The Ten Arbitration Trends Of 2017

Liz Kramer, writing in Stinson Leonard Street's **Arbitration Nation** blog, provides a rundown of the top 10 developments in arbitration law during the past year.

"2017 was a big year in arbitration law," she writes. "We went from a country that seemed on the verge of banning arbitration in most consumer and employee contracts to a country whose federal policy embraces arbitration in nearly every context."

Among the trends she discusses are cases on regulation reversal, preemption, the NLRB, small claims court confusion, statutory preclusion, non-signatories getting divergent results, and more.

Read the article.

Governing Law and Jurisdiction or Forum Clauses Same Country/Different

Country? How to Decide

Contract drafters sometimes confuse governing law clauses and jurisdiction clauses, according to **a post** on the website of Wilk Auslander.

Karen A. Monroe and **Olga Larionova** explain those clauses are related but are not the same. There is a greater likelihood of confusion or overlap in the context of international contracts, versus domestic contracts.

Their article presents a sample governing law clause, as well as a sample juristiction/forum selection clause for dispute resolution by courts and not by arbitration.

Read the article.

How Forced Arbitration and Non-Disclosure Agreements Can Perpetuate Hostile Work Environments

Non-disclosure agreements are part of an arsenal of legal tools that employers have at their disposal to protect their

reputation and their bottom line – but those tools often come at the expense of wronged employees, writes **Michelle Chen** in an article for ***The Nation***.

She also discusses the use of forced arbitration that requires employees to channel their workplace disputes through an extralegal negotiation process, rather than through the courts.

She adds:

> According to the National Women's Law Center (NWLC), both forced arbitration and NDAs have in many workplaces become a standard tactic to preempt workers from taking legal action or disclosing sexual-harassment and -assault charges. These agreements force workers to sign away their rights in exchange for a job, by making them agree to settle future disputes outside the courts through an opaque negotiation process controlled by management and lawyers—effectively sentencing women to silence before they ever step into a courtroom.

Read the article.

A Twist in Oil Patch Arbitration

Delegating a $12 million arbitration to accountants rather than lawyers in *Apache v. YPF SA* was the right call, writes Charles Sartain in the Gray Reed **Energy & the Law** blog.

The problem was in the procedures and protections for a party believing the accountants got it wrong.

Sartain provides background: “Apache sold its entire business in Argentina to YPF for $700 million. The Sale and Purchase Agreement allowed for adjustments to the consideration based on a variety of factors. The parties traded accounting statements, and a dispute arose over a ‘Lock Box Working Capital’ amount and ‘Leakage.’ YPF contended that Apache owed $12 million.”

The parties submitted the dispute to KPMG, which found that Apache owned $98. million. Apache challenged the finding.

Read the article.

Segway Competitor Rolls Away from Former CEO’s Attempt to Force Arbitration

Jason M. Knott of Zuckerman Spaeder LLP describes a recent case in which T3 Motion, Inc. (a Segway competitor) used a lack of mutual assent to avoid arbitration of its claims against its former CEO, William Tsumpes.

Writing in the firm’s **Suits By Suits** blog, Knot explains that it’s unusual for an employee to seek arbitration in a contract

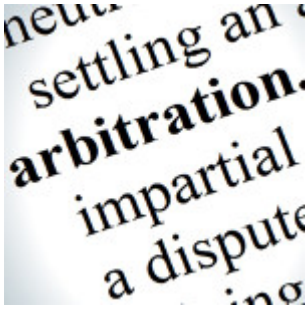
dispute.

“T3 wanted to litigate in court, and its former CEO, William Tsumpes, wanted to force T3 into arbitration. T3 had brought suit against Tsumpes and various corporate entities that it alleged were his alter egos, alleging that Tsumpes improperly took money from the company for his own personal use,” Knott writes.

Tsumpes presented a signed employment agreement that required arbitration, but T3 contested whether it had agreed to the written contract.

Read the article.

Enforce Arbitration Agreement or Waive Right to Arbitrate Trade Secret Misappropriation Claims



A recent federal court denied an employer’s motion to compel arbitration, finding that it waived its right to arbitration by engaging in litigation.

George L. Kanabe, a partner in the San Francisco office

of Orrick, Herrington & Sutcliffe LLP, **discusses** three key lessons the ruling provides for plaintiff-employers.

Kanabe reports that the ruling noted, "[t]here is no other reasonable interpretation of plaintiff's untimely demand for arbitration than as a deliberate tactic to test the judicial waters but then, when those waters did not flow the direction plaintiff intended, to change routes in hopes of finding a different current."

Read the article.

Enforcing Nursing Home Arbitration Agreements Post-*Kindred*

Image by NY Photographic

Liz Kramer, writing for Stinson Leonard Street's **Arbitration Nation**, writes that a recent ruling for a state supreme court

may be indicative of what litigation over nursing home arbitration agreements will look like after the U.S. Supreme Court's ruling in *Kindred Nursing Centers v. Clark*.

Kramer, a partner in the firm, discusses the Wyoming Supreme Court's reversal of a lower court's ruling in an arbitration case. The lower court denied a nursing home's motion to compel arbitration.

But the state's high court reversed, following the U.S. Supreme Court's *Kindred* ruling that another state's rationale for not enforcing an arbitration agreement was preempted by the Federal Arbitration Act.

Read the article.

A Lesson from the 3rd Circuit on Arbitration Clauses: Say What You Mean

A recent decision by the United States Court of Appeals for the Third Circuit is a reminder that – for an arbitration clause to apply in certain situations or to certain parties – that intention must be built into the plain terms of the contract.

In **a post** on the Blank Rome website, partners **Stephen M.**

Orlofsky and **Deborah Greenspan** discuss *White v. Sunoco, Inc.* The case involved the "Sunoco Awards Program," under which customers who used a Citibank-issued "Sunoco Rewards Card" credit card were supposed to receive a 5-cent per gallon discount on gasoline purchased at Sunoco gas stations.

A dispute over the discount led to arbitration.

In its ruling the appellate court found: "[n]owhere does the agreement provide for a third party, like Sunoco, the ability to elect arbitration or to move to compel arbitration."

Read the article.

Senate Kills Rule On Class-Action Suits Against Financial Companies

The Senate has voted 51-50 to get rid of a banking rule that allows consumers to bring class-action lawsuits against banks and credit card companies to resolve financial disputes, **NPR reports**.

Vice President Pence cast the tie-breaking vote to rollback the Consumer Financial Protection Bureau rule banning restrictive mandatory arbitration clauses found in the fine print of credit card and checking account agreements, writes

NPR reporter **Scott Neuman**.

President Trump is expected to sign the measure, which has already been approved by the U.S. house.

Neuman writes: “CFPB said it was redressing a situation in which consumers were forced ‘to give up or go it alone – usually over small amounts,’ while companies were able to ‘sidestep the court system, avoid big refunds, and continue harmful practices.'”

Read the NPR article.

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Will the Supreme Court End Employment Contract Arbitration Clauses?

The validity of arbitration clauses in employment contracts is unclear and is now before the U.S Supreme Court, points out **Mary An Couch** in Bradley Arant Boult Cummings LLP’s **Labor & Employment Insights** blog.

The Supreme Court heard oral argument in *National Labor Relations Board v. Murphy Oil, USA, Inc.* and two other consolidated cases about whether such clauses violate the

National Labor Relations Act (which governs employer-employee relations) or whether the Federal Arbitration Act (which governs arbitration agreements) trumps the NLRA, she writes.

The relevant cases being considered are from the 5th Circuit, which found the arbitration clause did not violate the NLRA, and the 7th and 9th circuits, which found similar clauses unenforceable.

Read the article.

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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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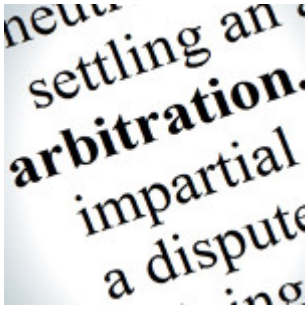
11th Circuit Holds Arbitrators Have Venue-

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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