Just How Broad is That Arbitration Clause in Your Transportation Contract?

In a case of first impression, the First U.S. Circuit Court of Appeals addressed issues that have broad implications and present a reminder to companies to review their arbitration clauses and confirm if they are drafted properly as to the issue of who decides arbitrability issues; a court or arbitrator?

Christopher R. Nolan and **Clayton J. Vignocchi** discuss *Oliveira v. New Prime, Inc.* in Holland & Knight's **Transportation Blog**.

"The dispute concerned a Fair Labor Standards Act class action between an independent contractor truck driver and an interstate trucking company. The plaintiff executed an 'Independent Contractor Operating Agreement,' which included an arbitration clause," the authors explain.

They discuss the court's rejection of the trucking company's argument, warning that in-house counsel who draft a broad arbitration clause similar the the trucking company's will result in litigation concerning arbitrability.

Read the article.

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Trump's Impact Felt in Supreme Court Labor Rights Cases

When the Supreme Court opens its 2017 term on the first Monday in October, its very first cases will serve as a stark reminder of why elections matter, predicts ***USA Today***.

Reporter **Richard Wolf** writes that the upcoming term stands "a real chance of being a one-two punch against workers' rights," says Claire Prestel, associate general counsel for the Service Employees International Union.

Wolf points out how things have changed:

> When the court was asked to hear three cases on labor arbitration agreements last September, Barack Obama was president, Hillary Clinton was heavily favored to succeed him, and federal appeals court Judge Merrick Garland was in line to replace the late Antonin Scalia. Garland had a strong record of defending workers' rights.

Read the *USA Today* article.

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Landmark Second Circuit Ruling Clarifies the Standards for Mobile Contracts

The U.S. Second Circuit Court of Appeals has issued a landmark ruling in *Meyer v. Kalanick* that clarifies the standards for contract formation in the age of smartphones and mobile contracting, providing important guidance to companies about how to design enforceable mobile contracts, reports **Coblentz Patch Duffy & Bass**.

The court applied California law to determine the enforceability of the arbitration clause in Uber's Terms of Service, holding that a "reasonably prudent smartphone user" unambiguously assents to a conspicuously hyperlinked contract when he downloads a smartphone application to his mobile phone and signs up for an account.

"Now is a good time for businesses to review their online and mobile contracting practices," according to the article by **Timothy Crudo**, **Rees Morgan**, **Skye Langs**, and **Mark Hejinian**. Make sure that your terms and conditions are highly visible on an uncluttered page or screen."

Read the article.

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Construction Contracts and Arbitration Provisions: Is the Word “May” Mandatory? Maybe!

According to some courts, the traditional line of reasoning in defining “may” versus “shall” is no longer the trend in the context of arbitration provision in construction contracts, writes Matthew DeVries in **Best Practices Construction Law**.

Traditionally, the use of “may” could be interpreted as making performance permissive or optional, while “shall” makes performance mandatory.

DeVries cities a case in which the Supreme Court of Virginia held that the parties’ use of the word “may” in the dispute resolution provisions of their construction contract required mandatory participation in arbitration at the election of one of the parties.

Read the article.

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No Signature? No Problem! Enforcing Arbitration Even Without Everyone Signing

California courts are often hostile toward defendants that seek to require litigious employees to honor their arbitration agreements, warns **Michael Wahlander** in the Seyfarth Shaw **California Peculiarities Employment Law Blog**.

"The defendant's plight might seem more stark still if the defendant has not itself signed the agreement. But defendant employers still have means of enforcing such agreements, which can be especially significant in class actions claiming joint employment," he writes.

He covers the subjects of the agency theory, equitable estoppel, and third-party beneficiary.

Read the article.

What In-House Counsel Need To Know About Their Form Arbitration Clauses

Most arbitrations, and all commercial arbitrations, are creations of contract, and courts are generally required to

enforce an arbitration agreement as they would any other contract, points out **Samuel M. Tony Starr** on Mintz Levin's **ADR: Advice From the Trenches** blog.

Because the arbitration clause in a commercial contract is so critical, careful review of that clause surely must be a component of an enterprise's risk analysis.

He offers 10 basic considerations that will help to guide that review.

Read the article.

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Has the Era of the Consumer Class Action Waiver Passed?

As a result of a rule imposed by the Consumer Financial Protection Bureau, consumer contracts entered into after March 19, 2018, with a wide range of consumer financial services companies will need to be revised in regard to their agreements' arbitration clauses.

Pillsbury Global Sourcing explains on its website that those companies "will need to: (a) remove language in pre-dispute arbitration provisions that bars consumers from participating in class actions; and (b) add language informing consumers of their rights to participate in class actions. The Rule will also require such companies to provide information on

individual arbitration awards to the CFPB for publication in a public database (redacting consumers' private financial information)."

Read the article.

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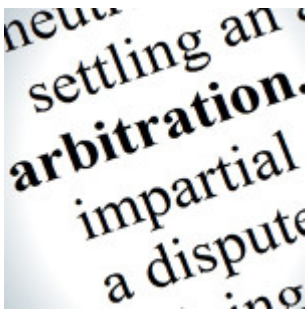
11th Circuit Holds Arbitrators Have Venue-Setting Authority in International Arbitrations

Alston & Bird asks and answers the question: In an international arbitration, when an arbitration provision is ambiguous about the seat of the arbitration, who resolves the question?



Authors Andy Tuck and Lee Deneen discuss *Bamberger Rosenheim Ltd. v. OA Development Inc.*, in which the Eleventh Circuit held that interpretation of a venue provision is the arbitrator's prerogative.

They write:

> The federal circuits are split on whether the FAA serves as

> a proper basis for vacatur of an international arbitration award. In this case, the panel saw "no reason to analyze [Bamberger's] arguments under the New York Convention or [the FAA] separately," since Bamberger's argument was the same for both bases for vacatur. The court stated in a footnote that it "assume[d], without deciding, that [the FAA] applies to the award in the present case."

Read the article.

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Republicans Introduce Bills to Scrap New Bank Arbitration Rule

Republican lawmakers in the House and Senate have introduced bills calling for the repeal of a just-announced regulation that would make it easier for consumers to bring class-action lawsuits against banks, reports ***The Los Angeles Times***.

The new Consumer Financial Protection Bureau rule would ban banks and other financial institutions from forcing arbitration clauses on customers to prevent them from bringing or joining class-action suits.

Some Republicans have introduced resolutions calling for use of the Congressional Review Act, which allows Congress to new regulations created by federal agencies, writes **James Rufus Koren**.

Read the *LA Times* article.

Should I Have an Arbitration Clause in My Construction Contract?

Although it is typical for AIA form contracts to contain arbitration clauses, as a contractor you should consider whether you should have an arbitration clause in your construction agreement, advises **Paul W. Norris** of Stark & Stark.

In an article posted on the **New Jersey Law Blog**, Norris explains "there are numerous factors to consider in determining whether mandatory arbitration is the preferred dispute resolution mechanism, or whether the state court system is preferred. Although arbitration may have some advantages, there are also disadvantages which must be considered rather than simply adopting the AIA form."

He discusses the cost of the arbitration proceeding, judge or jury vs. an arbitrator, discovery during an arbitration process vs. the state court process, timeliness of the proceeding, judgments, and appeals from arbitration of a state

court.

Read the article.

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CFPB Hits Back at Efforts to Kill Rule Easing Bank Lawsuits

Just days after approving a controversial rule that will make it much easier for Americans to sue their banks, the U.S.'s top consumer watchdog is already fighting back against attempts to prevent the regulation from taking effect, **reports Bloomberg**.

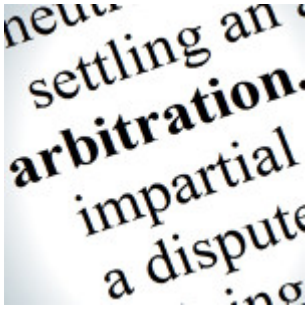
Bloomberg's **Elizabeth Dexheimer** reports that Consumer Financial Protection Bureau Director Richard Cordray said there is "no basis" to claims that his agency's action will put the nation's financial system at risk. Cordray was responding to concerns raised by acting Comptroller of the Currency Keith Noreika, a regulator appointed by the Trump administration who had a long legal career representing banks.

Under the new rule, financial firms are restricted from forcing consumers to resolve their disputes through arbitration, a practice that has been used by the industry for years to keep grievances tied to payday loans, credit cards

and other products out of courts.

Read the Bloomberg article.

Consumer Watchdog Makes It Easier to Sue Banks and Other Companies



The government's consumer watchdog has finalized a rule that will make it easier for people to challenge financial companies in court, reports ***The Washington Post***.

The new Consumer Financial Protection Bureau rule targets arbitration clauses, which can show up on user agreements for credit cards, bank accounts and other consumer products.

"As a condition for receiving services or products, consumers often give up their right to join a class-action lawsuit with these clauses, and instead agree to settle any disputes in a private process known as arbitration," writes the *Post*'s **Jonnelle Marte**.

Now the rule will ban companies from using these agreements to block consumers from joining group lawsuits. But supporters of arbitration say the clauses can help companies and consumers save money by minimizing legal costs.

Read the *Post*'s article.

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Post M&A Disputes: Breach of Indemnification Clauses in M&A Contract

Baker McKenzie's **Global Arbitration News** has posted an article discussing the difficult questions raised in both substantive and procedural law by indemnification clauses in share purchase agreements.

The author, **Dr. Philipp Schuett**, explains that the reason is that an indemnification dispute involves at least four parties: "The target company, the third party who raises claims against the target company, the seller (= the indemnitor) and the buyer (= the indemnitee)."

He then discusses the reasons to include indemnification clauses in SPAs, the scope and wording of indemnification clauses, the potential for disputes, and avoidance of post-M&A disputes.

Read the article.

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Drafting and Negotiating IP & IT Provisions in M&A Transactions

Practical Law will present a free **75-minute webinar** with Rita Berardino, Senior Legal Editor, Practical Law Intellectual Property & Technology, and presenters from Wilson Sonsini Goodrich & Rosati, who will discuss IP and information technology (IT) considerations in drafting and negotiating M&A agreements.

The event will be Wednesday, June 28, 1-2:15 p.m. EDT.

Intellectual property and technology assets have become increasingly significant components of a company's business strategy and the focus of many M&A transactions, the company says on its website.

Topics will include:

- Common structures for M&A transactions.
- Key IP and IT provisions of M&A transaction documents, including:
  - Drafting and negotiation of IP and IT provisions.
  - How courts have interpreted these provisions.
- Key ancillary IP and IT agreements, including licenses and assignments.

A short Q&A session will follow.

Presenters:

- Manja Sachet, Partner, Wilson Sonsini Goodrich & Rosati
- Jason Greenberg, Associate, Wilson Sonsini Goodrich & Rosati
- Jennifer McGrew, Associate, Wilson Sonsini Goodrich & Rosati
- Rita Berardino, Senior Legal Editor, Practical Law Practical Law IP&T (Moderator)

Register for the webinar.

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Tips for Drafting Arbitration Clauses in Smart Contracts

While arbitration may be a preferable alternative to court for smart contract disputes, it doesn't happen on its own – it typically requires a properly drafted arbitration clause, points out **Jared Butcher** in Steptoe & Johnson's **Blockchain Blog**.

Butcher discusses some aspects of the arbitration clause that should be re-considered when dealing with smart contracts.

The article covers the topics of arbitrator appointment, governing law and the arbitral body, forum selection, and summary dispositions.

Read the article.

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Using Arbitration Agreements to Reduce the Costs of Litigation and the Risk of Class Action Claims

A properly drafted arbitration clause with a class action waiver should be enforceable and can be a good and useful line of defense against expensive and costly litigation, especially class action lawsuits, write **Jay N. Varon** and **Jennifer M. Keas** in Foley & Lardner's **Consumer Class Defense Counsel** blog.

Their article explains how arbitration works, what type of arbitration agreements are generally enforceable, what features that have or can cause problems, and how such provisions can reduce the risk of class actions.

They also discuss the possible effect or non-effect that could come from the Consumer Financial Protection Bureau's proposed arbitration rule.

Read the article.

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Insight on Waiving Contractual Right to Arbitration

Bass, Berry & Sims attorney Chris Lazarini provided insight on factors a court should consider when determining whether a party has waived a contractual right to arbitration, the firm reports on its website.

“The factors, which are tied to potential prejudice to the non-moving party, include: (1) the time elapsed between commencement of litigation and the request for arbitration, and (2) the extent to which the moving party has participated in the litigation process,” according to **Lazarini’s article**.

His article examines the issue as presented in the case *Chehebar vs. Oak Financial Group, Inc.*, No. 14-2982 (E.D. N.Y., 3/7/17)

Read the article.

Arbitration Clauses Extending

to Non-Signatory Affiliates: Are They Enforceable?

Image by NY Photographic

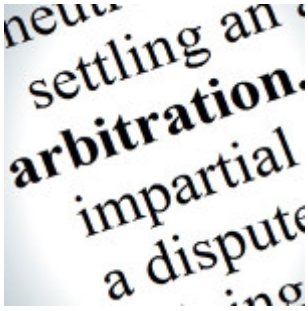
A recent decision of the New Jersey Appellate Division considered the enforceability of arbitration agreements by non-signatories, writes **Marissa Tillem** in Proskauer Rose's **Minding Your Business** blog.

She discusses a case in which the plaintiff filed a putative class action complaint against defendant alleging violations of New Jersey's Truth-In-Consumer Contract, Warranty and Notice Act, as well as the state's Lemon Law.

The panel determined, among other things, that by signing a lease agreement, plaintiff agreed to arbitrate her dispute not only with the underlying signatories of the lease, but with any of its affiliates. Now the plaintiff will need to decide whether to pursue her claims in arbitration, Tillem explains.

Read the article.

Is ‘Class Arbitration’ an Oxymoron?



“Class arbitration” – the utilization of a class action mechanism in an arbitration proceeding – is considered by some to be the unicorn of ADR; desirable but elusive, writes **Gilbert Samberg** on Mintz Levin’s blog, **ADR: Advice from the Trenches**.

“Another view is that it is the Frankenstein’s monster of ADR – an anomalous hybrid of disparate parts that comprise a disconcerting and ultimately nonviable creation,” he writes. “And so let us ask, is ‘class arbitration’ an oxymoron? Should it be viable given the essential nature of arbitration? And whither the emperor’s jurisprudential clothes?”

The Mintz Levin post is one in a series of posts concerning the concept, its theoretical roots, the current state of the law, implementation of the mechanism, the significance and effects of a class arbitration award, etc.

Read the article.

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Clear Arbitration Provision Deemed Enforceable

In his **Petes' Take** blog for Porzio, Bromberg & Newman, **Peter J. Gallagher** describes a New Jersey case in which a court ruled that a clear arbitration provision, negotiated by a sophisticated party while represented by counsel, is enforceable.

In Columbus Circle NJ LLC v. Island Construction Co., LLC, the appellate court held that the arbitration provision in the AIA contract used in this case satisfied the requirements to explain to the signer the possible consequences of giving up the right to adjudication in a court of law, Gallagher explains.

"By its terms, the provision required plaintiff to choose between arbitration and 'litigation in a court of competent jurisdiction,' therefore, when plaintiff chose 'arbitration,' it did so 'with full knowledge that arbitration [was] a substitute for the right to have [its] claim adjudicated in court.' Moreover, the Appellate Division noted that neither the LLC nor its sole member was 'an average member of the public,'" according to Gallagher.

Read the article.

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