Litigation Committee Presents:

Navigating a New Landscape: Hot Issues in Arbitration

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Overview

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Recent developments – including the increasing appetite of the U.S. Supreme Court to grant *certiorari* petitions relating to the enforcement of arbitration agreements under the FAA and the NLRB's decision prohibiting class action waivers as a condition of employment in mandatory pre-dispute arbitration procedures – suggest that we are increasingly encountering challenges to the way in which parties and neutrals conduct arbitrations as a mechanism for dispute resolution. This program presents a panel representing the in-house employment bar, the plaintiffs' bar, the NLRB perspective, and arbitrators and arbitration practitioners who will explore various "hot issues" in the field of arbitration, including class action waivers, discovery issues, motions to vacate arbitral awards, and the need for more diverse neutrals.

I. CLASS ACTION WAIVERS

Beginning with *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*,[2] the U.S. Supreme Court has, in recent years, increasingly weighed in on the enforceability of arbitration clauses under the Federal Arbitration Act ("FAA"). Indeed, the Court has not hesitated to chastise both Circuit Courts and the States' highest courts for failing to recognize that "[t]he Federal Arbitration Act reflects an emphatic federal policy in favor of arbitral dispute resolution."[3] At the end of the last Term, the Court ruled in *American Express Co. v. Italian Colors Restaurant*[4] that a contractual provision that demands a waiver of class actions and mandates the bringing of individual arbitrations is enforceable under the FAA, even if the costs of individual arbitration outweigh the potential recovery, thereby making it economically impracticable to maintain the action individually.

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[2] 559 U.S. 662 (2010).

[3] *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (internal citation and quotation marks omitted).

[4] 133 S. Ct. 2304 (June 20, 2013) (available as a handout with today's program).

By contrast, in January 2012, in *In re D.R. Horton, Inc.*,[5] the National Labor Relations Board ("Board") held that an employer violates the National Labor Relations Act ("NLRA") when it requires employees covered under that act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial, notwithstanding the FAA. Just last month, in a long-anticipated decision, the Fifth Circuit[6] disagreed with the Board, concluding that the "decision did not give proper weight to the Federal Arbitration Act."[7] That result notwithstanding, and even after the Supreme Court's *American Express* decision, the Board has continued to reaffirm its *D.R. Horton* decision, distinguishing *American Express* on the basis that the employment context is different because the NLRA provides "substantive rights" for collective action by employees.[8]

While a majority of the federal district courts disagree with the Board's *D.R. Horton* decision, two courts, one in Missouri and one in Wisconsin, applied *D.R. Horton* to strike down class action waivers in arbitration agreements because they violated the NLRA.[9] The highest courts of at least two states, Massachusetts and West Virginia, have also recently followed the teachings of *American Express*.[10] Since *American Express* was decided in June 2013, we are aware of no federal or state court that has reaffirmed the Board's *D.R. Horton* decision.

Notwithstanding the seemingly settled nature of the law on class action waivers, we have identified at least three open interpretive questions:

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[5] No. 12-CA-25764, 2012 NLRB LEXIS 11 (N.L.R.B. Jan. 3, 2012) (available as a handout with today's program).

[6] Petitions for review by aggrieved parties of the Board's decisions are governed by 29 U.S.C. § 160(f).

[7] *D.R. Horton, Inc. v. NLRB*, No. 12-60031, 2013 U.S. App. LEXIS 24073, at *3 (5th Cir. Dec. 3, 2013); *see also Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 292 (2d Cir. 2013) (holding, in light of *American Express*, that an employee cannot invalidate a class-action waiver provision in an arbitration agreement when it removes the financial incentive for her to pursue a claim under the Fair Labor Standards Act).

[8] *See, e.g.*, *In re Nijjar Realty, Inc., d/b/a Pama Management and Gerapdo Haro, an Individual*, 2013 NLRB LEXIS 746, at *34-35 (N.L.R.B. Dec. 4, 2013); *see also In re Kmart Corporation, a Subsidiary of Sears Holding Corporation, and Ronald Daniels, an Individual*, 2013 NLRB LEXIS 713, at *32 (N.L.R.B. Nov. 19, 2013) ("The key point is that the Board's 'issue' is with protecting the substantive right under the [NLRA] for employees to act collectively – at least in some forum – to vindicate their legal and contractual rights.").

[9] *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 U.S. Dist. LEXIS 36220 (W.D. Wisc. Mar. 16, 2012); *Owen v. Bristol Care, Inc.*, No. 11-04258-CV-FJG, 2012 U.S. Dist. LEXIS 33671 (W.D. Mo. Feb. 28, 2012).

[10] *Feeney v. Dell Inc.*, 466 Mass. 1001 (Mass. 2013) (concluding that its prior analysis "no longer comports with the Supreme Court's interpretation of the FAA"); *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, No. 13-0151, 2013 W. Va. LEXIS 1287 (W. Va. Nov. 13, 2013) (holding that the lower court "erred in concluding that the class action waiver rendered the instant arbitration agreement substantively unconscionable").

- ***What is the extent to which courts, rather than arbitrators, should deal with "gateway" issues to arbitration (e.g., whether the arbitration clause permits certain procedures such as class actions), especially in situations where parties contractually agree to a "barebones" arbitration clause?***

In footnote 2 of *Oxford Health Plans LLC v. Sutter*,[11] the Court noted the following: "We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability.' Those questions – which 'include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy' – are presumptively for courts to decide. A court may therefore review an arbitrator's determination of such a matter *de novo* absent 'clear[] and unmistakabl[e]' evidence that the parties wanted an arbitrator to resolve the dispute. *Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures. Indeed, Oxford submitted that issue to the arbitrator not once, but twice – and the second time after *Stolt-Nielsen* flagged that it might be a question of arbitrability."[12]

- ***What kind of waiver or restriction in an arbitration clause would constitute an unenforceable attempt to prevent a party's ability to "vindicate its statutory rights"?***

In *American Express*, the Majority gave little weight to the fact that a plaintiff's cost to individually arbitrate a federal statutory claim could exceed the potential recovery, whereas the Dissent argued that such a waiver would frustrate effective vindication of federal statutory rights. The Ninth Circuit recently held that saddling a party with high filing and administrative fees to initiate arbitration could, in fact, frustrate the vindication of rights and, thereby, attempted to

[11] 133 S. Ct. 2064 (2013).

[12] *Compare Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 598-99 (6th Cir. 2013) (holding that it is a gateway question that is "presumptively for a judge" where the arbitration clause in question does not expressly preclude class action arbitration) *with Vilches v. Travelers Cos.*, 413 F. App'x 487, 492 (3d Cir. 2011) ("Where contractual silence is implicated, the arbitrator and not a court should decide whether a contract was indeed 'silent' on the issue of class arbitration, and whether a contract with an arbitration clause forbids class arbitration.") (internal quotations and citations omitted); *see also Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 792-93 (7th Cir. 2013) (interpreting *American Express* as instructing courts to "supply details" to a barebones arbitration clause, rather than find it unenforceable or interpret it to allow procedures such as class action arbitration).

distinguish this situation from the one in *American Express* involving the costs of "proving" the case in arbitration.[13]

- ***Is "unconscionability" a viable ground to invalidate arbitration clauses?***

Although *American Express* greatly defers to the contract consummated between private parties, the Court fails to explain whether there are contractual agreements that are so extreme or one-sided in nature that they could be invalidated on the ground of "unconscionability." Indeed, the word "unconscionable" does not ever appear in *American Express*. Some courts, such as the California Supreme Court and the Ninth Circuit, have attempted to retain the role of "unconscionability" in reviewing arbitration clauses.[14]

II. DISCOVERY ISSUES

Many practitioners and commentators have noted that modern arbitration practice, particularly in the arena of complex commercial disputes, has steadily incorporated litigation-like discovery devices, including interrogatories, requests for admission, and depositions.[15] But, as

[13] *See Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926-27 (9th Cir. 2013) ("The Supreme Court's recent decision in [*American Express*] does not preclude us from considering the cost that Ralphs' arbitration agreement imposes on employees in order for them to bring a claim. . . . The Court explicitly noted that the result might be different if an arbitration provision required a plaintiff to pay 'filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.' Ralphs' arbitration policy presents exactly that situation. In this case, administrative and filing costs, even disregarding the cost to prove the merits, effectively foreclose pursuit of the claim. Ralphs has constructed an arbitration system that imposes non-recoverable costs on employees just to get in the door.") (internal citations omitted).

[14] *See, e.g.*, *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 211 (Cal. 2013) ("In sum, *Italian Colors* does not alter the unconscionability analysis we set forth above. . . . This unconscionability inquiry does not, in purpose or effect, express a preference for nonarbitral as opposed to arbitral forums. To the contrary, it promotes and encourages the use of conventional bilateral arbitration as a means of low-cost, efficient dispute resolution. Our unconscionability doctrine poses no obstacle to enforcement of arbitration agreements so long as the arbitral scheme, however designed, provides employees with an accessible, affordable process for resolving wage disputes that does not 'effectively block[ ] every forum for the redress of [wage] disputes, including arbitration itself.'") (internal citation omitted); *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) ("The Supreme Court's holding that the FAA preempts state laws having a 'disproportionate impact' on arbitration cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration. Our court has recently explained the nuance: '*Concepcion* outlaws discrimination in state policy that is unfavorable to arbitration.' We think this is a sensible reading of *Concepcion*.") (internal citations omitted); *see also Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 600 (6th Cir. 2013) (discussing, but ultimately rejecting, the contention that the arbitration clause is unenforceable because it is unconscionable).

[15] *See, e.g.*, New York State Bar Association, Report by Arbitration Committee of Dispute Resolution Section: Arbitration Discovery in Domestic Commercial Cases, at 1 (April 2009) ("More recently, as discovery proceedings have exploded in civil actions in the United States, there has been a trend to inject into arbitration expensive elements that had traditionally been reserved for litigation – interrogatories; requests to admit; dispositive motions; lengthy depositions; and massive requests for documents, including electronic data. This has particularly been the case as the use of arbitration has grown for the largest, most complex commercial cases. To an extent, this trend is understandable, since the arbitration of large commercial cases must include enough discovery to permit a fair result

one well consulted treatise has noted, "[w]hat is appropriate discovery in arbitration cases depends on several factors: (1) the type of transaction or relationship involved in the dispute, (2) what is at stake, (3) where the parties reside or do business, (4) the nature of arbitration hearings, and (5) the attitude of the American courts."[16] That same treatise wisely advises that the arbitrators and the parties "[s]earch the arbitration agreement, the arbitration rules, and the applicable law, and you will know whether discovery is available."[17] It also notes the following trends:

- "allow relevant and reliable document exchanges, including electronically stored information, because this method is reasonably affordable and doable";
- "deny or limit interrogatories, because arbitration claims and responses are explanatory and detailed and there is no real need for this device"; and
- "allow depositions, especially of key witnesses, depending on the type of case, the need for deposition, and its cost relative to the issues."[18]

By contrast, arbitration providers are responding to the need to limit discovery in arbitrations so as to deliver on the primary tenets of the arbitration process, namely, speed, economy, and efficiency, while maintaining fundamental fairness and due process. For example, the American Arbitration Association ("AAA") recently promulgated a new set of arbitration and mediation rules for commercial cases, in which the word "discovery" is not ever mentioned.[19] Indeed, one of the key features is "[b]road arbitrator authority to order and control the exchange of information, including depositions."[20]

III. MOTIONS TO VACATE ARBITRAL AWARDS

Under the FAA, an aggrieved party to an arbitration award may seek vacatur of the award on the following enumerated grounds:

(1) where the award was procured by corruption, fraud, or undue means;

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in a complex setting.") (available at https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/ARBITRATION_DISCOVERY__IN_DOMESTIC_COMMERCIAL_CASES.html).

[16] Roger S. Haydock and David F. Herr, Discovery Practice § 37.06 (5th ed. 2013).

[17] *Id.*

[18] *Id.*

[19] *See generally* AAA Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes) (amended and effective Oct. 1, 2013) (available at http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased).

[20] *Id.* at 9.

(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[21]

But, as almost everyone knows, the likelihood of an arbitration award being vacated is very low.[22] A few years ago, the AAA conducted a review of 182 state and federal cases (published and unpublished) in 2004, in which a party sought to vacate an arbitration award. Among the findings of that study were the following:

- motions to vacate were successful in 20% of the cases;
- motions to vacate were more likely to succeed in state court, rather than federal court; and
- the most successful ground was against arbitrators who had "exceeded their powers, or so imperfectly executed them that a . . . final and definitive award upon the subject matter submitted was not made."[23]

One fertile ground for debate is the continued viability of the "manifest disregard of the law" standard for vacating arbitration awards after the U.S. Supreme Court's decisions in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*[24] and *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*[25] In *Hall Street*, the Court held that the enumerated grounds in the FAA "are exclusive" and may not be supplemented by contract.[26] While this holding seemingly foreclosed the judicially created manifest disregard standard, the Court did suggest that that standard might encompass one of three things: (1) a ground for review beyond Section 10 of the FAA; (2) a reference to the

[21] 9 U.S.C. § 10(a).

[22] The Honorable Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen In America?*, 40 St. Mary's L.J. 795, 869-70 (2009) ("Judicial review of arbitration awards is essentially limited to review for extreme arbitrator misconduct such as fraud or corruption.").

[23] Vacatur of Arbitration Awards: A Real-World Review of the Case Law, at 2-10 (AAA Neutrals Conference, Mar. 2006) (available at http://millsadr.com/wp-content/uploads/2011/04/Vacatur-of-Arb-Awards-March_2006.pdf).

[24] 552 U.S. 576 (2008).

[25] 559 U.S. 662 (2010).

[26] 552 U.S. at 578.

collective grounds set forth under Section 10, rather than an addition to them; or (3) a shorthand for Section 10(a)(3) or Section 10(a)(4), which authorize vacatur where arbitrators are "guilty of misconduct" or have "exceeded their powers."[27] Then, in *Stolt-Nielsen*, the Court made clear that it was not "decid[ing] whether 'manifest disregard' survives our decision in [*Hall Street*], as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."[28] Rather, it assumed that the standard applied to the case before it and concluded that it had been satisfied, thereby vacating the award.[29]

The Supreme Court's curious failure to directly address the fate of the manifest disregard standard has consequently created disarray in the way in which that doctrine is both understood and applied. For example, the Second, Fourth, Sixth, and Ninth Circuits have held that the standard is merely reflective of the statutory grounds found in the FAA and, thus, survives *Hall Street*. Conversely, the Fifth, Seventh, Eighth, and Eleventh Circuits view the manifest disregard standard as a non-statutory, non-enumerated, and impermissible ground for review in light of *Hall Street*. Other circuits take the view that *Hall Street* did not reach the question of whether the manifest disregard standard remains viable, leading them to either uphold it or avoid ruling on it. The chart below summarizes the current divide amongst the various Circuits:

Manifest Disregard Standard in the Circuit Courts		
Accepted	**Rejected**	**No Clear Decision**
Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008)	*Citigroup Global Mkts. Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009)	*Affinity Fin. Corp. v. AARP Fin., Inc.*, 468 F. App'x 4 (D.C. Cir. Mar. 9, 2012)
Dewan v. Walia, 2013 U.S. App. LEXIS 21970 (4th Cir. Oct. 28, 2013)	*Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc.*, 660 F.3d 281 (7th Cir. 2011)	*Ramos-Santiago v. UPS*, 524 F.3d 120 (1st Cir. 2008)
Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed. Appx. 415 (6th Cir. 2008)	*Medicine Shoppe Int'l, Inc. v. Turner Investments, Inc.*, 614 F.3d 485, 489 (8th Cir. 2010)	*Rite Aid N.J., Inc. v. United Food Commer. Workers Union, Local 1360*, 449 F. Appx. 126 (3d Cir. 2011)
Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277 (9th Cir. 2009)	*Frazier v. Citifin. Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010)	*Lynch v. Whitney*, 419 F. Appx. 826 (10th Cir. 2011)

[27] *See id.* at 585.

[28] 559 U.S. at 672 n.3 (internal citation omitted).

[29] *Id.*

IV. THE NEED FOR MORE DIVERSE NEUTRALS

There is growing recognition that there is a need for neutrals who serve the ADR marketplace to be more diverse, and that administering authorities and providers – *e.g.*, AAA, JAMS, and CPR (International Institute for Conflict Prevention & Resolution) – need to increase their recruitment efforts to attract, retain, encourage, and support more diverse neutrals on their rosters. Moreover, in an increasingly global and cross-cultural society, especially where cross-border disputes are becoming more prevalent, having rosters of diverse neutrals becomes a tremendous asset.

For more on this topic, please see the following:

- David H. Burt and Laura A. Kaster, *Why Bringing Diversity to ADR Is a Necessity*, ACC Docket (Oct. 2013) (arguing that ADR neutrals "serve a role that is often a substitute for (and sometimes annexed to) the judicial process," and, thus, "it becomes an issue of fairness that the decisionmakers or facilitators should be representative of the individuals, institutions and communities that come before them").

- Sasha A. Carbone and Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators*, NYSBA Journal (Jan. 2012) (arguing that, because "ADR is increasingly a mainstay of our justice system . . .[,i]t is critical . . . that ADR neutrals reflect the diverse cultural makeup of its market") (available as a handout with today's program).

Additionally, the Diversity Committee of the New York State Bar Association's Dispute Resolution Section, along with AABANY and other specialty bar associations, will be presenting a program on Tuesday, March 25, 2014 entitled "Enhancing Opportunities for Diverse Neutrals in Dispute Resolution." More details to come.

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