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U.S. Supreme Court

- **AMBIGUITY IN ARBITRATION AGREEMENT INSUFFICIENT BASIS TO COMPEL CLASSWIDE ARBITRATION**

  Lamps Plus, Inc. v. Varela
  2019 WL 1780275
  Supreme Court of the United States
  April 24, 2019

  Frank Varela was employed by Lamps Plus, Inc., (Lamps) a company that sells light fixtures and related products. In 2016, a hacker tricked Lamps into disclosing the tax information of employees. After a fraudulent federal income tax return was filed in Varela's name, Varela brought a putative class action against Lamps for negligence and other claims. Pursuant to the arbitration agreement that Varela signed when he began working at Lamps, Lamps moved to compel arbitration on an individual rather than a classwide basis, and to dismiss the lawsuit. The court rejected the individual arbitration request, but authorized class arbitration and dismissed Varela's claims. Lamps appealed the order, asserting that the court erred by compelling class arbitration. The Ninth Circuit affirmed. The Ninth Circuit concluded that *Stolt-Nielsen*, which prohibits forcing a party to submit to class arbitration unless there is a contractual basis that the party agreed to do so, did not apply. In *Stolt*, the parties stipulated that their agreement was silent about class arbitration; because there was no subject stipulation here, *Stolt* did not control. The Ninth Circuit determined that this agreement was ambiguous on the issue of class arbitration, with some phrases in the agreement seeming to contemplate "purely binary claims," and some seeming to encompass class arbitration. Construing the ambiguity against the drafter – Lamps – the Ninth Circuit adopted Varela's interpretation authorizing class arbitration. Lamps petitioned for a writ of certiorari, asserting that the Ninth Circuit's decision contravened *Stolt*. Varela asserted that the Ninth Circuit lacked jurisdiction over the appeal and that the Supreme Court lacked jurisdiction in turn. The Court granted certiorari.

  In a 5-4 decision, the Supreme Court of the United States reversed and remanded. Chief Justice Roberts delivered the opinion of the Court. The Court first held that it had jurisdiction. Section 16(a)(3) of the FAA provides that an appeal may be taken from a "final decision with respect to an arbitration that is subject to this title." An order that compels arbitration and dismisses the underlying claims qualifies as a final decision with respect to arbitration within the meaning of

Section 16(a)(3) – as construed in *Green Tree v. Randolph*. Varela attempted to distinguish *Randolph* on the grounds that the appeal here was taken by the party who had secured the relief that it requested. But Lamps did not secure the relief it requested: it sought an order compelling individual arbitration and instead got an order rejecting that relief and compelling arbitration on a classwide basis. That gave Lamps a stake in the appeal.

Following its normal practice, the Court deferred to the Ninth Circuit's interpretation and application of state law in determining that the agreement should be regarded as ambiguous. The Court then considered the seminal question: whether, consistent with the FAA, an ambiguous agreement can provide the necessary contractual basis for compelling class arbitration. Arbitration is strictly a matter of consent. Parties may generally shape arbitration agreements to their liking; the tasks for courts and arbitrators is to "give effect to the intent of the parties." There are critical differences between class arbitration and individual arbitration: class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more expensive, and more complex. Class arbitration also raises due process concerns by "adjudicating the rights of absent members of the plaintiff class…with only limited judicial review." Because of these differences, the Court found in *Stolt* that consent to participate in class arbitration absent a "contractual basis for concluding that the party *agreed* to do so" may not be inferred. Silence was not enough. And like silence, ambiguity "does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[ ] the principal advantage of arbitration.'" (quoting *Concepcion*). The Ninth Circuit reached a contrary conclusion based on California's rule that ambiguity in a contract should be construed against the drafter. This doctrine, known as *contra proferentem*, is triggered only after a court determines that it cannot discern the intent of the parties. Class arbitration is inconsistent with the FAA. The Court reiterated in *Epic* that courts may not rely on state contract principles to "reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." That is what the Ninth Circuit did – and such an approach was inconsistent with the foundational FAA principle that arbitration is a matter of consent.

Justice Thomas filed a concurring opinion, suggesting that the arbitration agreement between Varela and Lamps unambiguously required individual arbitration. Still, he joined the Roberts opinion "because it correctly applies our FAA precedents."

Justice Kagan wrote the main dissent. After asserting that the arbitration agreement unambiguously required individual arbitration, she defended *contra proferentem*, highlighting the role that the FAA preserves for state contract law that does not discriminate against arbitration agreements. She reasoned that resolving ambiguities against a contract's drafter is "as even-handed as contract rules come." She added that as the drafter of the contract, Lamps could have avoided class arbitration simply by being clear about its intentions.

Federal Circuit Courts

- **CONSTRUCTIVE KNOWLEDGE RESULTS IN WAIVER OF RIGHT TO OBJECT TO ARBITRAL CONFLICT OF INTEREST**

  Light-Age, Incorporated v. Ashcroft-Smith
  2019 WL 1856644
  United States Court of Appeals, Fifth Circuit
  April 25, 2019

  Attorney Ashcroft-Smith provided legal services to Light-Age over a five-year period. Light-Age refused to pay the $344,990.58 in legal fees, arguing that they were excessive, and the parties proceeded to arbitration under the Houston Bar Association's fee-dispute program. Per the Fee Dispute Committee's (FDC) rules, the FDC Chair appointed two lawyers and one non-lawyer to the panel. The non-lawyer, Ana David, was a full-time payroll manager for a law firm. Light-Age asserted that it did not realize this until after the hearing, at which time it objected to Davis' participation. The three-arbitrator panel found in favor of Ashcroft-Smith and Light-Age petitioned to vacate the award. The court denied the petition and confirmed the award, finding that Davis was qualified to serve as a non-lawyer arbitrator. Light-Age appealed.

The United States Court of Appeals for the Fifth Circuit affirmed. A party to an arbitration waives an objection to an arbitrator's conflict of interest if the party has constructive knowledge of the conflict at the time of the arbitration hearing but fails to object. In this case, Light-Age had constructive knowledge. Prior to the arbitration hearing, Davis exchanged multiple emails with the parties that listed Jackson Walker as her employer in the signature line. Light-Age could have discovered that Jackson Walker was a law firm by clicking on the link provided in Davis' email signature or conducting an internet search.

- **FEDERAL COURT SITTING IN DIVERSITY CONFIRMS AN ARBITRATION AWARD ACCORDING TO STATE PRECLUSION LAW**

  NTCH-WA, Inc. v. ZTE Corporation
  2019 WL 1810776
  United States Court of Appeals, Ninth Circuit
  April 25, 2019

  NTCH-WA, PTA-FLA, Daredevil, and NTCH-West, owned by Eric Steinmann, operated together under the name ClearTalk to provide pre-paid and flat rate cell-phone service to customers with poor credit. In 2011, the ClearTalk entities sued ZTE USA for breach of contract and related claims; in addition to his suit against ZTE USA, Steinmann also sued ZTE Corp. ZTE USA moved to compel arbitration and, from that point forward, the arbitration "went forward as a single, unified proceeding." Months later, the ClearTalk entities filed an amended statement of claim in the arbitration, asserting claims against ZTE USA and ZTE Corp. The arbitrator declined to hear the claims against ZTE Corp., determining that the scope of arbitration was limited to claims, counterclaims, and defenses that existed or might arise…in the lawsuits pending at the time of the agreement to arbitrate. In the final award, the arbitrator denied the ClearTalk entities' claims. The district court confirmed the award under the FAA and the Eleventh Circuit affirmed. NTCH-WA then initiated a Second Amended Complaint, asserting claims for breach of contract, tortious interference, fraudulent misrepresentation, negligent misrepresentation, promissory estoppel, and unjust enrichment against ZTE Corp. The court granted ZTE's motion for summary judgment and dismissed NTCH-WA's claims. NTCH-WA appealed.

  The United States Court of Appeals for the Ninth Circuit affirmed. As a matter of first impression, the Court held that when a federal court sitting in diversity confirms an arbitration award, the preclusion law of the state where that court sits determines the preclusive effect of the arbitral award. Here, a district court in FL confirmed the award. Under FL law, claim preclusion barred NTCH-WA's claims because: NTCH-WA was seeking the same remedy it sought in arbitration; the evidence needed to prove NTCH-WA's claims was the same; ZTE Corp was in privity with its wholly-owned subsidiary ZTE USA; and the parties were suing in the same capacity as in the arbitration.

- **DISTRICT COURT CONFIRMATION OF INTERNATIONAL ARBITRATION AWARD AFFIRMED**

  Inversiones y Procesadora Tropical Inprotsa, S.A. v. Del Monte International
  2019 WL 1768911
  United States Court of Appeals, Eleventh Circuit
  April 23, 2019

  Inprotsa and Del Monte entered into an agreement for the production, packaging, and sale of MD-2 pineapples. The parties stipulated that Del Monte was "the exclusive owner of the…MD-2," and they agreed that if the Agreement were terminated for any reason, including expiration, INPROTSA would cease producing the MD-2 and either destroy the plant stock or return it to Del Monte. After the agreement expired in 2013, INPROTSA did not destroy or return its MD-2 plant stock to Del Monte; instead, it sold the MD-2 pineapples to third parties. Del Monte initiated an arbitration against INPROTSA in the International Court of Arbitration of the International Chamber of Commerce, alleging that INPROTSA breached the Agreement. The arbitration tribunal ruled in favor of Del Monte on the claim that INPROTSA breached the Agreement. It also rejected INPROTSA's contention that it was fraudulently induced to enter into the Agreement, found that the Agreement's statement regarding exclusive ownership of the MD-2 was a

stipulation not a representation, and that INPROTSA was aware of the falsity of any representation of exclusive ownership of the MD-2 (because it knew that Del Monte had engaged in a lawsuit with Dole over that issue and Del Monte acknowledged that it did not have the exclusive right to sell the MD-2). Based on the evidence provided by Del Monte (INPROTSA refused to provide information on profits or expenses during discovery), the tribunal concluded that Del Monte's damages should be $26.133 million, which was 93% of INPROTSA's sales in 2014. INPROTSA petitioned to vacate the award in Florida's Eleventh Judicial Circuit. Del Monte removed the petition to US District Court and filed a combined motion to dismiss the petition to vacate and cross-petition to confirm the Award. INPROTSA filed a motion to remand the proceeding to state court, contending that the district court lacked subject matter jurisdiction. The court granted Del Monte's motion to dismiss the petition to vacate and denied INPROTSA's motion to remand. The court later granted Del Monte's cross-petition and confirmed the Award. INPROTSA appealed.

The United States Court of Appeals for the Eleventh Circuit affirmed. INPROTSA contended that the district court lacked subject matter jurisdiction, arguing that a petition to vacate is not one of the two causes of action expressly provided by the Convention Act and cannot be an action or proceeding falling under the Convention; consequently, a federal court cannot exercise subject-matter jurisdiction over a petition to vacate an arbitral award, even if the award itself falls under the Convention. The Court disagreed. The relevant inquiry was not whether a particular proceeding or action was provided by the Convention Act, but whether the action or proceeding fell under the Convention itself. The Court provided that an action or proceeding fell under the Convention (for purposes of §203) when it involved subject matter that – at least in part – was subject to the Convention, such that the action or proceeding implicated interests the Convention sought to protect. Given that Congress specifically authorized removal where the subject matter of an action or proceeding pending in a State court related to an arbitration agreement or award failing under the Convention. (§205), it made sense to conclude that Congress intended §203 to be read consistently with §205 as conferring subject matter jurisdiction on proceedings sufficiently related to agreements or awards under the Convention. It follows that the district court had subject matter jurisdiction over INPROTSA's petition to vacate the Award.

The district court did not err when it dismissed the petition to vacate because INPROTSA did not assert a valid defense under the Convention. INPROTSA contended that the court erred by applying the Eleventh Circuit's holding in *Industrial Risk*, which held that the defenses enumerated by the Convention provide the exclusive grounds for vacating an award subject to the Convention. INPROTSA argued that Industrial Risk was wrongly decided and abrogated by the Supreme Court decision in *BG Group PLC v. Argentina*. To constitute an overruling for the purpose of the prior panel precedent rule, however, the Supreme Court ruling must be clearly on point and abrogate or directly conflict with the holding of the prior panel. At most, the Supreme Court's analysis indirectly suggested that the Convention did not supply the exclusive grounds for vacating an international arbitral award, which was not enough under precedent to conclude that *Industrial Risk* had been overruled. Even if the Court was not bound by *Industrial Risk*, the petition to vacate would warrant denial. INPROTSA asserted three grounds on appeal and none supported vacatur. 1) INPROTSA contended that the tribunal exceeded its authority when it rewrote the parties' agreement by reading out "as long as language" in the Agreement, which INPROTSA argued conditioned its agreement not to sell to third parties on Del Monte's exclusive ownership of the MD-2 variety. The tribunal at least arguably interpreted the contract and thus, did not exceed its authority. 2) INPROTSA contended that the tribunal exceeded its authority by awarding damages far in excess of the amount allowed by Florida law; however, it cited no authority to support the argument that a disgorgement award based on revenues (where the defendant's profits could not be calculated because the defendant refused to provide evidence of expenses during discovery) would not be permitted under FL law. 3) INPROTSA also contended that the tribunal exceeded its authority by refusing to apply the procedural rules the parties had contracted for. The tribunal did not exceed its power by reasonably construing its own rules as barring substantive reconsideration of the merits of its damages awards.

INPROTSA also argued that the Award should not have been confirmed because the court failed to consider its public policy defense based on fraud. The public policy defense under the Convention is very narrow. In the context of the FAA, vacatur cannot be premised on a purported fraud known at the time of the arbitration. INPROTSA knew about the Dole-Del Monte litigation when it contracted with Del Monte; therefore, enforcing the Award in this case did not offend

public policy.

- **"LOOK-THROUGH" APPROACH REVEALS SUBJECT MATTER JURISDICTION**

  Landau, et al., v. Eisenberg, et al.
  2019 WL 1924224
  United States Court of Appeals, Second Circuit
  May 1, 2019

  Landau and Eisenberg, representing two groups from the Bobov Hasidic Jewish community, agreed to arbitrate disputes related to who has the right to be referred to as Bobov and to publish and distribute books and merchandise under that name. The rabbinical panel ruled that the Landau group owned the Bobov mark and was entitled to register it. The panel also ruled that any party could confirm the award in secular court. Landau sought confirmation of the award in district court under the FAA. Baruch Eisenberg filed an opposition, raising subject matter jurisdiction, venue, and merit-based arguments. The court held that it had subject matter jurisdiction over the petition, rejected the other arguments, and confirmed the award. Eisenberg appealed.

  The United States Court of Appeals for the Second Circuit affirmed. The FAA "bestows no federal jurisdiction but rather requires for access to a federal forum an independent jurisdictional basis over the parties' dispute." (*Vaden*, 556 U.S. 49) The Supreme Court instructs that district courts should "look through" the petition to the underlying substantive controversy to determine whether the claims arose under federal law. (*Vaden*) Applying the look through approach here, the district court properly determined that it had subject matter jurisdiction to confirm the award. The substantive controversy underlying the petition involved questions of federal trademark law, over which district courts possess subject matter jurisdiction. Because the district court would have had jurisdiction over the underlying substantive controversy, it had jurisdiction to confirm the award pursuant to FAA §9. As for confirmation of the award: an arbitration award should be enforced if there is a barely colorable justification for the outcome reached. Here, there was – the district court did not err in confirming the award.

- **CLAIMS OUTSIDE SCOPE OF ARBITRATION PROVISION**

  Baptist Hospital of Miami v. Medica Healthcare Plans, Inc.
  2019 WL 1915439
  United States District Court, S.D. Florida
  April 29, 2019

  Medicare providers, Baptist Hospital of Miami et al., (Baptist) brought an action against health insurer, Medica Healthcare Plans, alleging breach of contract, unjust enrichment, and promissory estoppel. Medica removed the action to federal court and moved to compel arbitration pursuant to a provision in the 2005 Medical Hospital Provider Agreement that required the Baptist providers to comply with any manuals or publications maintained by Medica. Medica contended that the manual that applied to contracted providers was the 2018 UnitedHealthcare Provider Administrative Guide (2018 UHC Provider Guide), which contained an arbitration provision. Baptist maintained that the operative manual was the 2017 UHC Provider Guide, which did not contain an arbitration provision. The Chief Magistrate Judge recommended that the motion to compel arbitration be denied. The arbitration provision that was added in the 2018 UHC Provider Guide was enforceable from the effective date of April 1, 2018. Neither Medica nor Baptist agreed to arbitrate the subject claims for non-payment that occurred between January 2017 and January 2018. Medica could not retroactively bind Baptist to claims predating April 1st where the claims had no nexus with the 2018 UHC Provider Guide. Baptist's claims were not subject to and did not fall within the scope of the arbitration provision in the 2018 UHC Provider Guide.

  The United States District Court, S.D. Florida adopted the report and recommendation of the magistrate judge. An arbitration agreement existed between the parties; however, the claims did not fall within the scope of the arbitration provision.

California

- **TERMINATION AGREEMENT DID NOT EXTINGUISH ARBITRATION OF CLAIMS ARISING BEFORE THE TERMINATION DATE**

  Oxford Preparatory Academy v. Edlighten Learning Solutions
  2019 WL 1760083
  Court of Appeal, Fourth District, Division 3, California
  April 22, 2019

  Edlighten Learning Solutions entered into three contracts with Oxford Preparatory Academy. One was a management services agreement containing an arbitration clause. The parties subsequently entered into a termination agreement, terminating all rights and obligations under the three contracts, with the exception of two payment obligations. When Oxford brought action against Edlighten for breach of contract and related claims, Edlighten moved to compel arbitration. The court denied the motion, finding that the termination agreement terminated the arbitration clause in the management services agreement. Edlighten appealed.

  The Court of Appeal, Fourth District, Division 3, California reversed and remanded. Edlighten contended that the court erred by finding that the termination agreement terminated the arbitration clause and that all of Oxford's causes of action fell within the scope of the arbitration clause. The Court agreed that the parties did not expressly or impliedly terminate the arbitration clause with respect to disputes over the performance, before the termination date, of their respective contractual obligations. The parties merely divided their respective rights and obligations on a temporal basis – those existing before the termination date and those existing after the termination date. They reversed and remanded for the court to decide whether any of the plaintiff's causes of action fell within the scope of the arbitration clause.

- **MOTION TO COMPEL ARBITRATION DENIED; LMRA PREEMPTION DID NOT APPLY**

  Melendez et al., v. San Francisco Baseball Associates LLC
  2019 WL 1848722
  Supreme Court of California
  April 25, 2019

  Melendez, a security guard, brought an action against San Francisco Baseball Associates LLC (the Giants), alleging that their failure to pay wages immediately after the end of series of games or other events violated the state statute requiring prompt payment of final wages upon discharge. The Giants filed a motion to compel arbitration, arguing that the action was preempted by the Labor Management Relations Act (LMRA) because it required interpretation of a collective bargaining agreement (CBA) between the union and the Giants. The court denied the motion and the Giants appealed. The Court of Appeals reversed the order denying the motion to compel and Melendez filed a petition for review, limited to the question of whether the action was preempted because it required interpretation of a CBA.

  The Supreme Court of California reversed. The US Supreme Court held that Section 301 of the LMRA's "jurisdictional grant required the 'complete preemption' of state law claims brought to enforce collective bargaining agreements." In California, *Sciborski v. Pacific Bell* (205 Cal App.4th 1152) outlines a two-part test to determine whether a claim is preempted. First, the court should evaluate whether the claim arises from independent state law or from the CBA. If the claim arises from the CBA, it is preempted. If the claims arise from independent state law – as it does here - then the court must look to the second step, and determine whether the claim requires interpretation or construction of a labor agreement, or whether a CBA will merely be referenced in the litigation. In this case, the parties' dispute turns on an interpretation of California's independent labor laws, not on an interpretation of the CBA. This lawsuit was not preempted.

New York

- **PUBLIC POLICY ARGUMENTS DEFEATED BY BROAD ARBITRATION PROVISION**

  Selendy, et al., v. Quinn Emanuel Urquhart & Sullivan, LLP
  2019 WL 1782358
  Supreme Court, New York County, New York
  April 22, 2019

  Selendy and others were former partners of law firm Quinn Emanuel (Quinn), a California limited liability partnership with international offices. The Selendy group withdrew from Quinn's New York office to start their own firm. Richard Werder, managing partner of Quinn's NY office, demanded that the former partners comply with Section 5.1 of the Partnership Agreement, which provides that departing partners who work with former Quinn clients are to pay to Quinn 10% of total fees billed from that client for an 18-month period following withdrawal from the partnership. Selendy refused on the basis that the provision was against NY public policy as an impermissible restraint on the practice of law. Quinn filed a demand for arbitration pursuant to the arbitration provision in the Partnership Agreement. Selendy filed a petition to stay and enjoin the arbitration proceeding. The parties agreed to a stay and Quinn moved to dismiss the petition.

  The Supreme Court, New York County, New York granted the motion. The public policy issue – whether Section 5.1 of the Partnership Agreement was prohibitively anti-competitive under NY law - did not overcome the broad arbitration provision, which must be given effect as overriding policy. Although Selendy submitted proof supporting the argument that Section 5.1 was anti-competitive, that question was for the arbitrator to consider in the first instance. Selendy also raised the issue of whether the Partnership Agreement's choice of law provision, which provided that California law applied, should apply when determining the applicability of Section 5.1 against NY attorneys. This, too, was for the arbitrator to determine.

Pennsylvania

- **ESTATE ADMINISTRATOR LACKED AUTHORITY TO SIGN ARBITRATION AGREEMENT**

  McIlwain v. Saber Healthcare Group. et al.
  2019 WL 1759812
  Superior Court of Pennsylvania
  April 22, 2019

  McIlwain, the administratrix of the estate of her father, Norman Franks, sued nursing home Saber, alleging negligence, wrongful death, and survival claims. Saber filed preliminary objections, arguing that the dispute was subject to binding arbitration, and attached the "Resident and Facility Arbitration Agreement" that McIlwain signed when her father was admitted to the nursing home. McIlwain asserted that Saber did not produce any evidence that McIlwain had the authority to sign that agreement. The court sustained Saber's preliminary objections as to the survival claims, finding that McIlwain had the authority to bind Franks to the arbitration, bifurcated the survival claims, and sent them to arbitration. McIlwain filed a petition for review, which was granted.

  The Superior Court of Pennsylvania reversed and remanded. While McIlwain was appointed temporary conservator of Franks' person and estate (in CA) a few days before signing the arbitration agreement, that did not give McIlwain the authority to sign the arbitration agreement on behalf of Franks in PA. Though the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Uniform Act) did provide procedures for an out-of-state conservator to be recognized in PA, McIlwain did not follow those procedures. There was no agency relationship between McIlwain and Franks that would have provided an independent authority for McIlwain to have executed the arbitration agreement on his behalf. The FAA does not require parties to arbitrate when they have not agreed to do so. Because McIlwain did not have the authority to

sign the arbitration agreement on behalf of her father, the survival claims proceeded to trial court concurrent with the wrongful death and negligence claims.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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