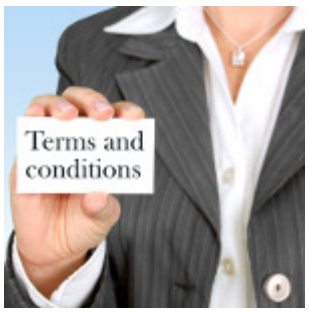
Notice of Terms via Buried Link within a Post-Sale Email Unenforceable



The Second Circuit affirmed a ruling that denied a web service's motion to compel arbitration, finding that the user did not have reasonable notice of the arbitration provision contained in the terms and conditions that were communicated via a hyperlink in a post-sale email, reports Proskauer Rose in its **New Media and Technology Law Blog**.

Jeffrey Neuburger, a partner in the firm, wrote the article.

"While the court recognized that a party has a duty to read a contract, it stressed that this does not morph into a duty to 'ferret out contract provisions when they are contained in inconspicuous hyperlinks,' particularly where, as in this case, the user was presented with multiple documents, each containing different sets of terms," Neuburger writes.

Read the article.

Seventh Circuit: Class

Arbitration is for Courts to Decide, Not Arbitrators

A **post** on the Carlton Fields website updates the latest ruling in a class action alleging violation of the Fair Labor Standards Act and breach of contract.

A U.S. district court had compelled arbitration pursuant to an agreement between the plaintiff and defendant, but it struck as unlawful a waiver clause that appeared to forbid class or collective arbitration of her claims, reasoning that the plaintiff could not waive her right to bring a class action under the National Labor Relations Act.

On appeal, the Seventh Circuit was faced with reconciling the district court's decision with a subsequently-decided U.S. Supreme Court case, writes **Gail E. Jankowski**.

Read the article.

Three Recent Cases Consider the Interpretation and Enforceability of Arbitration

Agreements

A post on the website of **McGuireWoods LLP** discusses three recent cases before the Supreme Court and the Third Circuit relating to the interpretation and enforceability of arbitration agreements.

The Third Circuit found in favor of Kaplan University in a case in which a student challenged an arbitration agreement included in an e-signed enrollment.

The Supreme Court ruled in a case in which the justices rejected a judicially created exception limiting enforcement of arbitrability.

And the Supreme Court upheld statutory exemption for an independent contractor.

Read the article.

Have You Really Agreed to Arbitrate?

Image by [NY Photographic]

Unless an employment contract specifies the forum for arbitration and the process by which the arbitration will be conducted, a court may find that the parties have not reached an agreement to arbitrate, warns **[a post]** on the website of Porzio, Bromberg & Newman.

The authors discuss a New Jersey case that illustrates the need to use care in drafting.

An appellate court found that the arbitration clause in the contract did not specify what forum would substitute in place of the jury trial.

Read the article.

Supreme Court Hands Rare Win for Workers in Arbitration

Case

Justice Neil Gorsuch

The U.S. Supreme Court on Tuesday sided with a long-haul truck driver who sued his employer for failing to pay him a minimum wage, handing down a decision that could have broad ramifications on the transportation sector and the economy as a whole, **reports CNBC**.

CNBC reporter **Tucker Higgins** explains:

> "In an opinion delivered for a unanimous court, Justice Neil Gorsuch held that courts must decide whether an exception in the Federal Arbitration Act, or FAA, for transportation workers applies before requiring arbitration. And, he wrote, that exception applies not just to traditional employees but also to independent contractors."

The U.S. Chamber of Commerce had urged the court to rule in favor of the employer.

Read the CNBC article.

Arbitration Agreements: Tips for Enforceability

Steven P. Gallagher of Akerman LLP **offers some tips** on what to do – and not do – when considering arbitration agreements for new hires.

He discusses some of the advantages and potential disadvantages to having arbitration agreements in place for employees.

"Because arbitrations are private, the proceedings, claims, and ultimate outcomes are ordinarily confidential. Most interesting to employers is that arbitrators tend to award lower damages than juries," Gallagher writes.

But sometimes arbitration is "neither quicker nor less expensive than litigation, and arbitrators are sometimes inclined to 'split the baby,' even if the law is clearly on your side."

Read the article.

Kavanaugh's First Opinion Rejects Vague Exception Limiting Enforcement of Arbitration Agreements

Many of the recent U.S. Supreme Court rulings on arbitration agreements cases have been decided by narrow 5-4 majorities, which has raised the possibility that the replacement of Justice Anthony Kennedy by Brett Kavanaugh might lead to some softening of the court's position in those cases.

But as Ronald Mann, writing in the **SCOTUSblog** points out, the latest such ruling will shed no light on that broader question, because even the justices more skeptical about arbitration saw no merit in the arguments against arbitration here.

Kavanaugh wrote the opinion for the unanimous court. In this case anyway, none of the justices saw any merit in a process calling for collateral litigation over the gateway question of arbitrability.

"At bottom, the question is whether a court or an arbitrator decides whether an arbitration agreement governs a particular dispute," writes Mann.

Read the article.

Parties Must Proceed to Arbitration Despite Unavailability of Arbitration Forum Specifically Named in the Contract

An Ohio appellate court has addressed an issue that arose when an arbitrator specified in a contract is no longer available.

Pepper Hamilton's **Constructlaw** blog covers the case in which a homeowner sued a contractor, alleging unjust enrichment and fraud. The contractor moved to compel arbitration under the agreement arbitration provision. But the specified arbitrator, the Ohio Arbitration and Mediation Center, appeared to be defunct.

"Because it was still possible to arbitrate the issues, the Court determined the agreement was not unenforceable due to impossibility," writes **Ryan R. Deroo**. "The Court explained that this conclusion was consistent with the intent of the parties as they agreed to arbitrate disputes, and a change in forum should not override the fundamental purpose of the arbitration provision."

The appellate court directed the trial court to appoint another arbitrator.

Read the article.

Court Rules Law Firm's Arbitration Provision Unconscionable

A California appellate panel determined that a law firm's arbitration agreement with a partner was unconscionable, reversing a trial court's grant of a motion to compel arbitration in an employment dispute, according to a **post on the website** of Manatt, Phelps & Phillips.

In the case, a litigator who had been employed at Winston & Strawn sued the firm, asserting claims of discrimination, retaliation and wrongful termination. A trial court granted the firm's motion to compel arbitration.

> "The arbitration provision in the employment agreement signed by [the plaintiff] failed to meet the standard of *Armendariz v. Foundation Health Psychcare Services, Inc*., the court said, and was unconscionable. Further, the taint of illegality could not be removed by severing the unlawful provisions without altering the nature of the parties' agreement, leading the panel to void the entire agreement and send the case back to Superior Court."

Read the article.

5th Circuit: Company in Class Action Waived Right to Arbitrate Because of Litigation Conduct

The standards for determining when a party waives its right to arbitrate through participation in litigation have never been uniform among the circuits or easily applied writes **John Lewis** in BakerHostetler's **Employment Class Action Blog**.

He discusses the recent Fifth Circuit opinion in *Forby v. One Technologies, L.P.*, which illustrates the difficulty of applying the "prejudice" requirement in a consumer fraud and unjust enrichment class action.

In reversing a district court ruling, the appellate court highlighted some analytical problems that apply equally in the employment law context.

Read the article.

Arbitrator's Undisclosed Relationships Sink Oil and Gas Awards

An arbitrator's failure to disclose his longstanding business relationships with one of the parties requires setting aside the arbitration awards, the U.S. District Court for the Southern District of Texas ruled, according to **Bloomberg Law**.

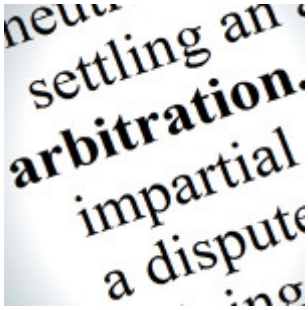
Reporter Brian Flood writes that Patrick Long, part of a three-member arbitration team, heard a contractual dispute over joint oil and gas operations between OOGC America LLC and Chesapeake Exploration LLC. But the court found that Long lied when he "claimed that he did not have professional or social connections with the parties or witnesses."

"In reality, Long was a long-time business partner of Yong Siang Goh, the board chairman of FTS International Inc., an affiliate of Chesapeake Exploration," Flood writes. "In addition, Long failed to disclose that he had represented FTS as a lawyer, that FTS's deputy general counsel was a former partner at his law firm, and that his law firm had employed Goh's daughter."

The court vacated the awards.

Read the Bloomberg Law article.

Four Decisions Conclude Claims Outside Scope of Arbitration Agreement



In a **new post** on the Arbitration Nation site of Stinson Leonard Street, **Liz Kramer** has collected four recent decisions in which courts have found the parties' dispute over the scope of an arbitration clause is not covered by their agreement.

Kramer considers the question: "Is this the new arbitration resistance? Some kind of "scope-a-dope," in which courts that don't take kindly to arbitration can hold up their hands and say 'I accepted that the arbitration agreement was formed, and that it was valid, but under state contract law, I interpret this claim as outside the scope.'"

Read the article.

Court Holds That Arbitration Clauses Bind Nonsignatories Who Seek to Enforce Contracts

A **post on the website** of Pepper Hamilton describes a North Carolina case that involved non-signatories to a construction

contract attempting to avoid the contract's arbitration claim.

When the building's current owner asserted various claims against the original owner, architect and general and subcontractors, the general contractor moved to have the suit dismissed on the ground that they were subject to arbitration. Plaintiffs argued that the arbitration clauses were not binding on them because the contracts that contained them were not assigned to plaintiffs when they purchased.

"The court held that the plaintiffs' argument could not be squared with the language of the Contractor Warranty. On its face, the Contractor Warranty stated that [the general contractor] performed all work 'in accord with the Contract Documents.' This express reference to [the contractor's] construction contract put the plaintiffs on notice of the contract's existence," explains the article's author, **Jane Fox Lehman**.

Read the article.

Federal Courts Uphold Arbitration Agreements Via Email

Federal district courts in New York and New Jersey recently turned aside employee attacks on arbitration agreements challenged on the grounds that the employer's communication of its arbitration policy via email was inadequate, reports the

Gibbons Employment Law Alert.

"The courts in both *Lockette v. Morgan Stanley* and *Schmell v. Morgan Stanley* held that the employees' assertions that they never saw the email forwarding the terms of the arbitration agreement were insufficient to overcome the employer's evidence that the email had been delivered to the employees' email inboxes," explains **Richard S. Zackin**.

But employers must keep in mind that they must comply with relevant state contract law, cautions Zackin.

Read the article.

Argument Preview: How Should Courts Decide If Parties to an Arbitration Contract May Aggregate Their Claims?

SCOTUSblog **reports** that in *Lamps Plus Inc. v. Varela*, the U.S. Supreme Court will decide whether the U.S. Court of Appeals for the 9th Circuit correctly held that an employer consented to class arbitration.

The employer in that case included language in the arbitration contract that committed the parties to use arbitration "in

lieu of any and all lawsuits or other civil legal proceedings," specified that arbitral claims include those "that, in the absence of this Agreement, would have been available to the parties by law," and authorized the arbitrator to "award any remedy allowed by applicable law."

Lower courts have found that the arbitration agreement could be read to authorize class arbitration, and that California contract law called for ambiguity on that point to be resolved against the contract's drafter, Lamps Plus, writes **Charlotte Garden**.

Read the article.

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

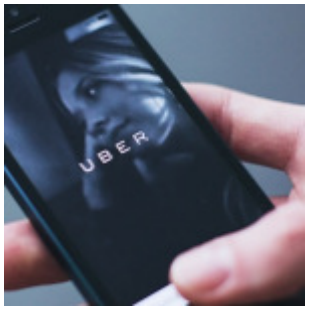
Resolving disputes in arbitration can sometimes lead to surprising results, even ones that might be inconsistent with the underlying contract or with applicable state law, warns **Ken Slavens** for **Husch Blackwell**.

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.