Arbitration Update 2019

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I. SOME BASICS

Exemption of Interstate Transportation Workers. The FAA exempts from its terms "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1. *OEP Holdings, LLC v. Akhondi*, 2018 WL 3629378 (Tex. Ct. App. July 31, 2018) found that an orientation instructor for a trucking company is a "transportation worker" under the Federal Arbitration Act. The court acknowledged that while cases involving truck drivers are easy, it is more difficult to determine whether other employees of transportation companies are within the exemption.

The court relied on the "nonexclusive eight-part test for determining whether an employee is a transportation worker" established by *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005). The "eight nonexclusive factors include: (1) whether the employee works in the transportation industry; (2) whether the employee is directly responsible for transporting goods in interstate commerce; (3) whether the employee handles goods that travel interstate; (4) whether the employee supervises employees who are themselves transportation workers, such as truck drivers; (5) whether like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; (6) whether the vehicle itself is vital to the commercial enterprise of the employer; (7) whether a strike by the employee would disrupt interstate commerce; and (8) the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties."

Where the employee works for a transportation company, his or her responsibilities still "must be closely related to interstate commerce," although they "need not actually transport the goods himself for the exemption to apply." The court found that the first, sixth and eighth factors were sufficiently weighty to conclude that the instructor, who trained employees on software used in trucking operations, was a transportation worker who was within the exemption.

Who Decides This Question? *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017) confronted two important issues involving this exemption. First, where the agreement (or, more commonly, the applicable arbitration rules) provide that arbitrability questions are to be decided by the arbitrator, is this a question for the arbitrator or the court. The First Circuit concluded that since the issue requires construction of the Federal Arbitration Act, not the arbitration agreement, the question was one for the court to decide.

Are Independent Contractors Covered? *Olivera* also decided this question, and concluded, based on common usage at the time the FAA was adopted, that independent contractor agreements fall within the scope of "contracts of employment" as that term is used in the FAA.

Certorari has been granted by the U.S. Supreme Court in the *Olivera* case.

No Independent Basis for Federal Jurisdiction under the FAA. *Moyett v. Lugo–Sánchez*, 321 F.Supp.3d 263 (D. P.R. June 27, 2018) confirms that while the FAA creates a body of substantive law governing arbitration, it does not create a jurisdictional basis for suit in federal court. Thus, parties seeking

relief under the FAA in federal court must establish federal subject-matter jurisdiction by showing diversity of citizenship or a separate federal question.

II. ENFORCEABILITY OF AGREEMENTS TO ARBITRATE

Mutual Assent to Arbitration Agreement

Both Parties Must Sign Agreement. In *Huckaba v. Ref–Chem, L.P.*, 892 F.3d 686 (5th Cir. June 11, 2018), the arbitration agreement was signed by the employee and kept in the files of the employer. But the employer's signature block on the document was left blank and the employee submitted an affidavit stating that she expected to receive a signed copy of the agreement, but never did, and so did not consider it binding. Applying Texas contract law, the court agreed that the arbitration agreement was not binding on the employee, noting that the agreement contained language indicating that execution by both parties was anticipated.

Arbitration Agreement on Product Packaging. In *Dye v. Tamko Building Products, Inc.*, 908 F.3d 675 (10th Cir. November 2, 2018), the court found that printing the arbitration agreement on the packaging of roofing shingles gave rise to an enforceable agreement when the packages were purchased and opened by the customer. The arbitration agreement was conspicuously displayed on the outerwrap of the package as part of the purchase agreement terms printed, with a legend stating "IMPORTANT"— "READ CAREFULLY BEFORE OPENING [THE] BUNDLE." The arbitration clause itself was also all in capital letters and appeared on the outside of the package. Citing to Florida cases involving computer software packaging, the court found an enforceable contract. In addition, the contractor, in purchasing the shingles, acted as the agent of the homeowner and as a result, the arbitration agreement was enforceable against the homeowner, as principal.

Inside the Box Agreement. In *Norcia v. Samsung Telecommunications America, LLC*, 845 F.3d 1279 (9th Cir. 2017), the court found no customer consent to an arbitration agreement with a cell phone manufacturer when the arbitration clause was in an agreement within 107-page information booklet that was in the product box and there was no other notice to customer of the arbitration clause.

Web-Based Arbitration Agreements. Arbitration being a creature of contract, the inclusion of arbitration clauses in web-based agreements has presented the question of when a click of the mouse is sufficient to bind the user to an arbitration clause. The Second Circuit in *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 2017 WL 3526682 (2d Cir. Aug. 17, 2017) found that a mouse click forms a binding arbitration agreement "where the notice of the arbitration provision was reasonably conspicuous and manifestation of assent unambiguous as a matter of law." It noted that prior contract cases had established this standard:

> [W]e have previously distinguished web-based contracts is the manner in which the user manifests assent—namely, 'clickwrap' (or "click-through") agreements, which require users to click an "I agree" box after being presented with a list of terms and conditions of use, or 'browsewrap' agreements, which generally post terms and conditions on a website via a hyperlink at the bottom of the screen. [citations omitted] Courts routinely uphold clickwrap agreements for the principal reason that the user has affirmatively assented to

> the terms of agreement by clicking 'I agree.' [citation omitted] Browsewrap agreements, on the other hand, do not require the user to expressly assent. [citation omitted] 'Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions.' [citations omitted]

In Uber's case, "the user must click a button marked "Register," underneath which the screen states "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY," with hyperlinks to the Terms of Service and Privacy Policy. Adopting the principle of the "reasonably prudent smartphone user," the court concluded that the user would know that additional information is available by clicking on the hyperlink and found this to be reasonably conspicuous notice of the arbitration clause, and that by clicking on "Register," the user manifested assent to the agreement.

Dugan v. Best Buy Co. Inc., 2017 WL 3442807 (N.J. Super. Ct. App. Div. Aug. 11, 2017) (unpublished) demonstrates that the specific language used in a web-based assent can be decisive to the question of whether there is an enforceable arbitration agreement. In that case, the employee checked a box stating that "I have read and understand" the arbitration policy but not, as prior court decisions had suggested, the additional language "and agree to it." While the policy did give sufficient notice to the employee that the right to court trial with a jury was being excluded, the "read and understand" wording was not sufficient to establish assent. The statement that "by remaining employed," the employee was being deemed to have agreed to the policy's terms was not sufficient because the brief period of employment (three weeks) was not sufficiently long to establish his assent to the policy.

In *James v. Global Tellink Corp.* 852 F.3d 262 (3rd Cir. 2017), the telephone service vendor's arbitration clause and class action waiver were contained on its website and it required that users signing up for an account to click "accept" to obtain service. But it also allowed users to sign up by telephone and for those users, there was no communication of the arbitration clause and class action waiver. As to those users—who used the telephone because they were incarcerated—the court concluded, the provisions were inapplicable.

Manifestations of Lack of Assent. In *Rightnour v. Tiffany and Company*, 239 F.Supp.3d 744 (S.D. N.Y. 2017), and employee with a pending claim of discrimination received a form e-mail message with the subject line, "Dispute Resolution Agreement course." When she later tried to complete the online course, it said that there was an arbitration agreement and the online module did not permit her to complete the program without clicking "yes" and agreeing to the terms of the arbitration agreement. So she exited the program and sent a message to management saying that she did not agree to the program. However, the program documents stated that the arbitration program was mandatory and "regardless of whether you submit the acknowledgment, continuing your employment after receipt of this Agreement constitutes mutual acceptance of the terms of this Agreement by you and the Company." Finding no objective manifestation of an agreement to arbitrate, the court held that there was no enforceable arbitration agreement.

A somewhat different situation occurred in *Dasher v. RBC Bank (USA)*, 882 F.3d 1017 (11th Cir. 2018). In that case, a bank's 2008 arbitration clause had been found to be superseded by the successor bank's 2012 agreement, which had no arbitration clause. Both the District Court and Court of Appeals ruled that there was no surviving arbitration agreement. Then the bank readopted arbitration with language suggesting that the revision had a retroactive application. It sent notice to the plaintiff, but not to counsel, nor did it advise the court of what the court called the bank's "purportedly court-evicting proposed amendment." It found that the bank's communications to a party actively opposing arbitration over arbitration could not be effective. The bank, having the burden of establishing an agreement, the bank only "demonstrated inconsistent communications from [the plaintiff] (his implicit acceptance by failing to opt out and his express resistance to arbitration)."

The opposite result obtained in *Kubala v. Supreme Production Services*, 830 F.3d 199, 203 (5th Cir. 2016). In that case, two days after the employee filed suit, the employer adopted an arbitration agreement and announced that continued employment was conditioned on agreement to it[1]. The arbitration agreement was enforced because under Texas contract law,

> acceptance need not be anything more complicated than continuing to show up for the job and accept wages in return for work. 'When the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit. If the employee continues working with knowledge of the changes, he has accepted the changes as a matter of law.'[2]

The agreement expressly delegated arbitrability issues to the arbitrator, rather than leaving them to the court. Thus, the question of whether the arbitration clause could be applied to the case that was pending was thus left to be decided by the arbitrator.

Language Barrier Does Not Excuse Failure to Read Arbitration Agreement. The drivers in *Saizhang Guan v. Uber Technologies, Inc.*, 236 F.Supp.3d 711, 725 n. 13 (E.D. N.Y.2017) did not speak English and Uber's online sign-up process was translated into Chinese. It included a mandatory arbitration program with provision for opt-out, but that program was in English and *not* translated into Chinese. The drivers clicked "I agree" on a page indicating that doing so agreed to the arbitration program. They did not opt out. The court said,

> Plaintiffs argue, with some force, that Uber clearly was aware of the limited English language abilities of many of its drivers, given the company's translation of the Uber App into different languages (including Chinese), and yet made the conscious decision not to translate the Services Agreement into any other language. While this decision, coupled with the likelihood that few, if any, non–English-speaking Uber drivers would have the resources to have the Services Agreement translated, raises legitimate concerns about the disparity in

[1] The employer insisted that this was coincidence, that it was unaware of the suit at the time it adopted the arbitration agreement.

[2] Judge Higgenbotham's concurring opinion suggested that the it might be retaliation by implication when an employer, by presenting the arbitration agreement as a condition of employment, effectively tells the employee that if he will not withdraw his suit from court and arbitrate it, he will no longer have a job.

> bargaining power between Uber and its drivers, the law against excusing a party's failure to "read" the contract before agreeing to it is unequivocal. Plaintiffs certainly have not provided any case law, and the Court has found none, supporting their argument that translation of the service itself, i.e., the Uber App, but not the accompanying contract, i.e., the Services Agreement, defeats a finding of assent.

But Neurological Deficit Does. *Patterson v. Care One at Moorestown, LLC*, 2017 WL 676996 (N.J. Super. Ct. App. Div. Feb. 21, 2017) refused to enforce an arbitration agreement where at the time that the agreement was signed, the nursing home resident suffered from a neurological deficit, after suffering a stroke, and was brought to the home from the hospital on a stretcher. There was no indication that the supplemental documents that included the arbitration agreement were shown to him, as they (unlike other documents) were not initialed.

Standard Operating Procedure as Proof of Assent. *National Federation of the Blind v. The Container Store, Inc.*, 904 F.3d 70 (1st Cir. September 14, 2018) found no assent to the arbitration agreement in a loyalty program agreement by blind customers who signed up for the program in the store, where plaintiffs had no way of accessing the terms of the loyalty program, including the arbitration agreement, that appeared on the touch screen. The store contended that its training materials indicated that customer were to be affirmatively told of the existence of terms and conditions and given an opportunity to review them, but this was not sufficient to create an issue of fact where the plaintiffs testified no store clerk actually informed them that an arbitration agreement existed as a condition of entering the loyalty program. Acknowledging the store's argument that the inability to read is not sufficient as a defense to contract formation on its own, the court held that a party cannot enter into a contract to arbitrate when it does not know or have reason to know the basic terms of the offer.

But in *Zean v. Comcast Broadband Security, LLC*, 322 F.Supp.3d 913 (D. Minn. August 1, 2018), the court did find an enforceable arbitration agreement between the internet service provider based in large part on reference to standard business procedures and supporting documentation, relying on Federal Rules of Evidence 406 and 803(6). In that case, there were also additional circumstances showing assent, such as paying charges under the agreement and attempting (albeit after the deadline in the agreement) to exercise the right to opt out of the arbitration provision.

Right to Modify Terms of Agreement Unilaterally. *The Shipman Agency, Inc. v. TheBlaze Inc.*, 315 F.Supp.3d 967 (S.D. Tex. June 21, 2018) rejected an argument that the arbitration agreement was illusory because one party retained the right to terminate the contract and the other did not. Under the applicable State law, a contract was illusory "where one party has the unrestrained unilateral authority to terminate its obligation to arbitrate." Since the agreement provided that the arbitration obligation would survive any expiration or termination, the agreement was not illusory and was enforceable.

In *Wolfe v. J.C. Penney Corp., Inc.*, 2018 WL 4600871 (Ohio App. September 25, 2018), the court enforced an arbitration agreement based on an electronic signature entered at an associate kiosk. The agreement was not rendered illusory by a provision permitting JC Penny to modify the agreement unilaterally on 14 days' written notice, since such changes could only have prospective effect.

Attempting Personal Notice of Unilateral Modification Required. Daniel v. eBay, Inc., 319 F.Supp.3d 505 (D. D.C. July 26, 2018) concerned adoption of an arbitration agreement where the original agreement allows the agreement to be amended by posting changes on the online provider's website. In that case, the consumer clicked on a 2009 agreement that contained provision allowing eBay to "amend this Agreement at any time by posting the amended terms on our site." Changes adopting and refining an arbitration agreement were posted in 2012 and 2015, but the consumer insisted that he did not receive any notice of them and that he was unaware of the changes. "[W]hile a party need not necessarily sign a contract with a later-added arbitration clause in order to assent, the party cannot agree to a newly-added arbitration clause without personal notice of that provision." The posts on the website were not sufficient notice of the arbitration agreement to bind the consumer to it. Because eBay was unable to document that actual notice of the agreement was provided, there was no arbitration agreement to enforce.

Competence to Enter Into Arbitration Agreement

A twist on the problem of mutual assent arose in *Stephan v. Millennium Nursing and Rehab Center, Inc.*, 2018 WL 4846501 (Ala. October 5, 2018), where the skilled nursing facility sought to enforce an arbitration agreement in a wrongful death case. The arbitration agreement was signed not by the decedent, but by the decedent's daughter, who was also executor bringing the action, despite the fact that there was no power of attorney. The facility argued that the document was signed in the decedent's presence by a family member, establishing apparent authority. But the agreement could not be enforceable unless the decedent himself was competent to contract at the time it was signed. Under State law, a party seeking to avoid a contract based on the defense of incapacity must prove either permanent incapacity or contractual incapacity at the very time of contracting. Finding on the evidence presented that the decedent did not have the capacity to understand the nature and effect of allowing his daughter to agree to an arbitration provision, the court concluded that the daughter did not have apparent authority to execute the agreement on his behalf.

Consideration

Doctor's Associates, Inc. v. Alemayehu, 321 F.Supp.3d 305 (D. Conn. June 12, 2018) found an agreement to arbitrate that required the franchisee to arbitrate but mentioned no such obligation on the franchisor to lack sufficient consideration to be enforceable under State law. The argument that the franchisor's promise to consider the franchisee's application furnished sufficient consideration was belied by the fact that, while the franchisor did consider the application, it did not promise to do so and

Patterson v. Nine Energy Service, LLC, 330 F.Supp.3d 1280 (D. N.M. August 30, 2018) noted that while at-will employment is not sufficient consideration for an employee's agreement to arbitrate, the employer's reciprocal agreement to arbitrate disputes does furnish sufficient consideration to make an agreement to arbitrate enforceable under State contract law.

Duress

Kero v. Palacios, 2018 WL 3639910 (Ill.App. July 23, 2018) found no duress where the plaintiff, a patient being discharged from the hospital and being admitted to a rehabilitation facility signed an arbitration agreement covering disputes arising out of his treatment. The plaintiff contended

that he was not notified that he would be given the arbitration agreement, that he was told that it was being given to him in order to be taken as a patient and that he had no choice but to sign it. For there to be duress, the court said, there must be a threat "of such nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person." There was no threat, said the court, no protest from the plaintiff and the arbitration agreement stated, in all capital letters above the signature line, that the patient could not be required to sign the agreement in order to receive treatment.

FAA Limits on State Laws Invalidating Arbitration Agreements

The Federal Arbitration Act provides that arbitration agreements are to be be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud or unconscionability, but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." State Supreme Courts have sometimes invalidated arbitration agreements on grounds that reflect a hostility towards some aspect of arbitration and run afoul of this principle.

Most recently, the Kentucky Supreme Court in *Kindred Nursing Centers v. Clark* , 533 S.W.3d 189 (Ky. 2017) held that a power of attorney did not permit the agent to waive the right to a jury trial or other fundamental right under the Kentucky constitution unless it expressly conferred the power to waive a "fundamental right" like the right to a jury trial. It thus refused to recognize an arbitration agreement entered into on behalf of nursing home residents by family members.

The U.S. Supreme Court reversed. In *Kindred Nursing Centers v. Clark*, 137 S.Ct. 1421 (2017) it found the Kentucky "clear statement" rule to be in conflict with the Federal Arbitration Act because it was "a legal rule hinging on the primary characteristic of an arbitration agreement." It was" too tailor-made to arbitration agreements—subjecting them, *by virtue of their defining trait*, to uncommon barriers." (emphasis added) Moreover, the Court pointed out, there was no indication that the rule would be applied, for instance, to releases in settlement agreements, which also waive the right to a jury trial. *Accord*, *Massey v. Oasis Health & Rehab of Yazoo City, LLC*, 2018 WL 4204207 (Miss. App. September 4, 2018) (state court cannot declare, as a matter of "public policy," that pre-dispute arbitration agreements will not be enforced in cases involving personal injury or wrongful death claims against a nursing home).

In *Marmet Health Care v. Brown*, 565 U.S. 530 (2012), The West Virginia Supreme Court of Appeals had concluded that "an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." The U.S. Supreme Court, on the same grounds, found the State Supreme Court's decision to be "both incorrect and inconsistent with clear instruction in the precedents of this Court." It enforced the arbitration agreements.

On the other hand, in *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014), *cert denied* 135 S.Ct. 2804 (2015) the Supreme Court denied certiorari where the New Jersey court had adopted a similar "clear statement" rule for waiver of the right to a jury trial in an arbitration agreement. In *Atalese*, the court cited numerous prior cases where a requirement of a "clear and unambiguous

waiver" was applied to waiver of other statutory or constitutional rights such as those pertaining to the right to a hearing on license renewals, to file a mechanic's lien, or a state employee's right to file a grievance. It also relied on the state's "clear language" requirement for consumer contracts.

The federal district court has since questioned, however, whether this requirement is vulnerable to attack as violative of the Federal Arbitration Act, *Bacon v. Avis Budget Group, Inc.*, 2017 WL 2525009 at *6 (D. N.J. 2017). But the court in *Bacon* decided against enforcement of the arbitration agreement on another, more neutral State law ground—the unusually conservative stance of New Jersey courts on when a document is incorporated by reference in an agreement.

Northern Kentucky Area Development District v. Snyder, 2018 WL 4628143 (Ky. September 27, 2018). This case enforced a state statute prohibiting employers from conditioning employment on an existing employee's or prospective employee's agreement to "waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled...." KRS 336.700(2). Noting that the FAA preempts state laws limiting arbitration, the court said that the statute "only proscribes conditioning employment on agreement to arbitration, not the act of agreeing to arbitration." Addressing the question of whether the statute treats arbitration agreements differently from other agreements, the court observed that "any contract that waives or limits an employee's rights against the employer is void if employment was predicated on signing the agreement."

Given that the FAA has long been held to allow employers to condition employment on agreement to arbitration, this finding may be vulnerable if the case goes to the U.S. Supreme Court. While it was not presented to the court, the case was an action under a state whistleblower statute and state wage and hour statute by a Kentucky employee against the State agency that employed her. The intermediate appellate court ruled that the FAA was not implicated because "federal law does not pre-empt the authority of the Commonwealth to deny the authority of its agencies to enter into arbitration agreements." Although the Kentucky Supreme Court did not rule on this ground, it could be viewed by the U.S. Supreme Court as a sufficient basis on which to uphold the result in the event of an appeal.

State Statutes Proscribing Out-of-State Arbitration Venue. Sachse Construction and Development Corporation v. Affirmed Drywall, Corp., 251 So.3d 1005 (Fla. Dist. Ct. App. July 18, 2018) weighed the validity of a statute prohibiting venue clauses in construction contracts requiring a resident contractor, subcontractor, sub-subcontractor, or materialman to be heard outside the state. The arbitration clause called for the arbitration hearing to take place in Michigan. After reviewing similar cases from other jurisdictions, the court found that the statute was pre-empted because it applied only to construction contracts, not to all contracts generally as is required under the FAA to invalidate an arbitration agreement. The court also suggested that if the statute was to be enforced, the remedy would be to hold the arbitration in Florida so long as the venue provision was severable.

Attorneys: Professional Ethics Prohibition on Arbitration Agreements

Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc., 425 P.3d 1 (Cal. August 30, 2018) found that an arbitration clause governing fee disputes contained in an attorney's engagement letter was invalidated because the entire agreement was defeated by an undisclosed conflict of interest underlying the representation. The court found that violation of the professional rules of

conduct represented a public policy of the State and rendered the entire agreement unenforceable. Since there were grounds for revoking the entire contract, the arbitration clause was invalidated as well as the substantive contract provisions.

In *Owens v. Corrigan*, 252 So.3d 747 (Fla. Dist. Ct. App. June 27, 2018), the court invalidated an arbitration clause in a fee agreement where the attorney failed to comply with a rule that prohibited lawyers from making an agreement with a client for mandatory arbitration of fee disputes without advising the client in writing that the client should consider obtaining independent legal advice. This invalidated the entire arbitration clause, making it inapplicable in a case where the client claimed legal malpractice.

Unconscionability

Confidentiality Unconscionable. Larsen v. Citibank FSB, 871 F.3d 1295, 1319 (11th Cir. 2017) found a confidentiality provision to be unconscionable, but severable, from the arbitration clause. It upheld the bank's power to modify the arbitration agreement unilaterally upon notice. With regard to the confidentiality provision, the court relied on a decision construing the law of Washington, which was applicable, citing in particular this point:

> The effect of the provision here benefits only [the respondent]. As written, the provision hampers an [claimant's] ability … to take advantage of findings in past arbitrations. Moreover, keeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process and thus, potentially discourages that employee from pursuing a valid claim. (citation omitted)

The court found little authority on the unilateral modification provision, but upheld it because the bank's "commitment to arbitrate is fixed and cannot be eliminated . . . [and] its right to unilaterally amend the terms of arbitration is limited by both the requirement to provide "appropriate" notice and the implied duty of good faith and fair dealing." *Larsen*, 871 F.3rd at 1318.

30-Day Right to Revoke Precludes Unconscionability. Massey v. Oasis Health & Rehab of Yazoo City, LLC, 2018 WL 4204207 (Miss.App. September 4, 2018) found that there was no procedural unconscionability in a pre-admission nursing home arbitration agreement that expressly provided that it could be revoked with no loss of service within 30 days after it was initially executed.

Limitations on Remedies: Injunctive Relief. In *The Shipman Agency, Inc. v. TheBlaze Inc.*, 315 F.Supp.3d 967 (S.D. Tex. June 21, 2018), the arbitration agreement provided that injunctive relief would not be available, but only money damages. The claim was under the Lanham Act, and the plaintiff contended that this rendered the agreement unconscionable. Arbitration provisions relating to federal statutes, the court said, are "valid so long as the arbitration agreement does not waive the substantive rights and remedies the statute affords and the arbitration procedures are fair, such that the employee may 'effectively vindicate his statutory rights.'" Making injunctive relief unavailable in a Lanham Act case, the court said, "would undermine the Lanham Act's purpose of preventing deception, securing the registered mark's owner's goodwill, and protecting consumers' ability to distinguish among competing products." Accordingly, the arbitration agreement was deemed unconscionable.

Despite the fact that the agreement did not contain a severability clause, the court found that under both State and federal law, the offending restriction could be severed, as there was no evidence that the arbitration agreement would not have been included if it did not contain that limitation. Accordingly, arbitration was ordered, but the unconscionable limitation on injunctive relief was not to be applicable in the arbitration.

A provision in an arbitration agreement prohibiting the arbitrator from issuing injunctive relief was found to be substantively unconscionable in *Patterson v. Nine Energy Service, LLC*, 330 F.Supp.3d 1280 (D. N.M. August 30, 2018), but the provision was severable and the agreement to arbitrate found enforceable with that limitation. The court found in the New Mexico contract law the principle that "If an arbitration agreement exempts from arbitration claims that the stronger party will likely bring, but mandates arbitration for claims that the weaker party will likely bring, then the arbitration agreement is substantively unconscionable." The court did, however, uphold a modification of the Statute of Limitations under FLSA to require that an arbitration be commenced "within sixty days after a dispute arises."

Limitation of Remedy: Exemplary Damages. Ridge Natural Resources, L.L.C. v. Double Eagle Royalty, L.P., 2018 WL 4057283 (Tex. Ct. App. August 24, 2018) addressed the scope of court review of unconscionability in a case where the gateway issue of contract validity and arbitrability are assigned to the arbitrator. The court found that in such cases, the scope of court review includes (1) whether there is a valid agreement to arbitrate and (2) any challenges to the validity of the arbitration provision specifically.

Because of the limited scope of review, the court said, it could not consider procedural unconscionability arguments, since those go to the contract as a whole, while it could consider substantive unconscionability arguments, which addressed features of the arbitration clause itself. A lease provision barring exemplary damages was found to be substantively unconscionable and was severed from the arbitration clause, and the clause was enforced with this exception. Provisions on venue were not shown to represent a hardship, and thus were found not to be unconscionable.

Roman v. Bergen Logistics, LLC, 192 A.3d 1029 (N.J. Super. August 23, 2018): The provision of an arbitration agreement prohibiting recovery of punitive damages provided for under the New Jersey Law Against Discrimination was held to be unenforceable as being against public policy. The remedy was to allow arbitration to proceed without the limitation, with the court finding that the federal policy favoring arbitration could be enforced by severing the improper prohibition.

Limitation of Remedy: Limitations Period Permitted, Cost Split Not. Clymer v. Jetro Cash and Carry Enterprises, Inc., 2018 WL 3861770 (E.D. Pa. August 14, 2018) applied Pennsylvania unconscionability standards, which require showing both procedural and substantive unconscionability. Procedural unconscionability was established by the adhesive nature of the employee agreement, and several substantive unconscionability issues decided. A provision allowing the arbitrator discretion to award up to 50% of arbitration costs against the employee was found to be unconscionable based on *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269 (3d Cir. 2004), upon a showing that the cost of arbitration could be a hardship for the employee. However, the term was

not essential to the arbitration agreement, and under Pennsylvania law could be severed and the arbitration agreement enforced subject to that restriction.

A one-year limitations period was not permitted for the claim under the FMLA claim because of regulations under the FMLA. The limitations period could be applied to the claims under Title VII and the Pennsylvania Human Rights Act, because the court found that Claimant was not required to exhaust administrative claims before filing an arbitration claim.

Cost-Sharing Can Be Permissible. Rappaport v. Federal Savings Bank, 2018 WL 4575016 (D. Ariz. July 31, 2018) refused to find procedural unconscionability under the applicable Illinois contract law in the failure to attach the arbitration rules to the agreement. The rules in question were JAMS rules, which were "easily accessible." The court also rejected a substantive unconscionability objection to the provision stating that the parties would share the cost of the Arbitration equally and that if the claim is minimal, the employer could pay the employee's share of the arbitration fee. Objections to sharing the cost of arbitration, said the court, required demonstrating that the cost of an arbitration hearing will be greater than that of litigating the case in court. Nor could the employee establish inability to afford arbitration based on an expensive lifestyle.

"Employer Pays" Provision Not Unconscionable. In *Curtis v. Cintas Corporation*, 229 F.Supp.3d 312 (E.D. Pa. 2017), the court held that the fact that the employer pays almost all of the cost of an AAA employment arbitration does not support a contention that the arbitrator will be partial to the employer such that the arbitration agreement is substantively unconscionable. Nor was the agreement procedurally unconscionable, even though presented on a take-it-or-leave-it basis. The claimant, a sophisticated businessman, never tried to bargain over it, and the agreement was conspicuous in the employment agreement.

Forum Selection & Fee-Shifting Provisions Permitted, Selection of Arbitration Service Is Not. Beltran v. AuPairCare, Inc., 907 F.3d 1240 (10th Cir. October 30, 2018) concerned the arbitration clause in the agreement between an American agency managing au pair sponsor organization acting under U.S. State Department regulations. The arbitration clause was contained in a six-page, eighty-paragraph agreement written in English. The plaintiffs were relatively young and while program participants were required to be proficient in English, it was their second language and they had no experience in contracts or contract law. Nor did they understand what "arbitration" meant.

Although it was undisputed that the contracts were contracts of adhesion, the court observed, that represented the start and not the end of the procedural unconscionability inquiry. The court found only "moderate" procedural unconscionability, noting that the au pairs received translations of the agreement in their native languages and were seeking a new experience, not employment necessary to making a living. They were 24-25 years old when they signed the agreements and one of them had previously participated in the au pair program in the United States. The agreement was in "plain language," the court noted, and they had the opportunity to seek independent review of the agreement.

The agreements contained a forum selection clause requiring arbitration (or suit) in San Francisco, provided for fee-shifting to the losing party and allowed the sponsor organization to select the arbitration provider organization. The court found no showing the California was an unreasonable site for arbitration, as the sponsor organization was located there, and California

law was applicable under the terms of the agreement. The fee shifting provision was unenforceable under California law and thus the court deemed it irrelevant to the unconscionability analysis. Allowing one side to select the arbitration provider, however, was deemed by the court to be tantamount to allowing one side to select the arbitrator and that aspect of the agreement was deemed to be substantively unconscionable.

This finding did not invalidate the arbitration clause as a whole, however, as the substantively unconscionable provision could be severed. Only where the agreement is "permeated with unconscionability," said the court, should the agreement be entirely invalidated,

Waiver of Arbitration

In *Chassen v. Fidelity National Financial, Inc.*, 836 F.3d 291 (3d Cir. 2016), the bank had delayed bringing a motion to compel arbitration for 2-1/2 years. The reason, the bank said, was that New Jersey invalidated arbitration clauses with class waivers in adhesive consumer contracts until the Supreme Court decided *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). Until then, the court said, bringing a motion to compel would have been futile, so the delay was excused. The subsequent three-month delay in moving for individual arbitration was excused because the bank asked opposing counsel within a month of the *Conception* decision to agree to arbitration and the plaintiffs identified no prejudice occurring within that period of time. Besides, said the court, three months is not an unreasonable amount of time.

Gutierrez v. Wells Fargo Bank, NA, 889 F.3d 1230 (11th Cir. May 10, 2018). In class action litigation over allegedly illegal bank overdraft fees, the court set a deadline for motions to compel arbitration. The defendant waived arbitration as to the named plaintiffs, but submitted a notice reserving its right to demand arbitration as to "any plaintiffs "who [might] later join, individually or as putative class members, in this litigation." It repeated its reservation of rights in its responsive pleadings. Thereafter, there was a year of class-certification discovery. Then the Supreme Court decision holding that the FAA pre-empts state laws invalidating arbitration clauses in consumer contracts, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) was handed down, and the defendant moved to compel arbitration. The District Court found that defendant had waived arbitration by participating in the case and that holding was affirmed. Upon remand, the District Court granted class certification and the defendant moved to compel arbitration as to class members who were not named plaintiffs. The District Court held that the defendant had waived arbitration as to the class members as well.

The court gave this basis for the waiver doctrine in arbitration:

> Acting in a manner inconsistent with one's arbitration rights and then changing course mid-journey smacks of outcome-oriented gamesmanship played on the court and the opposing party's dime. The judicial system was not designed to accommodate a defendant who elects to forego arbitration when it believes that the outcome in litigation will be favorable to it, proceeds with extensive discovery and court proceedings, and then suddenly changes course and pursues arbitration when its prospects of victory in litigation dim. Allowing such conduct would ignore the very purpose of alternative dispute resolution: saving the parties' time and money. (889 F.3d 1236)

The court went on to say, "the key ingredient in the waiver analysis is fair notice to the opposing party and the District Court of a party's arbitration rights and its intent to exercise them. If the court and the opposing party have such notice at an early stage in litigation, they can manage the litigation with this contingency in mind. … Accordingly, fair notice at a relatively early stage of litigation is a primary factor in considering whether a party has acted consistently with its arbitration rights."

The defendant could not have brought a motion to compel arbitration as to unnamed class members prior class certification, the court observed since they were speculative plaintiffs, the court would have no jurisdiction to rule on a motion to compel. Finding that the defendant had placed the plaintiffs and the court on notice of its intent to seek arbitration at the earliest possible time, the court held that there was no waiver of arbitration.

But in *Dickens on behalf of estate of Dickens v. GC Services Limited Partnership*, 2018 WL 4732478 (M.D. Fla. Oct. 2, 2018), a Fair Debt Collection Act class action, litigation had proceeded to a partial summary judgment for the named plaintiffs and a denial of class certification and on appeal, the court remanded on the issues of damages and class certification. Only at this point did the defendant seek to compel arbitration for the first time. The court found that the defendant's active participation in the case to that point constituted a waiver of arbitration. It is notable that the initial resistance to class certification, which was successful in the District Court but overturned in the Court of Appeals, did not give notice of an intent to seek arbitration as to unnamed class members.

In *American Airlines, Inc. v. Mawhinney*, 904 F.3d 1114 (9th Cir. September 26, 2018), the court found that waiver did not apply to participating in the defense of a pre-suit agency investigation of the disputed claim. As the court said, "As the Airline could not have compelled arbitration of [the agency's] independent investigation, the Airline cannot be faulted for failing to have sought to do so." In addition, the court rejected a Statute of Limitations defense, finding that the statute did not begin to run until the opposing party refuses to arbitrate. That date was not the date when the lawsuit was filed, said the court, but when, after a bankruptcy stay of litigation was lifted, the plaintiff refused to agree to include the lawsuit in a pending arbitration proceeding.

Breach: Failure to Arbitrate Bars Enforcement

The claimant in *Nadeau v. Equity Residential Properties Management Corp.*, 251 F.Supp.3d 637 (S.D.N.Y. 2017) filed a demand for arbitration with the AAA in May but the employer, after unsuccessfully trying to settle the case, still had not paid the AAA fee in July. The AAA then gave the parties notice that it was administratively closing its file. When she filed suit, the employer sought to compel arbitration, contending that her initial demand had not been in proper form, a contention the court emphatically rejected. The employer also argued that Claimant sought to arbitrate a different issue that was not arbitrable. Under the AAA rules, the court noted, the arbitrability issue was for the arbitrator to decide. In any case, the claim was subject to arbitration and was not distinct from the one that was being asserted in litigation and so arbitration had been waived.

Hernandez v. Acosta Tractors Inc., 898 F.3d 1301 (11th Cir. August 8, 2018). The failure of a party seeking to stay litigation and compel arbitration to pay arbitration fees justifies court in determining that that party has defaulted in arbitration, and thereby lost the right to require arbitration. The court

cited *Pre-Paid Legal Services, Inc. v. Cahill*, 786 F.3d 1287 (10th Cir. 2015) and *Sink v. Aden Enterprises, Inc.*, 352 F.3d 1197 (9th Cir. 2003) for this proposition. But it found no authority in the FAA or case law for entering a default judgment against the party seeking arbitration in the legal proceedings. The court did say in *dicta*, that a default judgment could be based on the court's inherent authority "to fashion an appropriate sanction for conduct which abuses the judicial process."

But such action would first require a finding of subjective bad faith, which the court left to the District Court to decide. On the facts presented, "A calculated choice to abandon arbitration after getting adverse rulings from the arbitrator certainly looks like forum shopping. And this type of behavior would surely be a factor the District Court could consider in deciding whether to sanction Acosta by entering a default judgment. At the same time, a party's good faith inability to afford the arbitration fees would be a factor properly considered to weigh against such a sanction."

III. Class Action Issues

Dodd-Frank §1028(b) & Class Waivers

The Statute empowered newly-created Consumer Financial Protection Bureau to regulate pre-dispute arbitration agreements in contracts for consumer financial products or services. A CFPB proposed rule to prohibit class action waivers in pre-dispute arbitration provisions was overruled by a Congressional resolution under the Congressional Review Act, signed by the President on November 1, 2017.

This does not alter the statutory provision in Dodd-Frank that invalidates arbitration clauses for claims asserted under the Sarbanes-Oxley Act, 18 U.S.C. §1514A(e)(2). Sarbanes-Oxley protects whistleblower-employees of public companies against retaliation by their employers for reporting or providing information on violations of mail fraud, wire fraud and other statutes and rules applicable to securities fraud, whether made to law enforcement or internally to the employer.

New Jersey Class Action Waivers

In *Snap Parking, LLC v. Morris Auto Enterprises, LLC*, 2017 WL 1131068 (N.J. Super. 2017), the court refused to enforce a class arbitration waiver because the arbitration clause did not state in so many words that class arbitration was not permitted. Instead, the provision stated at the start that the parties agreed "to waive any right (i) to pursue any claims arising under this agreement including statutory, state or federal claims, as a class action arbitration." Later on in the provision, it stated, "If a waiver of class action and consolidation rights is found unenforceable in any action in which class action remedies have been sought, this entire arbitration clause shall be deemed unenforceable, it being the intention and agreement of the parties not to arbitrate class actions or in consolidated proceedings." The court, in effect, required that to be enforced, a class waiver must be simple and clear; if the conclusion is that class proceedings are waived, that cannot be something derived from interpretation. Bear in mind that the case here reflects the New Jersey view that waivers must be clear and unambiguous. See the discussion of the *Altese* and cases above, on page 5.

Class Arbitrability Where the Arbitration Clause is Silent

In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) the Supreme Court held that class arbitration was a permitted form of arbitration under the Federal Arbitration Act[3]. *Stolt-Neilson* was addressed to the specific problem of whether class arbitration was permitted where the arbitration provision is silent on the subject. Class arbitration requires a separate contractual basis, said the Court, and did not flow automatically from an agreement to arbitrate, because the process is so different from a traditional bilateral arbitration process. And courts may not presume such consent from "mere silence on the issue of class arbitration" or "from the fact of the parties' agreement to arbitrate." *Id.* at 685, 687.The court remanded the case to the arbitration panel for that determination.

Varela v. Lamps Plus,Inc., 701 Fed.Appx. 670 (9th Cir. 2017) *cert granted*, 2018 WL 398496 (2018), will decide the question of how silence about class arbitration in the arbitration clause should be construed in deciding this question. Applying California law contract interpretation principles, the Ninth Circuit concluded that, under the rule of *contra proferentem*, that an arbitration agreement that is silent on the subject of class arbitration must be construed against the drafter. Analyzing the text of the arbitration provision references, the court relied on the waiver of the right to bring a class action in court (by waiving "any right I may have to file a . . . civil action or proceeding") and broad arbitral remedial powers (empowering the arbitrator to "award any remedy allowed by applicable law") to reach its conclusion that class arbitration was called for. The question presented is: "Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements."

Stolt-Neilson roundly criticized class arbitration, observing that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."

> An arbitrator chosen according to an agreed-upon procedure . . . no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. [citation omitted] Under the Class Rules, 'the presumption of privacy and confidentiality' that applies in many bilateral arbitrations 'shall not apply in class arbitrations,' [citation omitted] thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. [citation omitted] And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, [citation omitted] even though the scope of judicial review is much more limited [citation omitted]. We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere

[3] It was in response to *Bazzle* that the AAA adopted its class arbitration rules.

> silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.

These observations about class arbitration suggest that the Court will have difficulty agreeing with the proposition that parties who did not expressly address the question in the arbitration clause intended to allow class arbitration. The difficulty with that approach is that, as the Ninth Circuit noted in *Varela*, the question is one to be decided under the California law governing contract interpretation. Given that the U.S. Supreme Court does not grant *certiorari* to review issues of State law, it may be that the Court will adopt a special rule under the Federal Arbitration Act for deciding the availability of class arbitration.

Delegation of Class Arbitrability Decisions to Arbitrator

An arbitration agreement may provide that arbitrability questions, with some exceptions, are to be decided by the arbitrator. The Supreme Court has recognized that such a delegation is valid if the evidence that the parties so intended it is "clear and unmistakable." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) The reason for the heightened standard of contractual intent is that who decides arbitrability is an arcane issue the parties likely to not even contemplate when the arbitration clause is adopted. The Rules of the American Arbitration Association provide that arbitrators decide arbitrability questions, and this has generally been taken as sufficient to satisfy the "clear and unmistakable evidence" requirement. But especially given the hostility shown in *Stolt-Neilson* towards class arbitration, when is class arbitration a question for the arbitrator to decide?

There is an active debate in the federal Courts of Appeals over what must be shown to establish that the parties intended to leave it to the arbitrator to decide questions of class arbitrability. This debate is significantly impacted by the fact that the American Arbitration Association Supplementary Rules on Class Arbitration also assign the class arbitrability question to the arbitrator:

> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

> In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

Where the arbitration agreement specifies that AAA rules govern, then, does this mean that it is the arbitrator who decides whether class arbitration is contemplated? Relying on the disparaging comments about class arbitration in *Stolt-Neilson*, some Circuits say no, but they are not unanimous.

Catamaran Corporation v. Towncrest Pharmacy, 864 F.3d 955 (8th Cir. 2017) spelled out nicely the distinction between "substantive" questions of arbitrability that are normally for the court and "procedural" questions which are up to the arbitrator to decide.

> [T]hreshold or gateway issues are called substantive questions of arbitrability. Substantive questions include 'whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.' [citation omitted] Courts presume that substantive questions are 'for judicial determination unless the parties clearly and unmistakably provide otherwise.' [citation omitted] Because arbitration is about consent of the parties, we 'hesitate to interpret silence or ambiguity' in an agreement as grounds for committing such important questions to an arbitrator. [citation omitted]
>
> Many questions that arise in the arbitration context are procedural or subsidiary questions that courts presume an arbitrator may decide. [citation omitted] 'Procedural questions arise once the obligation to arbitrate a matter is established, and may include such issues as the application of statutes of limitations, notice requirements, laches, and estoppel.' These are questions for an arbitrator both because the parties would most likely expect an arbitrator to decide them [citation omitted] and because they do not challenge the arbitrator's underlying authority. [citation omitted]

Catamaran Corporation first addressed the issue of whether class arbitration was a substantive question of arbitrability. It canvassed Supreme Court decisions since 2003 and noted that while one plurality decision suggested that whether class proceedings in arbitration were permitted was a question for the arbitrator to decide, more recent cases pointed in the opposite direction. It reviewed several considerations pointing to the importance of the question of whether to permit class arbitration in a case, such as the impact on efficiency of the process, the higher stakes in class cases and the risk of loss of confidentiality and concluded that the issue of class arbitration was an issue committed to the court for decision, not the arbitrator.

But this does not mean that arbitrators can never decide the substantive, or "gateway" issues of arbitrability under the Federal Arbitration Act. They may do so if the agreement calls for that, *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Kubala v. Supreme Production Services*, 830 F.3d 199 (5th Cir. 2016). The issue is whether the arbitration agreement "clearly and unmistakably" designates the arbitrator to decide those issues in the first instance. Most significantly, *Catamaran*

Corporation found that while three prior decisions of that court found that incorporating the AAA rules was a "clear and unmistakable" delegation of substantive arbitrability questions to the arbitrator for initial decision[4], those cases had no application to the question of whether incorporating the AAA rules delegated the class arbitration question to the arbitrator. Because of those policy concerns about class arbitration, the court found that incorporating the AAA rules did *not* delegate the class action arbitrability issue to the arbitrator. Rather, "[w]hen dealing with class arbitration, we seek clear and unmistakable evidence of an agreement to arbitrate the particular question of class arbitration."

Thus, under the rule announced in *Catamaran Corporation*, where the only indication that delegation of the class arbitrability question to the arbitrator is contemplated it that AAA rules are incorporated into an arbitration agreement, the court decides the question of whether or not class arbitration is provided for.

The Third Circuit reached the same conclusion in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (2016). It relied on the use of the singular to refer to the parties in the arbitration clause, the absence of a provision on class arbitration in the arbitration clause itself, and the fact that the incorporation of AAA rules did not identify the Supplemental Rules (where class arbitration is addressed) or even the Commercial Rules (which were applicable and which the court conceded assigned arbitrability questions to the arbitrator). *Accord*, *Reed-Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013)

The Second Circuit has charted a different course in *Wells Fargo Advisors v. Sappington*, 884 F.3d 392 (2nd Cir. 2018) (finding class arbitrability was delegated to the arbitrator for decision by incorporation of AAA rules despite the use of singular terms to refer to the parties). The court pointed out that how explicit language must be to delegate class arbitrability to the arbitrator is a question governed by State law. It criticized the cases cited above for confusing that issue with the initial question of whether class arbitration is a gateway issue that would normally be assigned to the court for decision.

Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230 (11th Cir. Aug. 15, 2018). Disagreeing with *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972–73 (8th Cir. 2017); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 762–63 (3d Cir. 2016); *Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 876–77 (4th Cir. 2015); and *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599–600 (6th Cir. 2013), the Eleventh Circuit treated the incorporation of the rules of the American Arbitration Association as representing clear and unmistakable evidence that the parties intended to adopt class arbitration. The court was persuaded particularly by its prior decision in *Terminix International Co. v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332 (11th Cir. 2005).

In that case, a commercial arbitration proceeding, the court acknowledged the usual rule that arbitrability questions are decided by the court. But in that case, the parties had incorporated the AAA rules, which included Rule 8(a) of the AAA Commercial Arbitration Rules, providing that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections

[4] Where the parties to an arbitration agreement adopt the rules of the AAA, this is an unmistakable delegation of authority to decide "gateway" issues to the arbitrator. *Galilea, LLC v. AGCS Marine Insurance Company*, 879 F.3d 1052 (9th Cir. 2018)

with respect to the existence, scope or validity of the arbitration agreement." On that basis, the *Terminix* court held that there was clear and unmistakable evidence that they intended an arbitrator to decide whether the arbitration agreements were enforceable. So arbitrability questions were for the arbitrator to decide.

Turning to the decisions cited above, the court acknowledged the decisions but noted that they all relied on the observations about how significant the difference between bilateral arbitration and class arbitration were in *Stolt-Neilson*. But that decision, the court noted, concerned "the question of whether an agreement allows class arbitration at all, separate from the issue of who decides the question to begin with." The court did not see any reason to modify the already considerable "clear and unmistakable evidence" requirement for allowing arbitrability questions to be decided by the arbitrator by disallowing the incorporation of AAA rules to satisfy that requirement.

The *Spirit Airlines* court went on to observe that the requirement of "clear and unmistakable evidence" that the parties intended to have the arbitrator decide arbitrability questions, adopted in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, 1923, 131 L.Ed.2d 985 (1995), was premised on the empirical assumption that this is a question not likely to have been considered specifically at the time of the arbitration agreement. Given the significance of the decision to allow class arbitration as noted in *Stolt-Neilson*, the court observed, one would expect it to be something that would not so readily escape the notice of the parties in drafting the arbitration agreement.

Other Gateway Questions For Court

Existence of Agreement to Arbitrate. There are certain gateway issues, however, that remain for the court to decide even where there is a delegation clause. The first is whether there is an agreement to arbitrate in the first place. As the court in *Saizhang Guan v. Uber Technologies, Inc.*, 236 F.Supp.3d 711, 720 (E.D. N.Y.2017) noted,

> While the 'questions of arbitrability'—(1) 'whether the parties are bound by a given arbitration clause' and (2) 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy' may be delegated to an arbitrator if the parties do so clearly and unmistakably, '[t]he more basic issue ... of whether the parties agreed to arbitrate in the first place is one only a court can answer, since in the absence of any arbitration agreement at all, questions of arbitrability could hardly have been clearly and unmistakably given over to an arbitrator. [citations omitted]

When Fraud in the Inducement is a Gateway Issue. It is not sufficient to avoid an arbitration clause to allege and show that the underlying contract was procured by fraud—this is a claim that may be decided in the arbitration itself. But fraud is a threshold question where the fraud is specific to the arbitration provision itself. In *Cullinane v. Beverly Enterprises-Nebraska, Inc.*, 912 N.W.2d 774 (Neb. June 15, 2018), a nursing home case where the defendant sought to compel arbitration of a wrongful death case, the showing was made. At the time the arbitration agreement, contained in an ADR Agreement, was presented for signature, the nursing home representative told the family that it was a 'standard form" signing it was required for admission. She did not provide them with

a copy of it or explain its legal effect. She flipped through the pages and said to "sign here. But the court noted that ADR Agreement stated that execution of the ADR Agreement was *not* a condition for admission. The family member who signed under a power of attorney said that if he had known that it did not have to be signed, he would not have done so. Finding the elements of fraud in the inducement under State law to be satisfied, the court found that the arbitration agreement was nor enforceable.

Validity of Delegation Provision. The validity of a delegation provision allowing arbitrability questions to be decided by an arbitrator is also decided, in the first instance, by the court. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) characterized the delegation clause as an antecedent agreement to arbitrate that could itself be set aside if the grounds for invalidation of a contract particular to the delegation clause existed, in the same way as parties may seek to set aside an arbitration agreement by showing grounds for revocation not of the contract generally, but of the arbitration clause in particular. See also *Metter v. Uber Techs., Inc.*, 2017 WL 1374579, at *3 (N.D. Cal. Apr. 17, 2017) ("The parties also dispute whether Uber's terms of service validly delegate to an arbitrator any question of arbitrability, precluding summary judgment).

The court confronted this problem in *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449 (4th Cir. 2017) and found an instance in which a delegation clause was not enforceable. The case concerned arbitration of an insurance dispute, and a Virginia statute expressly provided that arbitration agreements in "contracts of insurance" are "void[5]." The court reasoned that the delegation clause was an agreement to arbitrate as much as the substantive arbitration clause, and so it violated this statute and was void—a proper ground for revoking it. The court pointed out that if an arbitrator erroneously found a contract of insurance *not* to be a contract of insurance, the resulting arbitration would violate the statute.

"Wholly Groundless" Arbitrability Issues

Even where the arbitration agreement is deemed to delegate arbitrability questions to the arbitrator (by incorporating the AAA rules, for instance), some cases allow the *court* to nevertheless decide that question where it finds the arbitrability objection to be "wholly groundless." The justification for this approach has been articulated as follows:

> The mere existence of a delegation provision . . . cannot possibly bind [the plaintiff] to arbitrate gateway questions of arbitrability in all future disputes with the other party, no matter their origin.
>
> . . .
>
> If it were otherwise, then every case involving an arbitration agreement with a delegation provision must, with no exceptions, be submitted for such gateway arbitration; no matter how untenable the argument that there is some connection between the dispute and the agreement, an arbitrator must decide

[5] Although the Virginia statute might otherwise violate the Federal Arbitration Act, the McCarran-Ferguson Act, 15 U.S.C. § 1011, mandates that federal statutes may not pre-empt State regulation of insurance companies.

> first. Douglas would have to go to the arbitrator, who would flatly tell her that this claim is not within the scope of the completely unrelated arbitration agreement she signed many years earlier when opening a checking account and that she must actually go to federal court after all.
>
> *Douglas v. Regions Bank*, 757 F.3d 460, 462-63 (5th Cir. 2014)

This doctrine of partial delegation has also been accepted in the Sixth Circuit, *Turi v. Main Street Adoption Services, LLP*, 633 F.3d 496 (6th Cir. 2011) and the Federal Cicuit, *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006).

The doctrine has been rejected elsewhere, *Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. Jan. 2017) (rejecting wholly groundless exception to the enforcement of delegation clauses); *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1269 (11th Cir. August 2017) ("We join the Tenth Circuit in declining to adopt what has come to be known as the wholly groundless exception."); *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168 (N.J. 2016) (Under the arbitration agreement, the arbitrator was supposed to rule on "any objection to arbitrability.").

This is an issue that will be decided by the U.S. Supreme Court, as it has granted *certiorari* in *Henry Schein, Inc. v. Archer and White Sales, Inc.* 878 F.3d 488 (5th Cir. December 21, 2017). In that case, the arbitration agreement incorporated the AAA Commercial Rules, which provide, in Rule 7(a), that arbitrability questions are for the arbitrator to decide. The court found in this clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. But the arbitration clause also contained a carve-out from the entire arbitration clause for injunctive relief and intellectual property disputes. This then presented the problem of whether, in a case arguably within this carve-out, the court or the arbitrator should decide whether a given case fell within the carve-out. The case was one which sought both injunctive relief and money damages.

The Fifth Circuit decided the case under the "narrow escape valve" of the "wholly groundless" exception. It construed the carve-out for injunction cases to cover any case in which injunctive relief was sought: "The arbitration clause creates a carve-out for "actions seeking injunctive relief." It does not limit the exclusion to 'actions seeking *only* injunctive relief,' nor 'actions for injunction in aid of an arbitrator's award.' Nor does it limit itself to only *claims* for injunctive relief." By construing the language of the agreement itself, the court came to the conclusion that the argument that the case was arbitrable was "wholly groundless" and did not leave the interpretation of the arbitration clause to the arbitrator.

Post-Award Review

A fourth way that judges can take over the determination of at least the gateway issue of class arbitrability that has been delegated to the arbitrator occurs in review proceedings after the arbitrator's award. This is illustrated by *Jock v. Sterling Jewelers Inc.*, 284 F.Supp.3d 566 (S.D. N.Y. 2018). Acting under its power to reject an arbitration award where the arbitrator exceeded his powers, 9 U.S.C. §10(a)(4), the court in that case found that because the arbitrator's decision to allow opt-out class arbitration[6] was erroneous as a matter of law, attempting to bind absent

[6] The court did not find an objection to opt-in class adjudication.

parties constituted an action exceeding the arbitrator's powers because the absent opt-out class members had not consented to the arbitration. Following this reasoning to its logical conclusion, a potential complete obstacle to all class arbitration lies in the fact that class arbitration does not permit the individual class member to participate in arbitrator selection and be assured that no conflicts of interest as to that class member exist.

Class and Collective Action Waivers & the NLRA

Epic Systems Corp. v. Lewis, 2018 WL 2292444 (May 21, 2018) held that class and collective litigation is not a "protected concerted activity" under the National Labor Relations Act ("NLRA"). Thus, the Federal Arbitration Act ("FAA") applies and arbitration agreements that include waivers of the right to bring a class action are valid. Justice Gorsuch noted that the defense to arbitration being presented (that the class waiver was illegal because it violated the NLRA and thus formed a basis to invalidate the contract under the FAA) was a defense that could only apply to an arbitration agreement. This, he said, ran afoul of *Conception.*

Moreover, the requirement that apparently conflicting federal statutes be harmonized if possible led the Court to conclude that class action litigation fell outside the protection of NLRA §7, since the employee rights created in the statute are focused on the right to organize unions and bargain collectively. After all, Justice Gorsuch observed, *Gilmer v. Interstate/Johnson Lane Corp.*,500 U.S. 20 (1991) held that the Fair Labor Standards Act process for collective actions does displace arbitration under the FAA. He noted that, in fact, the Court has rejected every other effort to avoid arbitration mandated by the FAA based on other federal statutes. Her brushed aside as *dicta* the comment in *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565-66 (1978) noting that other courts and the National Labor Relations Board ("NLRB") had held that the "mutual aid and protection" clause protected employees when they resort to administrative or judicial forums. The quotation did not say what kind of judicial proceeding that holding applied to. Finally, the Court found *Chevron* deference to the NLRB determination that class litigation was concerned activity under the NLRA was not appropriate because its choice implicated another statute over which it did not have jurisdiction,

Following *Epic*, the court in *Gaffers v. Kelly Services, Inc.*, 900 F.3d 293 (6th Cir. August 15, 2018) rejected attacks on an arbitration agreement that contained a class and collective action waiver. It found that neither the FLSA nor the NLRA was in conflict with the FAA and rejected the contention that the waiver rendered the arbitration agreement illegal under the FLSA.

The California Private Attorneys General Act ("PAGA") is a *qui tam* statute authorizing employees, individually and collectively, to sue to enforce a California Wage & Hour law that provides for civil penalties where employers violate labor code provisions. The civil penalty is $100 per affected employee for the first pay period and $200 per employee for subsequent pay periods in which the violation occurs. Employees bring the action on behalf of the State, with 75% of the civil penalties recovered distributed to the State and the remainder distributed to aggrieved employees. Cal. Lab.Code § 2699(i).

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), The California Supreme Court barred the waiver of representative claims under PAGA. The Ninth Circuit found in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015) that this prohibition on representative

actions did not stand as an obstacle to the accomplishment of the FAA's objectives, and thus that the Supreme Court decision in *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) did not require that it be deemed pre-empted.

In *Whitworth v. SolarCity Corp.*, 2018 WL 3995937 (N.D. Cal. August 21, 2018) addressed the follow-on question of whether *Epic Sys. Corp. v. Lewis*, --- U.S. ---, 138 S.Ct. 1612, 200 L.Ed.2d 889 (2018) required a different conclusion. Answering the employer's argument that *Epic* condemns all restrictions that are applicable to arbitration agreements and not all agreements generally, the court asserted that "The rule bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." It went on to point out that an agreement prohibiting representative actions was effectively an agreement to limit the penalties an employee-plaintiff may recover on behalf of the state, thereby, given the limited enforcement resources of the State, it was "effectively an agreement to limit the penalties an employee-plaintiff may recover on behalf of the state" and "allows a private party to immunize itself from liability under a particular law, especially a law prosecuted on behalf of a state."

Despite a split in the California appellate circuits on the issue, the court found that representative actions could also be brought under PAGA to enforce California Labor Code section 558 (hours and days of work under orders of the California Industrial Welfare Commission) because the recovery represented a civil penalty and not an individual recovery.

The court in *Juarez v. Wash Depot Holdings, Inc.*, 235 Cal.Rptr.3d 250 (Cal. App. July 3, 2018) similarly invalidated an employee handbook including an arbitration provision applicable to PAGA claims. The English version provided for severability in the event the PAGA waiver was found to be invalid, while the Spanish language version provided that it was not severable. Both provided that the English language version was the definitive document. The handbook also provided that an employee could opt out of the arbitration agreement.

Nevertheless, the court found the arbitration agreement to be invalid as to PAGA claims, despite the opt-out option, without more evidence that the employee's knowledge, provided a sufficient understanding of the relevant circumstances and likely consequences of forgoing the right to bring a PAGA representative action.

The court also declined to treat the PAGA waiver as severable because of the two divergent provisions on severability. While the handbook said that the English language version, the court was concerned that the employer may have left the meaning of severability "deliberately obscure'" and applied the rule that contractual ambiguity was construed against the drafter of the agreement, effectively enforcing the Spanish language prohibition on severing the PAGA waiver.

IV. Arbitration Process Cases

Subpoena Powers

Geographical limits: Alliance Healthcare Services, Inc. v. Argonaut Private Equity LLC, 804 F.Supp.2d 808 (N.D. Ill. 2011) holds that because under FAA §7, a federal court's authority to enforce an

arbitrator's subpoena is coextensive with the court's authority to enforce one of its own subpoenas, arbitrator subpoenas are limited by Fed.R.Civ.Proc. 45. That rule limits the scope of service to places within the district of the issuing court, or if outside that district, at a place within 100 miles of the hearing.

Discovery subpoenas: In *CVS Health Corporation v. Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017), the Ninth Circuit lined up with the view of the Second[7], Third[8] and Fourth[9] Circuits in holding that discovery subpoenas to non-parties are *not* authorized by the FAA. It rejected the view taken by the Sixth[10] and Eighth[11] Circuits that discovery subpoenas are permissible in that they facilitate greater efficiency at an arbitration hearing.

There is a work-around for the production of documents prior to the start of the full evidentiary hearing, as reflected in *Odfjell Asa v. Celanese AG*, 348 F.Supp.2d 283 (S.D. N.Y. 2004). In that case, after the court refused to enforce a discovery subpoena duces tecum (for production of documents), the panel issued subpoenas requiring that the custodians of records appear and testify before an arbitrator. Upholding the subpoenas, the court observed that

> Section 7 of the FAA states that the arbitrators 'may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.' 9 U.S.C. § 7. This is precisely what the instant subpoenas require. Nothing in the language of the FAA limits the point in time in the arbitration process when this power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing.

The court also said that appearance before just one of the three arbitrators was authorized by the FAA and in this manner, "preliminary proceedings can proceed expeditiously before a single arbitrator to deal with preliminary questions of admissibility, privilege, and the like before the full panel hears the more central issues.

Thus, it appears that the arbitrator may properly issue a subpoena for production of documents to a custodian of records to bring documents and testify to their authenticity, status as business records, etc. so long as the appearance is in person before the arbitrator (or in the case of an arbitration panel, at least one of them). The arbitrator would rule on objections as at a full hearing and protect the third party from undue burden or expense under Fed.R.Civ.Proc. 45(d)(1) ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."). The documents would then be available for use in the full arbitration hearing. There is no reason that the same

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[7] *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 215–16 (2d Cir. 2008).

[8] *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

[9] *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999).

[10] American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.), 164 F.3d 1004, 1009 (6th Cir. 1999).

[11] *In Re Security Life Insurance Co. of America*, 228 F.3d 865 (8th Cir. 2000).

procedure could not be employed to obtain the pre-hearing testimony of third party witnesses, although the witness might thereafter be excused from having to testify at the full hearing absent compelling circumstances. So the subpoena deposition of a third party would be similar to a deposition of an out-of-state witness in federal civil proceedings, where the deposition represents the trial testimony of the witness as well.

Functus Officio

General Re Life Corporation v. Lincoln National Life Ins. Co., 273 F.Supp.3d 307 (D. Conn. 2017) was a case in which an arbitration panel had issued a clarification of its final award concerning "recapture" of insurance policies by a primary carrier from an excess carrier when the parties differed over how to implement the retroactive unwinding of the recaptured policies. The court said that identify no precedent where any court allowed arbitrators to amend an original final arbitration award without first identifying an exception to the *functus officio* doctrine. The exceptions are:

> In addition to an agreement by the parties to allow the arbitrators to revisit an award, there are three commonly recognized exceptions to the doctrine of *functus officio*: '(1) an arbitrator can correct a mistake which is apparent on the face of his award; (2) where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination; and (3) where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify.'

Accepting the proposition that the arbitrator's power to clarify must be exercised within a reasonable period of time, the court found that the panel had done so. The court found a qualifying ambiguity and rejected the argument that the clarification issued had not modified any substantive aspect of the decision, even though it had a significant changed the relief awarded.

IV. Review of Arbitration Awards & *Vacatur*

Refusal To Hear Relevant Evidence as Grounds for *Vacatur*

Roy v. Buffalo Philharmonic Orchestra Society, Inc., 161 F.Supp.3d 187, 195 (W.D. N.Y. 2016) concerned the arbitrator's decision to exclude certain evidence, which was challenged by the proffering party as coming within the 9 U.S.C. §10(a)(3) "refusing to hear evidence pertinent and material to the controversy" ground for overturning an arbitrator's award. In the first place, the court noted, the section

> has been narrowly construed so as not to impinge on the broad discretion afforded to arbitrators to decide what evidence should be presented. Every refusal to hear potentially relevant evidence does not create grounds for vacating an arbitration award. Though an arbitrator must give each of the

> parties to the dispute an adequate opportunity to present its evidence and arguments, he is not required to hear all the evidence proffered by a party.

The exclusion of evidence, moreover, "must amount to a denial of fundamental fairness of the arbitration proceeding to warrant vacating the award."

The same holds true, even more so, for discovery. At a hearing, arbitrators have "great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings" and in discovery, "broad discretion" to manage discovery. *Doscher v. Sea Port Group Securities, LLC*, 2017 WL 6061653 (S.D. N.Y. 2017) (failure to order production of final tax returns when tens of thousands of documents were produced, including 12 years of audits, five years of tax returns and K-1 statements and a consolidated financial statement). *See Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC*, 876 F.3d 900 (7th Cir. 2017) (finding no failure to hear relevant evidence in refusal to order deposition of party's attorney involved in negotiating contract when breach was the issue, and pointing out that "nothing in the Federal Arbitration Act requires an arbitrator to allow any discovery"). In *White v. Four Seasons Hotel and Resorts*, 244 F.Supp.3d 1 (D. D.C. 2017) the award was upheld where the claimant insisted she did not receive evidence because respondent resisted and delayed discovery. This was based on the court's conclusion that the arbitrator:

> oversaw a thorough and extended discovery process and an eleven-day hearing during which [Claimant] received and was able to introduce into the record significant evidence—including scheduling data and witness testimony—related to the alleged booking-policy violations. Armed with that evidence, [Claimant] was able to present the Arbitrator with a well-developed, if ultimately unconvincing, argument that she had been denied client appointments on the basis of her race.

Oracle Corporation v. Wilson, 276 F.Supp.3d 22 (S.D. N.Y. 2017) upheld an award of summary judgment to an employee claiming under a commission policy. The arbitrator initially stated that he would not hear testimony at the hearing of the employer's motion to dismiss and the employee's cross-motion for summary judgment. But at the hearing, he questioned the employee. In challenging the award, the employer asserted that it was deprived of its opportunity to present evidence, but the court rejected this contention based on the procedural history of the case. At that hearing, the employer did not object to the employee answering questions or seek to cross-examine her. After that initial hearing, the employer asked that the case be decided on the contractual language unless the arbitrator found an ambiguity. Then the arbitrator asked if either side had an objection to his deciding the case based on the testimony of the employee and the documents, and the employer did not object. Overturning an award based on refusal to hear pertinent evidence requires a showing that a party has been denied a fundamentally fair hearing. A party may not complain if it "did not avail itself of the opportunity to be heard by proffering further evidence, seeking discovery, or requesting an evidentiary hearing."

Evident Partiality as Grounds for *Vacatur*

"Evident partiality means a situation in which 'a reasonable person would have to conclude that an arbitrator was partial to one party to an arbitration.'" *System4, LLC v. Ribeiro*, 275 F.Supp.3d 297

(D. Mass. 2017). Courts will not consider these complaints if raised only after the conclusion of an arbitration. Making such a showing requires proof of motives and in that case, the arbitrator's unprompted procedural investigation of a previous State court proceeding was not grounds for showing evident partiality simply because one side viewed it as being done to advance the interests of the other side. The court also noted that the fact that the arbitrator makes an unfavorable ruling does not, alone, provide evidence of bias.

Certain Underwriting Members of Lloyds of London v. Florida, Department of Financial Services, 892 F.3d 501 (2nd Cir. June 7, 2018) found that a party seeking to vacate an award for "evident partiality" under Section 10(a)(2) must sustain a higher burden to prove evident partiality on the part of a party-appointed arbitrator, who is expected to espouse the view or perspective of the appointing party. An undisclosed relationship between a party and its party-appointed arbitrator constitutes evident partiality, such that vacatur of the award is appropriate if: (1) the relationship violates the contractual requirement of disinterestedness; or (2) it prejudicially affects the award. The first test reflects the court's insistence that the parties be held to whatever standard they agreed to. In the case of a party-appointed arbitrator, a heightened burden applies, but that standard could be satisfied by a personal or financial stake in the outcome of the arbitration or if the party opposing the award can show that the party-appointed arbitrator's partiality had a prejudicial effect on the award.

Evident Partiality & Arbitrator Conflicts

In *National Indemnity Company v. IRB Brasil Resseguros S.A.*, 164 F.Supp.3d 457, 475 (S.D. N.Y.2016) *aff'd* 675 Fed.Appx. 89 (2nd Cir. 2016), the court observed that while a judge can be disqualified when "his impartiality *might* reasonably be questioned, an arbitrator is disqualified only when a reasonable person, considering all of the circumstances, would *have* to conclude that an arbitrator was partial to one side." (emphasis in original) While appearance of bias is not sufficient, the court said, "'proof of actual bias,' an 'insurmountable' standard, is not needed." The court restated the factors considered in making the judgment about evident partiality:

> (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding.

Failure to timely disclose conflicts can satisfy the evident partiality standard because "when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality." *Id.*, at 476. But where a full and accurate disclosure was made when the arbitrator became a candidate and again two years later when, after negotiation and litigation, he was selected, the court found his disclosures to be reasonable. After extended discussion, the court rejected the contention "that a person concurrently serving as party-arbitrator and umpire in two arbitrations involving affiliated parties is inherently biased in favor of both the party appointing him party-arbitrator and the affiliated party for whom he is serving as umpire." *Id.*, at 481-82. It rejected the contention that in a specialized field with a limited number of available arbitrators likely to have had contact with parties and counsel, it was improper for a neutral arbitrator also to serve as a party arbitrator for a party in an unrelated case.

LGC Holdings, Inc. v. Julius Klein Diamonds, LLC, 238 F.Supp.3d 452 (S.D. N.Y. 2017) concerned an arbitrator who disclosed too little. In an arbitration that also was in a specialized field with a limited number of arbitrators, he disclosed that he had done business with one party. The objection was that he had not disclosed that he was a partner with that party a "multi-million dollar diamond venture." The challenge was based on evident partiality and corruption, and the court held that the initial disclosure placed the complaining party on inquiry notice to seek additional information. Since the party did not investigate or object until after receiving an adverse award, this was a "belated cry of bias" and did not satisfy the requirement of objective facts inconsistent with impartiality. The court also rejected a complaint that the arbitrator failed to disclose a conviction for tax fraud, noting that "federal courts have been unreceptive to the argument that undisclosed legal trouble of an arbitrator requires vacatur under the FAA absent a showing that the legal trouble affected the outcome of the arbitration in some demonstrable way." (citing *United Transp. Union v. Gateway W. Ry. Co.*, 284 F.3d 710, 712 (7th Cir. 2002).

On the other hand, in *Move, Inc. v. Citigroup Global Markets, Inc.*, 840 F.3d 1152 (9th Cir. 2016), the court was confronted with a FINRA Panel chaired by an imposter. The arbitrator represented himself as a retired attorney of roughly the same name, and was disqualified from the FINRA panel upon discovery of this fact. The complaining party had been particular about needing a chair of the panel who was an attorney. Although the ruling was unanimous, the court found that there was no way to tell if the outcome was affected by the deceit, and that the complaining party was entitled to *vacatur* for misconduct under 9 U.S.C. §10(a)(3).

Arbitrators Exceeding Their Powers as Grounds for *Vacatur*

Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC, 876 F.3d 900 (7th Cir. 2017) addresses the meaning of this ground for *vacatur*. The court observed that § 10(a)(4) does not allow a judge to overturn an award for legal errors:

> Just as an arbitrator is entitled to interpret the parties' contract without judicial review, so an arbitrator is entitled to interpret the law applied to that contract. An agreement to arbitrate is an agreement to move resolution of the parties' disputes out of the judicial system. An arbitrator is not like a magistrate judge, whose recommendations are subject to plenary judicial review.

The court cited and relied on *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001) and *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660 F.3d 281 (7th Cir. 2011) for the proposition that an arbitrator acts as the parties' joint agent and may do anything the parties themselves may do. Thus, if the parties could reach a compromise over a legal issue, the arbitrator may do so on their behalf. Arbitrators exceed their powers "if they order the parties to violate the rights of persons who have not agreed to arbitrate . . . But when an arbitrator does only what the parties themselves could have done by mutual consent, § 10(a)(4) does not intervene."

This may seem to be at odds with the recent treatment of the "manifest disregard of the law" judicially-created ground for *vacatur*, whose survival is seriously in doubt. As currently construed, that exception is applicable where an arbitrator openly decides to disregard the applicable law. The court in *Sanwan Trust v. Lindsay, Inc.*, 251 F.Supp.3d 353, 357 (D. Mass. 2017) observed that as long as the arbitrator is "even arguably construing or applying the contract and acting within the

scope of his authority, a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision." (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). The standard would be satisfied only if the arbitrator "appreciated the existence of a governing legal rule but wilfully decided not to apply it." *Id.* Thus, in *Hagan v. Katz Communications, Inc.*, 200 F.Supp.3d 435 (S.D. N.Y. 2016), the court found that there was no basis for overturning the arbitrator's dismissal of an arbitration claim based on Title VII where the demand for arbitration was filed more than 90 days after the right-to-sue letter was received by the Claimant. Applying the deadline for suit as a deadline for initiating arbitration did not "disregard a well-defined, explicit, and clearly applicable federal law."

The court in *Salus Capital Partners, LLC v. Moser*, 289 F.Supp.3d 468 (S.D. N.Y. January 16, 2018) addressed the "exceeding powers" standard for vacatur of 9 U.S.C. § § 10(a)(4). The inquiry focuses on whether the arbitrator had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether that issue was correctly decided. As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the court will not overturn the award even if the court is convinced he committed serious error. In that case, a contract provision stating that the parties are to bear their own attorney's fees and arbitration costs did not prevent an arbitrator from awarding fees and costs for a bad faith defense. Even if the award was not designated as such, the authority precluded review of the award of fees and costs.

Sanchez v. Elizondo, 878 F.3d 1216 (9th Cir. January 5, 2018) concerned the interpretation by a single arbitrator of his authority to proceed under a FINRA rule calling for a single arbitrator in cases where the claim does not exceed $100,000 and a panel of arbitrators where the claim is over that amount. The original claim was for $100,000, but the ultimate amount sought by the claimant was $125,000. The arbitrator determined that the FINRA rule pertained only to the initial claim and that he could award more than $100,000. Finding the determination to be plausible,, the court concluded that the arbitrator confined himself to the interpretation and application of the parties' agreement and thus did not exceed his powers.

Manifest Disregard of the Law as Grounds for *Vacatur*

The Federal Arbitration Act specifies that "any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 . . ." (emphasis added) 9 U.S.C. §9.

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), the U.S. Supreme Court held that because of the "must" language, the Federal Arbitration Act's procedures for judicial review were not subject to modification by an agreed provision allowing the court to review legal conclusions of the arbitrator on a *de novo* basis.

The grounds on which an arbitration decision is subject to being vacated, 9 U.S.C. §10(a), are:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The Court in *Hall Street* noted the longstanding judicially-recognized "manifest disregard of the law" basis for *vacatur*, finding that even if it represented an interpretative expansion of judicial review Under FAA §10, that would not authorize private parties to enact their own wholesale rewriting of the grounds for *vacatur*. The Court mused that "manifest disregard" might be deemed a summary of all of the grounds or a combination of grounds (3) and (4).

The possibility that "manifest disregard" might be overturned as a basis for *vacatur* was specifically noted in *Stolt-Nielsen*., 559 U.S. at 671 n.3, 130 S.Ct. at 1768, 176 L.Ed.2d at 672. The Court noted that it was not addressing that issue, adopting the parties' standard that "the arbitrators knew of the relevant legal principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it" (and finding that it was satisfied).

This is an issue ripe for Supreme Court adjudication. Every Circuit but the Tenth has weighed in and the decisions run the gamut from finding that *Hall Street* eliminated this ground for *vacatur* to finding that it confirmed its validity. Perhaps more important, a variety of specific tests for this basis for vacating arbitration awards have been articulated, with no two Circuits saying it in quite the same way. Here is the rundown of the cases:

First Circuit: *Ramos – Santiago v. United Parcel Service*, 524 F.3d 120 (1st Cir 2008) (manifest disregard if the award is: "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact.").

Second Circuit: *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F. 3d 85 (2d Cir. 2008) (characterizing "manifest disregard" as a shorthand for the arbitrators exceeding their powers and adopting three-part test: (1) the arbitrator knew of the relevant legal principle, (2) appreciated that the principle controlled the outcome of the disputed issue, and (3) nonetheless willfully flouted the governing law by refusing to apply it). An award should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached, *Salus Capital Partners, LLC v. Moser*, 289 F.Supp.3d 468 (S.D. N.Y. January 16, 2018). In that case, the court found "far more" than what was required to sustain the award where the challenge was to equitable disgorgement of the executive's compensation under the faithless servant doctrine.

Third Circuit: *Sutter v. Oxford Health Plans LLC*, 675 F. 3d 215, 220 n.2 (3d Cir. 2012) (indicating that manifest disregard is within the "arbitrators exceeded their powers ground for vacatur and finding it applicable where the arbitrator "strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice").

Fourth Circuit: *Wachovia Sec., LLC v. Brand*, 671 F. 3d 472 (4th Cir. 2102) (finding that "manifest disregard" survived *Hall Street* based on its application in *Stolt-Neilson* and that "manifest disregard" required a showing that "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle.").

Fifth Circuit: *Citigroup Global Markets, Inc. v. Bacon*, 562 F. 3d 349 (5th Cir. 2009) (manifest disregard abrogated).

Sixth Circuit: *Grain v. Trinity Health*, 551 F.3d 374 (6th Cir. 2008) (abrogating "manifest disregard" as a ground for *modification* of an award); *Coffee Beanery, Ltd v. WW, L.L.C.*, 300 Fed.Appx. 415 (6th Cir. 2008) (unpublished opinion declining to abrogate "manifest disregard" as grounds for *vacatur*).

Seventh Circuit: *Affymax, Inc. v. Ortho- McNeil- Janssen Pharms, Inc*, 660 F. 3d 281 (7th Cir. 2011) (manifest disregard abrogated but retaining rule that an award that directs the parties to violate the legal rights of third persons who did not consent to the arbitration will be vacated).

Eighth Circuit: *Med. Shoppe Int'l., Inc. v. Turner Invs., Inc.*, 614 F. 3d 485 (8th Cir. 2010) ("manifest disregard" of the law rejected as a ground for *vacatur*).

Ninth Circuit: *Comedy Club, Inc. v. Improv West Assoc.*, 553 F. 3d 1277, 1290 (9th Cir 2009) (Finding that "manifest disregard" as grounds for *vacatur* is the same as 9 U.S.C. §10(a)(4) "arbitrators exceeded their powers" ground and requiring that the arbitrator recognized the applicable law and ignored it).

Eleventh Circuit: *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 Fed. Appx. 828 (11th Cir. 2014) (unpublished—abrogating "manifest disregard").

D.C. Circuit: *FBR Capital Mkts. & Co. v. Hans*, 985 F. Supp. 2d 33 (D.D.C. 2013) (finding "manifest disregard" not to be within the statute); *Coyne v. Hewlett–Packard Co.*, 2018 WL 1640038 (D.D.C. April 5, 2018) (finding "manifest disregard" to be proper if construed to mean "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.").

Misconduct as Grounds For *Vacatur*

In *Trina Solar US, Inc. v. JRC-Services LLC*, 229 F.Supp.3d 176 (S.D. N.Y. 2017) the complaint was about the award was "misconduct by. . . engaging in . . . misbehavior prejudicing the rights of a party" under 9 U.S.C. §10(a)(3). The arbitrator ordered before the hearing that both sides prepare written summaries of their witnesses' testimony sufficient to substitute for the direct examination. One side prepared fifty pages of statements and dozens of exhibits, the other a skeletal six-page declaration from one witness without references to exhibits. This allowed one side to prepare to cross-examine and left the other largely in the dark, the offended party complained. The panel proceeded with the hearing because, after hearing from both sides, it concluded that the witness was "unlikely to deliver any surprises during his testimony." Because the complaining party was unable to specify what evidence or argument it was prevented from presenting, its claim of fundamental unfairness was rejected.

Public Policy as Grounds For *Vacatur*

Another judicially-created ground for *vacatur* is where the award violates a clear public policy. The court addressed this issue in *Local 689, Amalgamated Transit Union v. Washington Metropolitan Transit Auth.*, 249 F.Supp.3d 427, 435 (D.D.C. 2017). In that case, an arbitrator reinstated an employee who had misrepresented his maintenance work on Metrorail tunnel fans after imposing a 6-month suspension and the employer challenged the award. In the D.C. Circuit, "the Award would either need to violate a positive legal proscription forbidding the reinstatement . . . or otherwise compel illegal conduct" before it would be overturned on public policy grounds, a standard the employer did not meet.

This is not the standard applied in the Third Circuit, however. *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1292-93 (3rd Cir. 1996) concluded that "the contours of positive law are broad enough to include not just specific rules or prohibitions but also the stated purposes behind the rules and prohibitions." It reaffirmed the previously-recognized "strong public policy against the operation of oil tankers and common carriers by crew members who are under the influence of drugs or alcohol." It did not, however, overturn the reinstatement award, which was based on a refusal to take a drug test, even though the order to take the test was prompted by finding marijuana in the employee's cabin.

V. Conclusion

The law under the Federal Arbitration Act has become increasingly complex as the Supreme Court has expanded its reach over the past thirty years or so. Perhaps this is not surprising, given that arbitration is not a variation on civil justice system, it is a separate (although similar) system that nevertheless depends for its definition on decisions from the courts.

The principles in this area of law are applicable to an increasingly large percentage of the litigation. The case law places the shortcomings of the process on display as the courts struggle to keep the essential elements of the process while ensuring its integrity. Just as the conventional civil justice system is fraught with complexity, inevitably the trend towards ever more complicated legal issues will increase in coming years.