Contracting Around Class Actions, a Win for Employers

A recent Ninth Circuit ruling that Uber's arbitration agreements did not violate the National Labor Relations Act provides a major victory to Uber by requiring each plaintiff to separately arbitrate his or her claims.

Christine M. Fitzgerald, writing in the Jackson Lewis **California Workplace Law Blog**, explains that plaintiffs filed a putative class action against Uber for failure to remit gratuity paid by customers, and for misclassification of the drivers as independent contractors and failing to pay their business expenses. The O'Connor plaintiffs sought an order declaring Uber's 2013 arbitration agreements unconscionable.

The panel rejected plaintiffs' argument that the lead plaintiffs constructively opted out of arbitration on behalf of the entire class.

Read the article.

Bankruptcy Court Finds Arbitration Clause in

Consumer Loan Contract to be Sufficient Cause to Grant Relief from Automatic Stay

A bankruptcy court has ruled that an arbitration clause was binding and ordered the stay lifted to permit arbitration in a bankruptcy proceeding to go forward, according to a post on the **Bankruptcy Update Blog** of Patterson Belknap Webb & Tyler.

Authors **Jonah Wacholder** and **Daniel A. Lowenthal** explain that, when a bankruptcy petition is filed, an automatic stay comes into effect staying proceedings against the debtor or the debtor's property.

The court "reasoned that because the contracts had been formed before the bankruptcy case was filed, and because the bankruptcy case was now a chapter 7 liquidation rather than a chapter 11 reorganization, adjudication of the validity of the contracts was not sufficiently entangled in the bankruptcy case to count as a core proceeding."

Read the article.

Why Getting the Wrong Result in Arbitration May Be What You Bought

Resolving disputes in arbitration can sometimes lead to surprising results, even ones that might be inconsistent with the underlying contract or with applicable state law, warns **Ken Slavens** for **Husch Blackwell**.

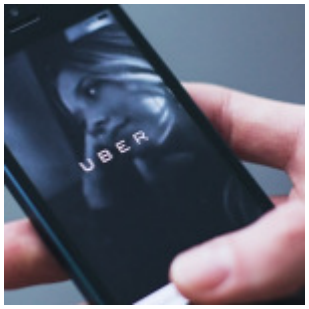
A recent Eighty Circuit decision is an example: The arbitrator in this case awarded attorney's fee of nearly a million dollars more than the liability cap in the contract. Despite the possibility that this result was inconsistent with state law, the Eighth Circuit let the award stand.

"In the court's words, '[t]he parties bargained for the arbitrator's decision; if the arbitrator got it wrong, then that was part of bargain,'" writes Slavens.

Read the article.

Federal Appeals Court Rules Uber Can Force Drivers Into

Individual Arbitration, Voids Class-Action



A federal appeals court Tuesday ruled that Uber can force its drivers into individual arbitration over pay and benefit disputes, voiding an effort by thousands of drivers to join in a class-action suit against the ride-hailing company, according to the ***Los Angeles Times***.

The U.S. 9th Circuit Court of Appeals in San Francisco overturned a lower-court order that had certified the drivers' class-action effort.

The court's opinion cited a 5-4 U.S. Supreme Court decision in May that employers could enforce arbitration agreements that require workers to give up the ability to collectively pursue claims that they were shortchanged or treated unfairly.

Read the *LA Times* article.

Dallas Attorney Deborah Hankinson Honored as One of

State’s Top 3 Lawyers

Alternative dispute resolution attorney and former Texas Supreme Court Justice Deborah Hankinson has earned recognition as one of the Top Three attorneys in the state by Texas Super Lawyers.

It is the fourth time since 2012 that she has been selected among the Top Three attorneys in the state by the peer-review rating service. She also has ranked consistently among Texas’ Top 10 lawyers over the past eight years and has been selected among the state’s Top 50 Women attorneys every year since the inaugural Texas Super Lawyers listing was released in 2003.

Earlier this year, Hankinson was named the Dallas Arbitration Lawyer of the Year by The Best Lawyers in America. In 2016, she was selected to The National Law Journal’s inaugural ADR Champions list recognizing alternative dispute resolution trailblazers from across the nation. She also has garnered wide-ranging recognition from legal guides and business publications, including Chambers USA, Benchmark Appellate, Texas Lawyer, Dallas Business Journal, D Magazine, the Dallas Bar Association and Lawdragon.

Texas Super Lawyers selections are based on peer nominations and evaluations, as well as independent editorial research. No more than 5 percent of eligible Texas attorneys are chosen each year for practice-specific recognition. The attorneys with the highest rankings regardless of practice focus are chosen for additional recognition. The full 2018 listing appears in the October edition of Texas Monthly and in the Texas edition of Super Lawyers magazine. The list also is available online at http://www.superlawyers.com.

Construction Arbitration: The Pros and Cons

It's an unfortunate fact that many construction projects end in disputes, driving the parties into some form of dispute resolution, writes **Jason T. Strickland**, a litigator with Ward and Smith.

Many of these construction disputes are resolved through arbitration, he writes in a **web post**.

His article explains how arbitration is different, the major differences between arbitration and lawsuits, court involvement in the arbitration process, avoiding unfavorable local law, and third-party administration of arbitration.

Read the article.

Morgan Stanley Lawsuit

Highlights Pitfalls of Emailed Employee Contracts

Litigation pitting Morgan Stanley against one of its former sales assistants could have implications for its employees and those of other wirehouses, warns **Financial Advisor IQ**.

Miriam Rozen explains:

"That will be particularly true if the wirehouse employees receive – but don't always read – emails sent by their employers to set employment conditions.

"The wirehouse contends that if they've sent you an emailed contract, you've essentially agreed to the contract just by continuing to work."

A lower court had ruled that an employment-arbitration agreement between Morgan Stanley and the employee was enforceable, even though the former sales assistant claimed she never read a 2015 email that the wirehouse sent notifying her she would be entered into such a contract.

Read the article.

Site Cannot Compel

Arbitration Based on Amended Terms Without User Notification of Change

A D.C. district court ruled that an eBay user did not assent to a later-added arbitration clause to the user agreement by virtue of a provision that stated eBay could amend the agreement at any time, as the user may not have received sufficient notice of the amendment, according to the Proskauer Rose **New Media and Technology Law Blog**.

"Notably, the court declined to find adequate notice sufficient to demonstrate an agreement to arbitrate merely based on the fact that the amended user agreements were posted on eBay's website (at least under Utah, Louisiana or Texas law). This case is interesting as many websites and services have added mandatory arbitration clauses to their terms in recent years, yet may have a stable of legacy users that agreed to a prior set of terms that did not contain such a provision," writes **Jeffrey Neuburger**.

Read the article.

When Your Contract Includes

an Arbitration Clause: Who Decides the Arbitrability of the Dispute?

Williams Mullen partner **Robert K. Cox** writes in a post on the firm's website that the answer to who decides the arbitrability of a dispute – in a case in which a contract includes an arbitration clause – requires consideration involving a multi-step inquiry.

In his **article**, a court resolving an arbitrability dispute first must determine who decides whether a particular dispute is arbitrable – an arbitrator or the court. Second, if the court determines that it is the proper forum to adjudicate the arbitrability of the dispute, then the court must decide whether the dispute is in fact arbitrable.

"Parties wishing to ensure resolution of 'gateway' questions of arbitrability by a specific decision-maker –whether the court or arbitrator –should spell out their preference as clearly as possible in the arbitration clause," Cox writes.

Read the article.

Fifth Circuit Overturns Arbitration Order Where Employer Failed to Countersign Agreement

Image by NY Photographic

The 5th U.S. Circuit Court of Appeals has reversed a Texas federal court's order compelling arbitration in a sexual harassment and discrimination case because one party failed to sign an agreement to arbitrate, reports Karl Bayer in the **Disputing blog**.

Writing for the blog, Beth Graham describes the case in which the plaintiff, Huckaba, signed an arbitration agreement that waived her right to sue Ref-Chem L.P. prior to beginning employment with the company.

> "The agreement included a signature box for Ref-Chem and also required that the company reciprocate by giving up its right to sue Huckaba. After the woman signed the contract, however, Ref-Chem failed to have an officer of the company countersign the document."

When Huckaba later filed a sexual harassment, discrimination, and retaliation lawsuit against Ref-Chem, the company responded by filing a motion to compel arbitration. The

district court granted Ref-Chem's motion.

The 5th Circuit concluded "there is not a valid agreement to arbitrate in this case," reversed the district court's order compelling the dispute to arbitration, and remanded the lawsuit back to the district court, Graham writes.

Read the article.

Drafting the Arbitration Provision in Commercial Contracts: Back to Basic

More and more cases are being submitted to arbitration as a result of pre-dispute contractual clauses, point out John P. DiBlasi and Jacqueline I. Silvey in **an article** for National Arbitration and Mediation.

"In other words, at the time of entering into the contract, it is wise to make sure the contract contains a clause that provides for arbitration in the event of a future dispute," they write. "These clauses are found in all types of agreements and in a myriad of contract forms involving construction, consumer financing, employment, insurance, rendering of professional services, sale of goods, and others."

The article covers the basics of the arbitration clause and the administration of the process in a dispute.

Read the article.

An Arbitrator's Power May Be Greater Than That of a Judge

Arbitration is a creature of contract, and an arbitrator's powers are in effect defined by the parties' arbitration agreement, points out a post on the Mintz, Levin, Cohn, Ferris, Glovsky and Popeo blog **ADR: Advice From the Trenches**.

"Paradoxically, although an arbitration agreement can be written (double-spaced) on one side of a cocktail napkin, in some cases it may grant greater authority to an arbitrator than a judge has," writes **Narges Kakalia**.

In the post, she discusses *Timegate Studios, Inc. v. Southpeak Interactive, LLC*, in which the Fifth Circuit confirmed an arbitration award in which the arbitrator substantially reformed the parties' commercial agreement by, among other things, awarding one a broad perpetual license to certain of the other's intellectual property, despite the fact that the original agreement had granted only a more narrowly drawn ten-year license.

Read the article.

Reducing the Cost of Arbitrating Large Complex Cases

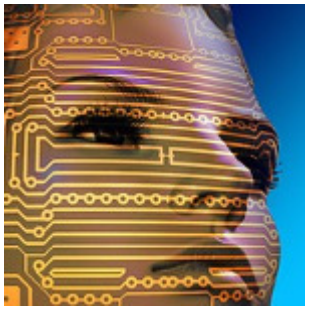
The American Arbitration Association has introduced the Streamlined Three-Arbitrator Panel Option to help parties in large cases lower the costs and escalate the speed of the dispute resolution process.

“When parties’ agreement calls for three arbitrators to hear and decide their case, the Streamlined Three-Arbitrator Panel Option allows them to utilize a single arbitrator for the preliminary and discovery stages of a case,” the AAA explains on its website. “The full panel of three arbitrators then participates in the evidentiary hearing and renders the final award—a more efficient and less expensive process.”

On its **website**, the AAA describes the three options and alternatives available.

Get more information.

Benefits and Challenges of Robotized Arbitration



Winston Maxwell and Gauthier Vannieuwenhuyse of Hogan Lovells point out that we are living in the era of constant technological progress, and then ask the question: As smart contracts emerge, why not think about totally automated arbitration?

"Big data and e-discovery can assist counsel in document management and reduce the risk of human error during discovery," they write for an article for Bloomberg Law.

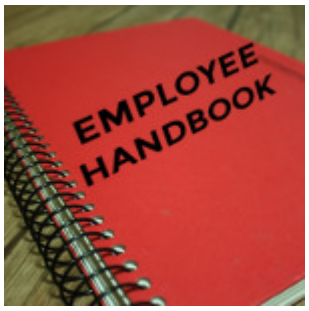
They discuss machine learning, predictive justice, and sophisticated programs that can even analyze the behavior of specific judges and arbitrators to predict their propensity to grant or deny certain motions and claims.

"This may open arbitration to new markets, such as low value disputes, whose players were traditionally reluctant to resort to this type of resolution," they write.

"While it is possible to envision completely robotized arbitration taking place in a not-so-distant future, that sort of arbitration would not be recognized by state institutions. If the arbitration occurs in a self-contained, self-executing framework, then its nonrecognition by state institutions may not be a major obstacle," the authors conclude.

Read the article.

Are Your Employees' Electronically-Signed Agreements Enforceable?



Drew York, writing in Gray Reed & McGraw's Tilting the Scales blog, offers some advice on how to "failsafe" electronic agreements with employees.

He describes a scenario in which a company requires its employees to electronically acknowledge receiving, reviewing and agreeing to abide by the company's employee handbook. One of the workers later is injured on the job, and the company wants to invoke the handbook 's arbitration agreement.

"In several recent cases, employees have disputed that they electronically acknowledged an agreement with their employer," writes York. "This raises an intriguing question: how do employers prove that an employee 'signed' an agreement when there is no written signature?"

Read the article.

Gig Worker's Hopes of Arguing Case in Court Are Dashed By Arbitration Agreement

Fisher & Phillips LLP **reports** that a delivery driver for gig economy company DoorDash has been ordered by the 5th Circuit Court of Appeals to take his misclassification case to a private arbitrator instead of court pursuant to a valid arbitration agreement he entered into.

"The April 25 decision is a solid win for gig employers and could provide a template for how other similar businesses should structure their own arbitration agreements," writes **Richard Meneghello**.

Delivery drivers for DoorDash are classified as independent contractors, but one driver filed suit, claiming wage and hour violations, and sought conditional class certification.

"If there is an agreement to arbitrate with a delegation clause…, we will consider that clause to be valid and compel arbitration. Challenges to the arbitration agreement as a whole are to be heard by the arbitrator," the 5th Circuit said.

Read the article.

Arbitrability Basics: An Illustration of the 'Autonomy' Principle

When considering an arbitration clause in a contract, one must always bear in mind the "separability" or "independence" of the arbitration agreement – the autonomy principle, writes **Narges Kakalia** in the **ADR: Advice From the Trenches** blog of Mintz Levin.

She asks: "For example, should a plaintiff be compelled to arbitrate a dispute if the contract containing the ADR clause has expired? What if the contract containing the arbitration clause is unconscionable as a matter of public policy? A plaintiff may nonetheless be compelled to arbitrate in order to resolve his dispute, as illustrated recently in a decision by the U.S. District Court for the Northern District of Texas."

She discusses *Athas Health, LLC v. Giuffre* and explains how the court reached its decision.

Read the article.

Do You Know Who Will Decide

Whether Your Next Dispute Is Subject to Arbitration?

In a **client alert**, Pepper Hamilton surveys the effects of incorporating an arbitration provider's rules or common arbitration provisions on who determines questions of arbitrability.

"While questions of arbitrability are ordinarily decided by a court, contracting parties can agree to delegate questions of arbitrability to an arbitrator instead," the alert explains. "Because an arbitrator deciding questions of arbitrability is contrary to the ordinary course of events, contracting parties must express their intent to delegate questions of arbitrability to an arbitrator 'clearly and unmistakably.' When doubt exists as to the parties' intent to 'arbitrate arbitrability,' the FAA's presumption in favor of arbitrability is reversed."

The authors conclude: if you want a court to decide whether, and to what extent, your dispute is subject to arbitration, you must be mindful of the impact that incorporating an arbitration provider's rules or a broad arbitration provision into your agreement can have on the question of who will decide arbitrability.

Read the article.

Dissecting Common Basic Arbitration Clauses – You Can Build a Better One

A well-designed arbitration clause can give the parties substantial control over procedures and costs, as well as over who decides which issues and when, writes Daniel Pascucci in the blog **ADR: Advice from the Trenches**.

But, the Mintz, Levin, Cohn, Ferris, Glovsky and Popeo lawyer warns, all too often parties make agreements that leave the decisions on most of their options to others or to chance.

In his article, he dissects the generic arbitration clause, and describes what an arbitration clause should do and what it can do.

"Arbitration's promise of being faster, more efficient, and more predictable than judicial litigation should be viewed as conditional – *if the parties are willing to put in the effort to design a suitable process*, arbitration can deliver on its promise," Pascucci concludes.

Read the article.

Supreme Court to Clarify Applicability of Arbitration Act to Transportation Contracts

The U.S. Supreme Court has granted certiorari in *New Prime Inc. v. Oliveira*, which should provide guidance as to the circumstances in which the Federal Arbitration Act (FAA) applies to interstate transportation workers who are purported independent contractors, according to the **Transportation Blog** of Holland & Knight.

"The case will be important for in-house and private transactional attorneys who draft contracts with transportation sector independent contractors, as well as litigators handling employee misclassification cases," the article's authors write.

They explain: "Over the past several years, a spate of class action litigation has targeted the long-standing use of owner-operator truck drivers as independent contractors, with drivers claiming that they should be classified as employees. The contract between the motor carrier and the driver often contains an arbitration clause, but drivers typically file these cases in court, leading to a fight over the proper forum."

Read the article.