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## ADR Case Update 2022-7

### Federal Courts

- **UNDERLYING CLAIMS CANNOT SUPPORT FEDERAL JURISDICTION OF ACTIONS TO CONFIRM OR VACATE ARBITRATION AWARD**

*Badgerow v Walters*

2022 WL 959675

Supreme Court of the United States

March 31, 2022

Denise Badgerow worked as a financial advisor with REJ Properties, Inc. When Badgerow was terminated from her position, she initiated FINRA arbitration against REJ's principals (Walters), alleging unlawful termination under state and federal law. The arbitration panel held for Walters, dismissing Badgerow's claims. Badgerow sued in state court to vacate the award on fraud grounds. Walters removed the case to federal court, and Badgerow moved to remand, arguing that the court lacked subject matter jurisdiction to confirm or vacate the award. The court denied Badgerow's motion for remand and dismissed the suit. Badgerow appealed the court's jurisdiction determination, which the Fifth Circuit affirmed. Citing the Supreme Court's decision in *Vaden v Discover Bank*, involving an action to compel arbitration, the court applied a "look through" analysis to find jurisdiction based on the federal claims underlying Badgerow's arbitration. Badgerow petitioned for and was granted certiorari.

The Supreme Court of the United States, in an 8-1 decision, reversed and remanded, holding that federal issues underlying an arbitration were insufficient to support federal jurisdiction over actions to confirm or vacate an arbitral award. Although the FAA authorizes parties to bring certain arbitration actions before the federal courts, it does not, of itself, create federal jurisdiction, which parties must establish on independent grounds. In *Vaden v Discover Bank*, the Court addressed this issue in the context of FAA Section 4, which allows a party to bring an action to compel arbitration in "any United States district court which, save for such agreement, would have jurisdiction." The Court interpreted this provision to require a court to "look through" the case pleadings to the legal issues underlying the proposed arbitration. If the underlying legal issues fell within federal jurisdiction, the action to compel arbitration of those issues did also. The Court declined to extend this "look through" method to FAA Sections 9 and 10, which authorize parties to bring actions to confirm or vacate an arbitral award in the federal district in which that award was made. The Court distinguished Section 9 and 10's "venue" provisions from Section 4's "jurisdiction" provision and its specific directive that courts determine such jurisdiction "save for" the arbitration agreement. Those words,

according to the Court, “instruct a court to imagine a world without an arbitration agreement, and to ask whether it would then have jurisdiction over the parties’ dispute.” The “look through” method was the means by which the Court imagined that world. Because Sections 9 and 10 do not include this language, ordinary principles of statutory construction dictated that the “look through” method did not apply. When Congress includes specific language in one section of a statute but not another, the Court assumes that choice to be deliberate. Congress could have used “save for” language in drafting Sections 9 and 10, or could have drafted a global “look through” provision applicable to the FAA as a whole. As Congress did neither, it was not the Court’s role to expand federal jurisdiction by judicial decree.

- **APPLICATION OF FSIA'S ARBITRATION EXCEPTION DID NOT REQUIRE DETERMINATION OF ARBITRAL AWARD'S VALIDITY**

*Process and Industrial Developments Limited v Federal Republic of Nigeria*  
2022 WL 727292  
United States Court of Appeals, District of Columbia Circuit  
March 11, 2022

Nigeria contracted to provide P&ID with natural gas, which P&ID would refine and return to fuel Nigeria’s electronic power grid. Nigeria failed to provide the required natural gas, and P&ID was awarded damages in arbitration. Nigeria challenged the award in its federal court, which issued a set-aside order. P&ID subsequently brought an enforcement action in U.S. district court, which Nigeria moved to dismiss for lack of jurisdiction under the Foreign Sovereign Immunities Act (FSIA). The court rejected Nigeria’s immunity challenge. Invoking the FSIA’s waiver exception, the court found that Nigeria had impliedly waived its sovereign immunity by signing the New York Convention and agreeing to arbitration in a Convention state. Nigeria filed an interlocutory appeal.

The United States Court of Appeals, District of Columbia Circuit, affirmed, relying instead on the FSIA’s arbitration exception, which applies to disputes where there is an arbitration agreement, an arbitration award, and a treaty governing the award. While the arbitration agreement and its governance under the New York Convention were uncontested, Nigeria asserted that there was no valid or enforceable award, as the award had been set aside by the Nigerian court. The Court held that the award’s validity or enforceability was not a jurisdictional question, but a merits question to be determined in arbitration and need not be determined to find that Nigeria’s sovereign immunity was abrogated by FSIA’s arbitration exception.

- **AGE OF CONSENT WAS ENFORCEMENT ISSUE TO BE DECIDED BY ARBITRATOR**

*K.F.C. v Snap Inc.*  
2022 WL 871996  
United States Court of Appeals, Seventh Circuit  
March 24, 2022

K.F.C., a minor, opened a Snapchat account online when she was eleven years old. She acknowledged that she accepted the Terms and Conditions, which included an arbitration clause, but lied about her age to meet the requirement that users be at least thirteen. After using her account for several years, K.F.C. sued Snapchat, alleging that Snapchat’s facial recognition features violated the Illinois Biometric Privacy Act. Snapchat moved to compel arbitration, which K.F.C. opposed, arguing that, as a minor, she was incapable of forming an agreement to arbitrate. The court granted Snapchat’s motion to compel and dismissed the case. K.F.C. appealed.

The United States Court of Appeals, Seventh Circuit, affirmed. Under Illinois law, a contract signed by a minor is voidable rather than void. A minor may enter into a contract and may choose to ratify or void the contract upon coming of age. For this reason, Illinois treats the age of consent as a defense to enforcement. K.F.C.’s status as a minor was, therefore, an issue of enforcement rather than formation and was properly decided by the arbitrator.

## New York

- **ARBITRATOR SHOULD DECIDE ARBITRABILITY OF INTERTWINED CLAIMS**

*Revis v Schwartz*  
2022 WL 801429  
Court of Appeals of New York  
March 17, 2022

Professional football player Derelle Revis hired Neil Schwartz as his attorney and contract advisor in a Standard Representation Agreement (SRA), a pre-printed form contract used by the National Football League. The SRA included an arbitration clause incorporating the rules of the NFL Players Association (NFLPA), which in turn specified that AAA Rules would govern the arbitration. In a space provided on the form, the parties listed “other agreements” as “Marketing & Endorsements – Ten (10%) Percent – Cash Only,” which both parties understood to reference an oral agreement (M&E) that Schwartz would negotiate marketing and endorsement agreements for Revis for a contingent fee. The parties’ professional relationship soured, and Revis sued Schwartz on multiple grounds, including breach of fiduciary duty, breach of contract, unjust enrichment, and fraud. Schwartz moved to compel arbitration under the SRA. Revis opposed, arguing that his claims arose solely from the M&E. The court granted Schwartz’s motion to compel, holding that, under the AAA Rules, the arbitrator should determine the arbitrability of Revis’s claims. Revis appealed.

The Court of Appeals of New York affirmed. Noting the intertwined nature of Revis’s multiple claims and his request for rescission of all the parties’ agreements and disgorgement of all fees, the Court held that gateway questions of arbitrability should be determined by the arbitrator.

## Texas

- **VAGUE AND INCONSISTENT LANGUAGE DID NOT PREVENT FORMATION OF AGREEMENT**

*Baby Dolls Topless Saloons, Inc. v Sotero*  
2022 WL 815825  
Supreme Court of Texas  
March 18, 2022

Stephanie Hernandez, an exotic dancer at Baby Dolls Topless Saloon (the Saloon), was killed in a car accident after leaving the Saloon as a passenger in a co-worker’s car. Hernandez’s family (the Family) brought a wrongful death action against the Saloon, alleging that the Saloon had knowingly over-served alcohol to the co-worker. The Saloon moved to compel arbitration under the arbitration provision of the “License and Lease Agreement” (Agreement), by which the Saloon had granted Hernandez a License to perform and the right to use a portion of the Saloon’s premises. The Family opposed on formation grounds, arguing that the Agreement’s language was so vague and inconsistent that there could be no mutual understanding sufficient to form the Agreement. The Family cited, in particular, the Agreement’s term provision, which designated the termination date of the “Agreement” while providing for automatic extension of the “License.” The court agreed, holding in favor of the Family, and was upheld on appeal. The Saloon petitioned for and was granted review.

The Supreme Court of Texas reversed and remanded. Texas law requires courts to construe contracts to avoid forfeiture, and, to do so, they may find language to be definite “whenever the language is reasonably susceptible to such an interpretation.” Conceding that the Agreement’s term provision was “unartfully drafted,” the Court looked to the contract as a whole to find that the License was inseparable from the Agreement, making it reasonable to conclude that the Agreement and License had been formed and would subsequently renew in lockstep. The fact

that the parties had conducted their business relationship in accordance with the Agreement for more than two years gave credence to its formation, and the Court remanded the case with instructions that the trial court grant the Saloon's motion to compel arbitration.

## Florida

- **CHOICE OF LAW PROVISION DID NOT CREATE CHOICE OF FORUM**

*Tribeca Asset Management, Inc. v. Ancla International, S.A.*  
2022 WL 869780  
Supreme Court of Florida  
March 24, 2022

Ancla, a Colombian brewery, entered into an Agreement with Tribeca, a Panamanian investment company, in which Tribeca agreed to invest in the brewery. The Agreement contained an arbitration clause and a choice of law provision stating that the Agreement would be governed by Florida law. When Tribeca failed to make the required investment, Ancla sued in Florida circuit court to compel arbitration. Tribeca, citing its non-resident status, moved to dismiss, and the court dismissed the case for lack of personal jurisdiction. On Ancla's appeal, the appellate court reversed, holding that the Agreement's language identifying Florida as "a jurisdiction accepted by the parties" conferred jurisdiction on Florida courts to enforce the Agreement. Tribeca petitioned for review.

The Supreme Court of Florida quashed the appellate court's decision and remanded, holding that the Agreement's language reflected choice of law rather than forum selection. A choice of law provision reflects the parties' agreement to be bound by the substantive law of a specific jurisdiction and is typically expressed, as the parties did in the Agreement, with language that the parties "agree to be governed" by those laws. Applying plain language analysis to the Agreement, the phrase identifying Florida as "a jurisdiction accepted by the parties" was intended to clarify the parties' agreement that Florida was the source of the law being selected. The Agreement used none of the language typically used in forum selection, such as "the venue shall be" or "the parties expressly submit themselves to the venue," and did not constitute an agreement that arbitration must take place in Florida.

## Maryland

- **EXPIRED STATUTE OF LIMITATIONS FOR BREACH OF CONTRACT CLAIM DID NOT EXTINGUISH RIGHT TO ARBITRATION**

*Park Plus, Inc. v Palisades of Towson, LLC*  
2022 WL 883679  
Court of Appeals of Maryland  
March 25, 2022

Park Plus entered into a contract with Palisades to install an automated parking system in a Palisades luxury apartment building. The parking system proved excessively problematic, causing tenant departures and a fatal accident. Palisades demanded arbitration in compliance with the contract's arbitration clause and, when Park Plus proved reluctant to arbitrate, sued to compel arbitration. Park Plus opposed, arguing that Palisades could not invoke arbitration because the statute of limitations had expired on its breach of contract claim. The court held that Park Plus's refusal to arbitrate constituted a separate contract breach starting a new limitations period and ordered arbitration. The Court of Special Appeals affirmed. Park Plus petitioned for and was granted certiorari.

The Court of Appeals of Maryland affirmed. Palisades did not waive its right to arbitration by issuing its demand after the statute of limitations expired on its breach of contract claim. Under the Maryland Uniform Arbitration Act, the court sits in equity in an arbitration enforcement action,

and the relief it may grant is the equitable remedy of enforcing the arbitration. The statute of limitations governing Palisades's breach of contract claims applied only to an action to enforce that claim in a court of law and imposed no limitation on Palisades's equitable right to compel arbitration.

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*Case research and summaries by Deirdre McCarthy Gallagher and Rene Todd Maddox.*

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