PAGA action in California state court against ByteDance, doing business as TikTok, and ByteDance moved to compel arbitration relying on the company's confidentiality and inventions assignment agreement which contained an arbitration clause. The employee opposed the motion, primarily arguing that the arbitration agreement was substantively unconscionable because it lacked mutuality, as it required arbitration for the employee's claims but allowed the employer to seek injunctive or equitable relief in court. ByteDance responded that the agreement did not lack mutuality because it applies to "*any* dispute" arising out of the employee's employment. The California trial court sided with the employee, holding that the agreement was unenforceable due to its significant substantive unconscionability. Among the offensive provisions was one requiring the employee to arbitrate all of her claims while ByteDance retained the right to pursue court actions. In addition, the agreement stipulated that if ByteDance sought legal remedies in court, the employee would be required to waive her right to a jury trial. There was also a one-sided attorneys' fees provision making the employee liable for any attorneys' fees ByteDance incurred in enforcing the agreement. The trial court held that these substantively unconscionable provisions permeated the entire agreement and could not be severed from the agreement without materially altering it and, therefore, the motion was denied. On appeal, the trial court observed that, in the court below, "ByteDance did not argue either in its moving or in its reply papers that any portion of the agreement should be severed. It [only] briefly suggested the possibility of severance . . . at the conclusion of its rebuttal argument during the hearing." However, even if ByteDance's "passing reference to severance is sufficient to preserve the issue for appeal," the court "did not abuse its discretion by declining to sever the multiple unconscionable provisions of the agreement." Accordingly, the lower court's order denying defendant's motion to compel was affirmed. *Weisfeiler v. Bytedance, Inc.*, 2025 WL 1720606 (Cal. App.). See also *Silva v. Cross Country Healthcare*, 111 Cal. App.5th 1311 (2025) (employer's arbitration agreement ruled substantively unconscionable where: employee only was required to agree to confidentiality, non-compete, and non-solicitation provisions; any breach would allegedly

cause irreparable harm to the employer entitling it alone to injunctive relief, and; employer would not be required to post bond to obtain such relief).

Procedural and Substantive Unconscionability Bars Enforcement of Arbitration Agreement. A California trial court denied an employer's motion to compel arbitration of a former employee's claims, finding that numerous aspects of procedural and substantive unconscionability rendered the agreement unenforceable. The appellate court agreed, finding "extensive evidence" of procedural unconscionability due to the "adhesive" agreement, which was presented to the employee, "alongside 30 other documents, to review and sign while [the company's] HR manager stood and waited." In addition, when the employee stated that she was uncomfortable signing the agreement because she did not understand it, the company's HR manager made "false misrepresentations" about the "nature and terms of the agreement," "depriv[ing]" the employee "of having a meaningful opportunity to reflect and decide for herself if she wanted to speak to an attorney or conduct her own research prior to signing." Noting that the agreement's "terms might pass muster under less coercive circumstances," the terms of the agreement were made substantively unconscionable by the company's misrepresentations. "Had [the employer] either correctly explained the terms of the agreement, or had not explained them at all, and had given [the employee] a reasonable opportunity to review the agreement and to consult counsel, this would be a different case. But that is not what happened here." The trial court's order denying the employer's motion to compel was therefore affirmed. *Velarde v. Monroe Operations, LLC*, 111 Cal. App.5th 1009 (2025), review denied (August 20, 2025). Cf. *Hines v. National Entertainment Group*, 140 F.4th 322 (6th Cir. 2025) (dancer's claim of procedural unconscionability based on claim she was required to execute the arbitration agreement just before getting onstage rejected where arbitration provision was not hidden or obtuse and employer did not refuse to explain provisions in the agreement or deny plaintiff a chance to confer with counsel).

Case Shorts

- *Silva v. Cross Country Healthcare*, 111 Cal. App.5th 1311 (2025) (severance of substantive unconscionable provisions not warranted where the arbitration provision contained two unconscionable provisions and "the unconscionability of those provisions permeates and pervades the entire Arbitration Agreement, as they operate to shunt employees to an arbitrable forum for the adjudication of the claims they are most likely to bring while preserving a judicial forum" for the employer).
- *Alvarado v. Charter Communications, LLC*, 2025 WL 1910952 (Cal. App.) (broad carve out for employer allowing it to "bring claims against [plaintiff] in court, with the full panoply of discovery and remedies" while employee must arbitrate discrimination

claims serves to maximize the employer's advantage and precludes severance of the unconscionable terms).

- *Bahamonde v. Amazon.com Services, LLC*, 2025 WL 2021801 (N.D. Cal.) (arbitration agreement ruled substantively unconscionable as it was infinite in scope and duration and required workers to arbitrate claims with third parties and vendors with whom it did not have a relationship).
- *Nitta v. Hawaii Medical Service Association*, 575 P.3d 547 (Haw. 2025) (substantive unconscionability claim rejected based on plaintiff's argument "that the contracts as a whole violated public policy because they interfered with the statutory definition of the practice of medicine").
- *Bahamonde v. Amazon.com Services, LLC*, 2025 WL 2021801 (N.D. Cal.) (substantive unconscionability terms, such as an infinite duration term and application to claims unrelated to the employment relationship, can be severed, rendering the arbitration provision enforceable).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Ford Motor, As Non-Signatory, May Not Invoke Arbitration Provision. Plaintiffs purchased Ford vehicles and entered into sales agreements with the dealers which contained an obligation to arbitrate disputes. Plaintiffs sued Ford for alleged breaches of the expressed or implied warranties accompanying the cars they purchased. Ford moved to compel, invoking the arbitration provision in the dealers' sales agreements. The trial and appellate courts denied Ford's motion, and the California Supreme Court affirmed. The Court emphasized that the parties must agree to arbitrate their disputes. "Plaintiffs and Ford have not agreed to *anything*, much less to arbitrate any disputes between them. Further, nothing in the agreement between plaintiffs and the dealers expressed an intent to empower third parties to invoke the arbitration clause." The court focused on the agreement between plaintiffs and dealers which made clear that disputes between "you and us", the dealer and purchaser, only were subject to arbitration. The court emphasized that "plaintiffs' causes of action alleging warranty violations and fraud do not seek to enforce any contractual provision. As a result, they should not be estopped from pursuing their claims in court." The court acknowledged that the manufacturer's warranties may encourage purchase of the vehicles. It concluded, however, that the "availability of the manufacturer's warranty may influence a buyer's choice to purchase an item, but the existence of a warranty as a motivating factor for a purchase does not render the warranty part of the sales contract." The court observed that although the dealers sold Ford vehicles, they were not acting as Ford's agents so as to allow plaintiffs to invoke the agreements' arbitration provision. The court concluded that "plaintiffs' claims flow not from the contracts but from separate statutory requirements in conventional fraud theories." *Ford Motor Warranty Cases*, 17 Cal.5th 1122 (2025). Cf. *Watkins v. Musk*, 2025 WL 1661950 (D.

Mass.), reconsideration denied, 2025 WL 2952056 (D. Mass.) (Elon Musk's conduct promoting Tesla's vehicles was within the scope of his duties as CEO and therefore he can invoke the arbitration agreement on third-party beneficiary and agency grounds in contracts with customers and compel the arbitration of claims against him).

Non-Signatory Cannot Enforce Arbitration Agreement. Au pairs brought a putative class action against Cultural Care, a sponsor that placed foreign nationals as au pairs with host families in the United States. Cultural Care moved to compel arbitration under an arbitration agreement in a contract that the au pairs signed with a foreign recruiting company. Cultural Care was not a party to the contract but argued it could nevertheless enforce the arbitration agreement as a third-party beneficiary and, separately, on equitable estoppel grounds. The motion was denied, and on appeal to the First Circuit, the court noted that a non-signatory "faces a steep climb" to show it may enforce an agreement to which it is not a party and must "make that showing with special clarity." In an attempt to establish the "special clarity" requirement, Cultural Care pointed to six provisions in the agreement that conferred benefits upon it. The court was unpersuaded and explained that a "critical fact" determining whether a non-signatory is a third-party beneficiary is "whether the underlying agreement 'manifests an intent to confer specific legal rights upon [the non-signatory].'" The court concluded that there was no provision in the arbitration agreement indicating the parties' intent to confer arbitration rights on Cultural Care. Accordingly, Cultural Care could not enforce the agreement as a third-party beneficiary. The court then turned to Cultural Care's equitable estoppel arguments and quickly rejected them. Finding that plaintiffs' claims were not dependent on the terms of the contract, the court held that equitable estoppel did not apply. The district court's denial of the motion to compel was affirmed. *Morales-Posada v Culture Care, Inc.*, 141 F.4th 301 (1st Cir. 2025); *Telecom Business Solution, LLC v. Terra Towers Corp.*, 2025 WL 2256683 (S.D.N.Y.) (jurisdiction over non-signatory found where he personally secured shareholder benefits, obtained pecuniary benefits from the deal, and had the power to select and direct the defendant's managers).

Non-Signatory Fails to Establish Third-Party Beneficiary Status. For a party to establish itself as a third-party beneficiary in Delaware, it must show: "(a) the contracting parties intended that the third party beneficiary benefit from the contract, (b) the benefit was intended as a gift or in satisfaction of a pre-existing obligation to that person, and (c) the intent to benefit the third party [was] a material part of the parties' purpose in entering into the contract." Here, the court agreed with defendant USHA that the language of the agreement established USHA as a beneficiary of the contract. However, the court reasoned that "merely benefitting from a contract is not sufficient to become a third-party beneficiary under Delaware law." While USHA does benefit from the Agreement, "it is equally clear that NextGen would have contracted with Sessoms even if it could not include the benefit to USHA." As such, the court concluded that "the benefit was not material to the purpose of

their contract, and USHA is not a third-party beneficiary under Delaware law." *Sessoms v. US Health Advisors, LLC*, 2025 WL 2432191 (E.D.N.C.).

Lack of Inquiry Notice and Assent to Arbitration Found. Under New York law, an offeree is bound to contract terms where actual notice of its terms has been provided. The offeree may also be found to be bound where he or she is on inquiry notice of those terms and assents to them through conduct that a reasonable person would understand to constitute assent. Here, a few weeks after a consumer entered into an Enrollment Agreement with CleanChoice Energy, she received a package from the company containing a form with new dispute-resolution terms, including an arbitration provision (the "Subsequent Terms"). Two years later, the consumer sued CleanChoice for breach of contract and deceptive business practices. CleanChoice moved to compel arbitration based on the Subsequent Terms, but a New York district court denied the motion, finding that the consumer was not on notice of the Subsequent Terms. The Second Circuit affirmed, finding that inquiry notice was lacking and the consumer did not implicitly assent to the Subsequent Terms by making service payments. Observing that nothing in the Enrollment Agreement put the consumer on notice of forthcoming changes, the court found that receipt of the Subsequent Terms by mail a few weeks later was "temporally and spatially decoupled" from the consumer's enrollment as they "arrived unannounced, weeks after [she] executed her contract." In addition, the utility bills did not alert the consumer to the Subsequent Terms, and her payment was made in accordance with "her obligations under the Enrollment Agreement" and "not to signal an acceptance of new terms." Under these circumstances, a "reasonable person "would not have understood that the Subsequent Terms altered her contract with CleanChoice" or that "the act of mailing scheduled payments" constituted consent to them. As such, the arbitration provision was held to be unenforceable and the judgment of the district court was affirmed. *Sudakow v. CleanChoice Energy, Inc.*, 2025 WL 2457656 (2d Cir). See also *Frisch v. FCA US, LLC*, 2025 WL 1592935 (E.D. Mich.) (purchasers of cars were not provided sufficient notice of arbitration provision in warranty booklet to support formation of agreement and therefore motion to compel denied); *Cody v. Jill Acquisition*, LLC, 2025 WL 1822907 (S.D. Cal.), reconsideration denied, 2025 WL 2790681 (S.D. Cal.) (motion to compel denied where retailer failed to demonstrate that consumer was made sufficiently aware that she was entering into a continuing relationship with retailer including being bound to terms of use in arbitration provision); *Goudarzi v. JP Morgan Chase Bank, N.A.*, 2025 WL 1953121 (W.D. Wash.) (notice of requirement to arbitrate claims lacking where bank customers are required to "visit their website, navigate through several web pages, enter the accurate ZIP code, select the appropriate link from many to locate the applicable [agreement], and then scroll through to the correct page of the (agreement) to find the arbitration clause."); *Crews v. Tapestry, Inc.*, 2025 WL 2462710 (Cal. App.), as modified (August 27, 2025) (sign-in wrap agreement did not provide sufficient notice of

terms and conditions, including arbitration provision, where page was cluttered and notice text was less prominent than other elements of checkout page).

Inquiry Notice Found Sufficient Under Reasonably Prudent Online User Standard. Plaintiffs here purchased tickets online for a New York City observation deck. They brought a class action alleging that the vendor failed to fully and appropriately disclose all ancillary charges, in violation of New York law. The vendor moved to compel arbitration. The court granted the motion, finding that plaintiffs were properly placed on inquiry notice as to the online terms and conditions, including their obligation to arbitrate disputes. The court rejected the suggestion that adequate notice "needed to take a particular form, *i.e.*, in bold or capitalized text, or that the checkout page needed to use only one font size and color, in order for the Court to find that the hyperlinked [vendor terms and conditions] were reasonably conspicuous to the prudent user." The court noted that the vendor's terms and conditions "contained familiar indicia that provided reasonably conspicuous notice" of the terms and conditions on an uncluttered page, including the hyperlink to the terms and conditions "at the end of the short assent text paragraph in red print, in sharp contrast to both the white background of the page and the black text of the rest of the paragraph." For these reasons, the court concluded that the plaintiffs were placed adequately on inquiry notice and were bound by their obligation to arbitrate their dispute. *Newman v. SL Green Realty Corp.*, 2025 WL 1797043 (S.D.N.Y.). See also *Thompson v. Brew Culture*, 2025 WL 2198616 (S.D. Miss.) (consumer received adequate notice of arbitration obligation when she enrolled by text in coffee rewards program with conspicuous hyperlink to terms and conditions and with the option to opt out of program by texting "stop"); *Massel v. Successfulmatch.com*, 2025 WL 2452371 (9th Cir.) (district court erred in denying motion to compel based on color and design of hyperlink on website where reasonably conspicuous notice was present based on website's uncluttered visuals); *Tempest v. Safeway, Inc.*, 2025 WL 1953465 (N.D. Cal.) (single e-mail to customers regarding rewards program not sufficient to provide constructive notice of terms of use including arbitration provision where no evidence was presented that customers opened the e-mail or that customers were notified that defendant could modify terms of use at any time); *Bennett v. Barclays Bank Delaware*, 2025 WL 2690390, (S.D.N.Y.) (plaintiff credit card holder was placed on inquiry notice when he received the credit card and a member agreement from Barclays and was deemed by the court to have objectively manifested his assent to the agreement's terms, including the requirement to arbitrate disputes).

Unilateral Amendment of Arbitration Agreement Renders Enforceability Void. Robert Platt, a plan Participant, brought claims on behalf of himself and other plan participants to recover losses under ERISA, and a breach of fiduciary duty claim on behalf of an employer-sponsored health insurance plan. A California district court denied the employer's motion to compel arbitration, holding that there was no enforceable arbitration agreement because

the employer impermissibly unilaterally modified the plan to add the arbitration provision without the relevant party's consent. On appeal, the employer Sodexo, argued that consent to the addition of the arbitration provision was not required because employers are free to amend the terms of ERISA plans unilaterally. The Ninth Circuit disagreed. The court agreed with Sodexo that an employer is "generally free . . . for any reason at any time, to adopt, modify, or terminate welfare benefits unless it contractually cedes its freedom" to do so but held that that right does not extend so far as to allow an employer to create a valid arbitration agreement by unilaterally amending an ERISA-governed plan without consent from the plan participants. In so holding, the court noted that "there is no provision of ERISA or its implementing regulations that specifically governs the administration of arbitration clauses." In addition, the Act expressly provides that it shall not be "construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States". Therefore, the court concluded, "because ERISA does not conflict with or displace the FAA's requirement of consent for a valid arbitration agreement, we hold that Sodexo may not unilaterally amend the Plan to include an arbitration provision without the relevant party's consent." Because Platt did not consent to arbitration, no valid agreement to arbitrate was formed. *Platt v. Sodexo, S.A.*, 148 F.4th 709 (9th Cir. 2025).

Minors May Repudiate Arbitration Agreement Signed on Their Behalf. Two sisters in private school, one 16 years old and the other 10 years old, along with their mother, sued the school alleging discrimination. The plaintiffs sought to void the enrollment agreements that the mother signed on behalf of her daughters and which contained an arbitration provision. The first question for the court was whether it or an arbitrator must decide whether the agreements could be repudiated. The court decided that the question was for it to rule on. The court concluded that the students' mother could not disavow the agreement she signed on her own behalf. However, the court emphasized that, under New York law, the students, as minors, could void the enrollment agreements their mother had signed on their behalf. The court rejected defendants' argument that the students were precluded from voiding the agreements because they benefited from several months of schooling. The court reasoned that the students were not seeking to enforce their enrollment agreements per se but instead were seeking to "impose statutory liability on Defendants for withholding the benefits of contracts – that *once existed* – on the basis of race. Plaintiffs' argument now that the contracts have since been voided is thus consistent with that theory." For these reasons, the court denied the motion to compel as applied to the students, on the ground that, as minors, they could repudiate the agreements signed on their behalf by their mother. *Melendez v. Ethical Culture Fieldston School*, 2025 WL 1777887 (S.D.N.Y.). See also *Santiago v. Philly Trampoline Park*, 2025 WL 2724752 (Pa.) (parents did not have the ability under Pennsylvania law to agree to arbitrate on behalf of their minor children as it undermines an "obligation to monitor the conduct of the litigation to protect the child's best interests").

Specificity Required to Establish "Routine Practice" of Issuing Arbitration Agreement. The issue before the New Jersey Supreme Court was whether Altice could enforce an arbitration clause in its Customer Service Agreement by relying on its "routine business practice" of sending such agreements to customers by email once they purchase Altice's cellular service. The Court explained that "evidence of a specific, repeated, and regular business habit or practice, whether corroborated or not, would have been admissible to establish a rebuttable presumption that Altice had acted in conformity with that habit or practice" when plaintiff purchased Altice's cellular service, obviating the need to provide direct evidence that the Agreement was sent to plaintiff. Noting that the "degree of specificity" required to establish a business's habit or routine practice "is not a minor detail," the Court detailed the insufficiencies in the affidavit submitted by Altice including that it did not identify any specific business practices or describe how such habit or routine practices were undertaken. Instead, the affidavit only offered speculation "in conditional terms that '[w]hile placing the orders, plaintiff would have discussed the Customer Service Agreement and any contract terms and conditions for the [cellular] service with a customer service representative,' and that '[w]hen plaintiff ordered cellular services he would have received a copy of the Customer Service Agreement by email.'" The affidavit did not set forth, with specificity, what the customer service representatives routinely discussed with customers and "did not list how or when or from whom emails containing customer service agreements were routinely sent." The court concluded that "Altice is therefore not entitled to a rebuttable presumption that it acted in accordance with any such practice in this case." The trial court order compelling arbitration was reversed, and the matter was remanded for trial. *Fazio v Altice USA*, 261 N.J. 90 (2025). Cf. *Lamonaco v. Experian Information Solutions, Inc.*, 141 F.4th 1343 (11th Cir. 2025) (respondent's unrebutted declaration based on internal records offered in support of its contention that plaintiff agreed to terms of use which included an arbitration provision constituted competent evidence sufficient to support motion to compel); *Austin v. Experian Information Solutions*, 148 F.4th 194 (4th Cir. 2025) (corporate representative's affidavit attesting to familiarity with defendant's consumer website's enrollment procedures, based on day-to-day work responsibilities and review of pertinent documents, sufficed to support finding that plaintiff was put on notice of requirement to arbitrate claims).

Case Shorts

- *Division 5, LLC v. Fora Financial Advance, LLC*, 2025 WL 1548807 (S.D.N.Y.) (forum selection and venue clause providing for New York courts did not preclude enforcement of arbitration provision; rather, it makes clear that any judicial proceeding flowing from the arbitration is to be conducted in accordance with the forum selection and venue provision).

- *Hines v. National Entertainment Group*, 140 F.4th 322 (6th Cir. 2025) (consideration for arbitration provision present where both parties are obligated to arbitrate claims).
- *Austin v. Experian Information Solutions*, 148 F.4th 194 (4th Cir. 2025) (clickwrap agreement is the easiest but not the only way to demonstrate assent to online obligation to arbitrate; here, assent was demonstrated where terms of use were evidenced in conspicuous language and the consumer enrolled in a credit monitoring service, evidencing his consent to the terms).
- *Berland v. X Corp.*, 2025 WL 2097479 (N.D. Cal.) (motion to compel denied where stock agreement with judicial venue provision was agreed to after dispute resolution policy, which provided for arbitration of disputes, was enacted).
- *Coefficient Group Holding Ltd. v. Solana Labs, Inc.*, 2025 WL 1510934 (Cal. App.), reh'g denied (June 20, 2025) (court, rather than arbitrator, decides whether an arbitration agreement exists where the facts are in dispute).
- *Yanez v. Dish Network, LLC*, 140 F.4th 626 (5th Cir. 2025) (arbitration agreement need not be signed to be enforceable as long as signatures were not a condition precedent and parties otherwise consented to arbitrate claims).
- *Duran v. Taco Bell of America*, 2025 WL 2711521 (E.D.N.Y.) (employee's failure to sign arbitration agreement with full name not sufficient to defeat obligation to arbitrate where plaintiff used the same signature for all onboarding documents).
- *Johnson v. U-Haul Company of New York*, 2025 WL 2531416 (N.D.N.Y.) (plaintiff's claim that he did not recall signing the arbitration agreement not sufficient to counter production of the arbitration agreement with plaintiff's signature electronically entered).
- *Pott v. World Capital Properties*, 2025 WL 2719789 (11th Cir.) (non-signatory signed the ICC Terms of Reference conferring on arbitrator the authority to rule on question of arbitrability and therefore is bound by the arbitrator's ruling that the arbitration agreement covered him).
- *Santiago v. Philly Trampoline Park*, 2025 WL 2724752 (Pa.) (spouse lacks apparent authority to commit his or her spouse to arbitrate personal injury claim on behalf of their child in the absence of defendant's knowledge of the absent spouse's existence or authority to sign on behalf of that spouse).
- *Goldeneye Advisers, LLC v. Hanaco Venture Capital, Ltd.*, 2025 WL 2434643 (S.D.N.Y.) (investor in partnership must arbitrate its fraud claims where applicable arbitration clause in partnership agreement is broad and where investor, by contributing funds, became a limited partner in the partnership).
- *Brockman v. Kaiser Foundation Hospitals*, WL 2701643 (Cal. App.) (motion to compel denied where healthcare plan application referred applicant to summary plan description and not to the benefits booklet where the arbitration commitment could be found).

- *Pizza Hazel v. American Express Co.*, 2025 WL 2682394 (D. Mass.) (Amex's notice of immediate change to its arbitration provision rendered the arbitration agreement illusory and unenforceable).
- *Hamera v. Best Buy Co.*, 2025 WL 1823994 (N.D. Ill.) (enforceable arbitration agreement between online retailer and consumer was formed where consumer clicked "Place Your Order" button located directly under phrase "by placing your order, you agree to our . . . Terms and Conditions" on checkout page of retailer's website).
- *Avient Corp. v. Westlake Vinyls, Inc.*, 145 F.4th 662 (6th Cir. 2025) (provision in arbitration agreement allowing for *de novo* review of award was invalid under FAA and could be severed from contract).
- *Lexington Alzheimer's Investors, LLC v. Norris*, 718 S.W.3d 795 (Ky. 2025) (wife's signature on behalf of incapacitated spouse on nursing home's mandatory arbitration agreement did not constitute a healthcare decision under Kentucky law so as to compel arbitration of negligence and related claims following husband's death).

V. CHALLENGES TO ARBITRATOR OR FORUM

NFL Arbitration Process Voided as Violative of FAA. The NFL Constitution grants to the Commissioner "full, complete and final jurisdiction authority to arbitrate" certain disputes, including disputes between coaches and teams. Coach Brian Flores and two other coaches brought a putative class action asserting statutory discrimination claims against several teams. The NFL and the teams moved to compel arbitration. The district court granted the motion as to claims brought against the teams that employed the coaches, but denied it as to teams that interviewed but failed to hire the plaintiffs. The NFL appealed, seeking arbitration of the failure-to-hire claims. The Second Circuit affirmed, finding both that the NFL procedure lacked the indicia of "even a passive resemblance" to a traditional arbitration practice recognized by the FAA and failed to allow claimants the opportunity to vindicate their claims effectively. The court began its analysis by noting that merely labeling a process as arbitration did not make it so. While "dueling, flipping a coin, or settling controversies with a game of ping-pong" are alternatives to adjudication, the "only form of alternative dispute resolution protected by the FAA, though, is arbitration." A basic assumption is that arbitration will provide an "independent forum" separate from the parties. "Accordingly, an arbitration agreement that prevents parties from submitting their disputes to an independent arbitral forum, and that instead compels one party to submit its disputes to the substantive and procedural authority of the principal executive officer of one of their adverse parties, is an agreement for arbitration in name only." Further, no procedures are insured and the NFL Constitution affords the commissioner authority to "unilaterally dictate arbitral procedures" which the court found "bares virtually no resemblance to arbitration agreements as envisioned and as protected by the FAA." The court rejected the NFL's

belated attempt to appoint an arbitrator who happened to be an NFL adviser, including as a member of its diversity committee and as a consultant on diversity matters. The court observed that "the Commissioner's unilateral designation of an advisor to the NFL represents a further extension of his unilateral power rather than its remedy." Separately, the court ruled that the NFL's process was unenforceable under the effective vindication doctrine. "Here, enforcing this agreement would require [a coach] to submit his statutory claims to the unilateral discretion of the executive of one of his adverse parties, without an independent arbitral forum under contract without a process for bilateral dispute resolution." This, the court concluded, denied the coaches "arbitration in any meaningful sense of the word." *Flores v. New York Football Giants, et. al.*, 150 F.4th 172 (2d Cir. 2025).

Disqualification of Arbitrator Rejected in Absence of Partiality. The arbitrator in this case disclosed that his prior law firm may have worked on matters involving the respondent. He did not recall that, 20 years earlier, he handled a matter for the respondent for approximately three months, generating under $3,000 in fees for his former law firm. The trial court denied claimant's motion to disqualify the arbitrator, and the New York appellate court affirmed. The court pointed out that the representation at issue "was of short duration [three months] and involved little pecuniary value." The court added that the arbitrator had issued 39 orders in the case, to which claimant had no objection. And claimant offered no evidence that "the arbitrator was biased in his handling of the arbitration for nearly a year." The court reasoned that "an arbitrator may not be disqualified solely because of his relationship to a party, but rather upon facts demonstrating partiality to a litigant." Finally, the court rejected claimant's request for discovery related to the arbitrator's veracity with respect to his recollection of his prior representation of respondent as not being "material and necessary, as it is grounded only in speculation that the arbitrator was not forthright in his recollection." *Cuomo v. JAMS, Inc.*, 2025 WL 2832051 (N.Y. App. Div.).

Arbitral Immunity Applies to ADR Provider. SCI was unhappy with the arbitrator's inconsistent procedural rulings. For example, it objected that the arbitrator offered no reasoning when ruling against it on a crucial joint-employer question. When SCI complained, the arbitrator agreed to issue an order with reasoning (which he seemingly did not do). When SCI complained that the merits hearing should not proceed until the order with reasoning was issued, the arbitrator denied the request. SCI complained to the ADR provider, in this case ADR Services, which allowed SCI to seek the arbitrator's disqualification in court and adjourned the merits proceeding. The court denied the application, and the case settled. SCI sued ADR Services and its owner, arguing that they were guilty of consumer fraud by failing to live up to their promise of employing arbitrators of the "highest level of quality, integrity, and efficiency." In particular, SCI noted that over 20 years earlier, the arbitrator had a $200 million malpractice judgment against him (the ruling was

overturned on appeal). It complained that ADR Services, to which SCI paid $45,000 in arbitration fees, failed to screen or investigate the arbitrator's background properly. The trial court denied SCI's claims on arbitral immunity grounds, and the appellate court affirmed. The court noted that while SCI's allegations "appear to relate to actions taken before any arbitration proceedings - that is, the vetting process undertaken by SCI in choosing candidates to become neutrals on its roster," the damage actually suffered by SCI "was a direct result of the adverse rulings made by" the arbitrator. "Absent these rulings, and absent its involvement in arbitration proceedings, SCI would have no damages and thus no standing to bring this action." The court concluded that arbitral immunity was appropriately afforded to ADR Services and its owner. *Subcontracting Concepts v. ADR Services, Inc.*, 2025 WL 1903372 (Cal. App.), review denied (October 15, 2025).

Case Shorts

- *Tecnotubi S.P.A. v. Tex-Isle Supply, Inc.*, 2025 WL 2197148 (S.D.N.Y.) (challenge to panel's authority to rule on jurisdictional question waived where parties jointly agreed to submit question to a panel for resolution and, once decided, proceeded to a hearing in which an award was issued).
- *Eletson Holdings, Inc. v. Levona Holdings, Ltd.*, 2025 WL 1558380 (S.D.N.Y.) (court enjoined proceedings in Greece as well as the United Kingdom to enforce the arbitration award so that the court can rule on whether the award was procured by fraud).

VI. CLASS, COLLECTIVE, MASS FILINGS, AND REPRESENTATIVE ACTIONS

PAGA Claim Brought in Representative Capacity Cannot be Arbitrated. Under California's Safe Water Drinking Act claims may be brought by a person acting in the public interest when challenging exposure to carcinogens after providing notice to the State Attorney General. Plaintiff, a consumer advocacy group, brought a Private Attorneys General Act claim against Walmart after purchasing various products online, including products that included an agreement to arbitrate claims. The trial court denied Walmart's motion to compel arbitration, and the appellate court affirmed. The court explained that, when a claim is brought under PAGA, the real party in interest is the State of California, not the consumer. The court reasoned that an online purchaser who signed an arbitration agreement cannot be deemed an agent of the State at the time of purchase, unless the State is notified of the intent to bring suit. "While any such agreement may bind the purchaser to arbitrate disputes regarding the purchases, it cannot bind the state to the arbitration" of the action brought here to enforce the State's Safe Water Drinking Act. *Consumer Advocacy Group v. Walmart, Inc.*, 112 Cal. App.5th 679 (2025).

Case Shorts

- *Harrington v. Cracker Barrel Old Country Store*, 142 F.4th 678 (9th Cir. 2025) (issuance of notice of collective action made to potential opt-in collective members ruled proper despite existence of multiple fact issues concerning which prospective opt-in plaintiffs might be required to arbitrate their claims).
- *Roper v. Oliphant Financial, LLC*, 2025 WL 2058806 (4th Cir.) (right to arbitrate class claims under consumer protection laws waived where lender and law firm sued to collect on debt on the same loan agreement, which plaintiff sued and which contained an arbitration provision).

VII. HEARING-RELATED ISSUES

Pre-Hearing Subpoena Seeking Only Documents Not Enforceable Under FAA. A Texas arbitrator issued subpoenas to non-parties in California seeking production of documents only. The arbitrator was prepared to appear in person in California and directed the non-parties to "bring with you to the hearing the documents" identified in the accompanying schedules. The question raised was whether the FAA authorized arbitrators to subpoena documents solely for an interim in-person hearing. The court ruled that the FAA provides no such authority to arbitrators. In so ruling, the court emphasized that Section 7 of the FAA authorized an arbitrator to summon a person "as a witness" in a proceeding. "By requiring the summoned person to attend 'as a witness,' the statute clearly mandates that the recipient serve a certain role. That is, the arbitrator can only summon the person to attend the arbitration 'as a witness'; by implication he cannot summon the person to appear 'as' anything else." The court added that the FAA does authorize "in a proper case" that the witness bring documents, adding that "that is a supplemental duty the arbitrator may impose, not an alternative one. The clear upshot of Section 7 is that an arbitrator may only summon a witness, but in some cases he may also direct that witness to be a document producer." As the summons directed the non-parties to present documentary evidence only and the summons "does not command the person to testify or be prepared to testify, not even to establish the authenticity of the documents being produced", the court declined to enforce the third-party summonses. *KCK, Ltd. v. Identity Intelligence Group, LL*C, 2025 WL 2044628 (N.D. Tex.), Report and Recommendation adopted, 2025 WL 2223243 (N.D. Tex.).

Ex Parte Communications by Arbitrator Not Prejudicial. Georgia's Arbitration Code provides that an award may be vacated where prejudice is demonstrated. The arbitrator ruled in favor of claimant Biotek and against the healthcare provider, scheduling a hearing to determine damages. Counsel for the healthcare provider withdrew and no new counsel was retained. The arbitrator informed the representative of the healthcare provider that he could attend the hearing but could not present evidence. The arbitrator also sent numerous

ex parte emails to counsel for Biotek both before and after the hearing. For example, the arbitrator asked counsel: for copies of exhibits in advance of the hearing and to prepare a spreadsheet for purposes of calculating damages; sought information and feedback from Biotek on the arbitrator's damages calculations; thanked Biotek for the pre-hearing memoranda that it submitted, adding that "you did a good job", and; asked in which court Biotek intended to enforce the award as the arbitrator anticipated requiring judicial intervention to get paid by the healthcare provider. Both the trial and appellate courts rejected the healthcare provider's motion to vacate, finding no prejudice to the healthcare provider. However, the latter acknowledged that the ex parte communications "should not have happened." The Georgia Supreme Court affirmed. The Court found that no evidence was provided showing that the ex parte communications affected or influenced the outcome of the proceedings. In doing so, the Court rejected the healthcare provider's argument that it was denied a fair hearing. "So yes, prejudice is, in a basic sense, harm to the affected party's rights, including the right to a fair proceeding. But that harm is ordinarily established by showing an effect or influence on the outcome of the proceeding." As no evidence was offered to show that the ex parte communications prejudiced it, the Court affirmed the lower court's confirmation of the award. *Docs of CT, LLC v. Biotek Services, LLC*, 916 S.E.2d 383 (Ga. 2025).

Panel's Reliance on Extrinsic Evidence Requires Vacatur. Michael Lindell set up a contest challenging participants to prove that selected cyber data relating to the 2020 Presidential election were not valid. A five-million-dollar award was offered to anyone who could do so. Zeidman entered the contest and concluded that the cyber data was not related to the election. The selection panel rejected Zeidman's claim, who then filed for arbitration, and the panel unanimously found that Zeidman unequivocally proved the data was not election-related. The district court confirmed the award, concluding that the panel arguably interpreted the agreement. The Eighth Circuit reversed. The court reasoned that the panel effectively amended the deal by adding a "form-of-data requirement" which went beyond the agreement's unequivocal terms. The court explained that the panel based its conclusions "almost entirely on extrinsic evidence – Lindell's pre-Challenge publicity describing the data and views of experts who had analyzed the data." In addition, the court found that the panel relied on advertising relating to the contest and data and reports outside of the record of the proceedings. The court concluded that by imposing a new obligation upon Lindell, the panel effectively amended the agreement and exceeded its authority under Minnesota law. *Zeidman v. Lindell Management, LLC*, 145 F.4th 820 (8th Cir. 2025).

Case Shorts

- *Matthews International Corp. v. Tesla*, 2025 WL 2799317 (N.D. Cal.) (arbitrator's consideration of extrinsic evidence following finding of ambiguous contract language was proper under California's Parole Evidence Rule and did not constitute manifest disregard of the law).
- *Metropolitan Municipality of Lima v. Rutas De Lima, S.A.C.*, 141 F.4th 209 (D.C. Cir. 2025) (arbitrator's failure to receive relevant evidence did not constitute misconduct under New York Convention).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Award Vacated Where Damages Not Sought or Awarded. A *pro se* claimant raised a single claim in arbitration, namely, that his employer violated its own severance plan by demoting him without providing severance. The employer moved to stay the preceding pending resolution of its court action seeking a ruling that the severance claim was not arbitrable. The arbitrator denied the application and proceeded with the hearing while the court action was pending. The arbitrator agreed with the employer that the severance claim was not arbitrable. The arbitrator, however, ruled in favor of the employee on a claim not raised. In particular, the arbitrator awarded over $129,000 in "equitable relief" and costs, finding discrimination under ERISA, citing that other employees in similar circumstances were awarded severance under the employer's plan. The district court vacated the award, and the Eleventh Circuit affirmed. The majority concluded that by "awarding [the employee] relief on an ERISA discrimination claim that he did not submit to arbitration, the arbitrator exceeded her powers." The majority rejected the argument that, because the employee could have amended his demand to include the ERISA claim, the arbitrator was within her power to rule on it. The majority acknowledged that the employee "could have amended his demand, but the relevant question is not what claims he *could* have submitted to the arbitrator via an amended demand. Rather, the relevant question is what claims [the employee] *did* submit to the arbitrator." The record supported the view that no such claim was raised. Finally, the majority acknowledged that while *pro se* pleadings are to be liberally construed, "the leniency afforded to *pro se* litigants does not give courts or arbitrators license to serve as de facto counsel for a party." *Nalco Co., LLC v. Bonday*, 142 F.4th 1336 (11th Cir. 2025). Cf. *Telecom Business Solution, LLC v. Terra Towers Corp.*, 2025 WL 2256683 (S.D.N.Y.) (panel did not exceed its authority by awarding damages allegedly inconsistent with plaintiffs' proposed damages model and granting equitable relief not sought as such damages were "tethered" to relief sought and as governing AAA Rules grant to panel authority to award any just and equitable remedies).

Case Shorts

- *North Point Rx v. Key Therapeutics, LLC*, 2025 WL 1439447 (S.D. Miss.) (any fraud committed by the prevailing party occurred before the arbitration and did not involve the issues in the arbitration, and therefore, clear and convincing evidence supporting vacatur of the award is lacking).
- *MidSouth Construction, LLC v. Burstiner*, 2025 WL 1663550 (Tenn. App.), appeal denied (October 8, 2025) (arbitration award confirmed despite court's difficulty in reconciling arbitrator's findings of fact to the law applied as court did not have authority to review arbitrator's findings of fact under the Tennessee Arbitration Act).
- *Resource Group International, Ltd. v. Chishti*, 2025 WL 1725454 (S.D.N.Y.), motion for relief from judgment denied, 2025 WL 2301318 (S.D.N.Y.) (motion to vacate denied where challenge goes to arbitrator's application of legal principles and choice among reasonable alternative constructions of the agreement).
- *Employers' Innovative Network v. Bridgeport Benefits, Inc.*, 144 F.4th 571 (4th Cir. 2025) (remand required to establish sufficient record to allow appellate court to determine standard to be applied in ruling on a claim of arbitrator bias as results may differ depending on which section of FAA applied to this foreign award).
- *Metropolitan Municipality of Lima v. Rutas De Lima, S.A.C.*, 141 F.4th 209 (D.C. Cir. 2025) (motion to vacate under New York Convention on public policy grounds based on claims of fraud and fabricated discovery responses rejected where no evidence of actual prejudice shown).

IX. ADR – GENERAL

ADR Providers and Arbitrators, Not Courts, Decide Payment of Fees Dispute. Twitter required its employees to arbitrate disputes before JAMS and provided that the arbitration fees would be apportioned between the parties unless the law required otherwise. The policy further stipulated that arbitrators would decide any disputes regarding the payment of arbitration fees. Seven claimants brought claims alleging that Twitter refused to pay them the severance they were owed. JAMS, in accordance with its policies and rules, required Twitter to pay the arbitration fees in full. Twitter declined. JAMS refused to administer the case or appoint an arbitrator. Plaintiffs moved to compel, and the district court ordered Twitter to pay the arbitration fees and proceed with the arbitration. The Second Circuit reversed. The court explained that Section 4 of the FAA empowers the court to review a very narrow range of issues: whether an arbitration agreement exists and whether the dispute falls within the parties' agreement. In the court's view, "a party's decision not to abide by the procedural determinations of an arbitrator is . . . simply an *intra*-arbitration delinquency that arbitral bodies, like JAMS here, are empowered to manage. Once a court has determined that a dispute is subject to arbitration, a district court is not invited to involve itself in the arbitrator or arbitral body's resolution" of the procedural question unless the parties' agreement provided otherwise. The court

concluded that "we see no role for a court to involve itself in a dispute in an ongoing arbitral proceeding over a party's payment to fees or compliance with arbitral policies under" Section 4 of the FAA. The court added that it left it to JAMS to use the tools available to it, including the option of refusing to administer the arbitration. *Frazier v. X Corp.*, 2025 WL 2502133 (2d Cir.).

Case Shorts

- *Kosor v. Southern Highlands Community Ass'n*, 570 P.3d 160 (Nev. 2025) (Nevada statute requiring pre-litigation mediation or non-binding arbitration not a jurisdictional prerequisite to judicial action as such a procedural claim processing rule can be forfeited or waived).
- *Franklin Structures v. Williams*, 2025 WL 2487531 (Ala.) (trial court erred by compelling arbitration without ordering parties to non-binding mediation in accordance with the terms of the sales agreement).
- *Black v. Emerson*, 20225 WL 1635264 (D. Colo.) (application for broad sealing of arbitration documents in favor of much narrower request focusing on legitimate third-party privacy interests granted with court noting that parties to private arbitration proceeding should be aware of risk of that proceeding spilling into federal court where the presumption is for public disclosure).
- *Matthews International Corp. v. Tesla*, 2025 WL 2799317 (N.D. Cal.) (manifest disregard claim rejected as arbitrator was not guilty of refusing to enforce a contract term; "He just refused to enforce Tesla's interpretation of that term").
- *McSween v. Rockin Jump NYC, LLC*, 236 N.Y.S.3d 588 (N.Y. Sup. Ct. 2025) (defendant's failure to appear for mediation and non-binding arbitration found to be "frivolous conduct undertaken primarily to delay or prolong the resolution of the litigation" and results in restoration of case to court calendar as well as sanctions equal to payments made by plaintiff towards the mediation and nonbinding arbitration).

X. COLLECTIVE BARGAINING SETTING

Finality Absent Where Labor Arbitrator Retained Jurisdiction. The arbitrator ruled that a power plant operator violated its collective bargaining agreement with the union by assigning union employees to a non-union plant to address an emergency situation. The arbitrator then directed the parties to attempt to fashion a remedy on their own. He retained jurisdiction, however, in case the parties reached an impasse. The district court upheld the award, but the Fourth Circuit reversed. Under the Fourth Circuit's complete arbitration rule, an award is not final and, therefore, subject to review where the arbitrator retains jurisdiction to address the issue of remedies. The court considered whether the arbitrator intended the award to resolve all matters submitted for resolution. As the

"arbitrator here didn't think his job was finished", the Fourth Circuit applied the complete arbitration rule and vacated the district court's confirmation of the award on the ground that the award was not ripe for review." *Wheeling Power Co. v. Local 492*, 145 F.4th 468 (4th Cir. 2025).

Interim Award Definitively Resolving Discrete Issue Confirmed. The labor arbitrator in this case ordered the grievant, who had been terminated for misconduct, to be suspended for 15 days instead and to be paid his lost wages, less 15 days' pay. The arbitrator retained jurisdiction to oversee payment of the backpay award. That arbitration award was confirmed. The arbitrator issued a Supplemental Award directing that backpay be paid up to a certain date. The employer challenged the court's jurisdiction to rule on an interim award which it characterized as non-final. The court rejected the employer's claim. The court reasoned that "so long as an award resolves a discrete issue with finality, the award on that issue is ripe for judicial review when there are further outstanding issues the parties have asked the arbitrator to resolve." The court concluded that in this case "the Arbitrator issued two discrete and independently confirmable awards." The court acknowledged that there might be a further Supplemental Award in this case as the grievant's backpay remained unpaid and continued to run. The court rejected this as a ground not to confirm the Supplemental Award as "any future action by the Arbitrator will not result in a change to the Supplemental Award." The court also rejected the employer's argument that the Supplemental Award was not final because the arbitrator retained jurisdiction with respect to damages. The court observed that "courts routinely consider motions to confirm or vacate interim damages awards where the arbitrator retains jurisdiction to consider future potential damages." For these reasons, the court concluded that it had jurisdiction to confirm the Supplemental Award. *United States Court Security Officers v. Centerra Group, LLC*, 2025 WL 1413767 (N.D.N.Y.).

Case Shorts

- *Ohio Council 8 v. Lakewood*, 2025 WL 1657422 (Ohio) (Ohio courts have jurisdiction over labor dispute where union did not allege that city engaged in an unfair labor practice for if it had the state Employee Relations Board would have had exclusive jurisdiction).
- *Fraternal Order of Police v. Lexington-Fayette Urban County Government*, 718 S.W.3d 633 (Ky. 2025) (once court determines that dispute was governed by collective bargaining agreement and was arbitrable, issue whether party was entitled to indemnification under the collective bargaining agreement is for arbitrator to decide).

XI. NEWS AND DEVELOPMENTS

Supreme Court to Address FAA Transportation Exemption. The Supreme Court has agreed to review a Tenth Circuit ruling that the FAA transportation exemption covered a distributor of intrastate deliveries. The Tenth Circuit reasoned that, although the deliveries were intrastate, they were part of the goods' interstate journey. The specific issue to be decided is "Whether workers who deliver locally goods that travel in interstate commerce – but who do not transport the goods across borders nor interact with vehicles that cross borders – are 'transport workers' 'engaged in foreign or interstate commerce' for purposes of the exemption in Section 1 of the Federal Arbitration Act."

AAA-ICDR Provides AI Arbitrator for Low Value Construction Disputes. The AAA-ICDR announced that, effective November 3, 2025, it will provide an AI arbitrator option with the consent of both parties for documents-only construction disputes governed by its Construction Arbitration Rules. The AI arbitrator will evaluate the merits of the claims and provide draft awards with reasoning. The AAA-ICDR explained that the AI arbitrator was trained on over 1,500 construction disputes and awards and was developed with the input from construction practitioners and arbitrators. However, every decision made by the AI arbitrator is reviewed by a human arbitrator. The AI arbitrator uses legal reasoning to draft a recommended award—not a final decision. An AAA-trained human arbitrator reviews the AI's analysis, revises if needed, and issues the final, binding award. The AAA-ICDR also indicated that it intends to expand the eligibility of the AI arbitrator to other industries and, potentially, to higher-value claims in 2026.

California Limits Consumer Arbitrations. California enacted legislation allowing consumers to avoid contractual provisions requiring them to arbitrate their claims outside the state or to apply another state's law to a claim arising under California substantive law. Instead, consumers can litigate claims arising under California law in California courts. Attorneys' fees can be awarded to consumers who successfully enforce their rights under the new law.

XII. TABLE OF CASES

Cases