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ADR Case Update – SB 365 Precludes Stay Pending Appeal

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SB 365 Allows Plaintiffs to Continue Action in Court Pending Defendants' Appeal of Denial of Petition to Compel Arbitration.

On October 10, 2023, Governor Newsom signed SB 365 into law, which allows plaintiffs in California to continue pursuing their claims in court during the pendency of an appeal to an order denying a petition to compel arbitration.

SB 365 amends CCP §1294 to provide that "Notwithstanding Section 916, the perfecting of such an appeal shall not automatically stay any proceedings in the trial court" when appealing an order denying a motion to compel arbitration.

In light of the U.S. Supreme Court's decision in *Coinbase, Inc. v. Bielski*, challenges to SB 365 on preemption grounds are expected. (In *Coinbase*, the Supreme Court, Justice Kavanaugh, held that a district court must stay its proceedings while an interlocutory appeal on the issue of arbitrability is ongoing; abrogating *Britton v. Co-op Banking Group*, 916 F. 2d 1405 and *Weingarten Realty Investors v. Miller*, 661 F.3d 904. (*Coinbase, Inc. v. Bielski* (2023) 599 U.S. 736 [143 S.Ct. 1915, 216 L.Ed.2d 671].)

Arbitration award reversed on appeal because arbitrator exhibited bias against non-English speaking party who used interpreter.

In *FCM Investments v. Grove Pham, LLC* (Oct. 17, 2023) 96 Cal.App.5th 545, FCM Investments signed a purchase agreement to acquire commercial real property from Pham LLC, a company owned by Phuong Pham. The transaction never closed, resulting in FCM filing a complaint against Grove and Phuong. The parties successfully mediated the dispute, amended the purchase agreement, and proceeded with the transaction. However, FCM then refused to close and Grove and Phuong compelled arbitration. The arbitrator found in favor of FCM, concluding it was justified in terminating the escrow and did not breach the purchase agreement. Key to the arbitrator's finding was a lack of Phuong's credibility that was "rampant and obvious." According to the arbitrator, Phuong's use of an interpreter seemed "to be a ploy to appear less sophisticated" since she had been in the country for decades, engaged in sophisticated business transactions, and had herself served as an interpreter. FCM petitioned to confirm the award while Phuong sought to vacate it. The trial court confirmed the award.

Reversed. When parties agree to private arbitration, they bargain for very limited judicial review. One of the few grounds for vacating an arbitration award is misconduct on the part of a neutral arbitrator substantially prejudicing the rights of a party (Code Civ. Proc. § 1286.2, subd. (a)(3).) Misconduct includes circumstances creating a reasonable impression of possible arbitrator bias. Given the exceedingly narrow scope of judicial review of arbitration awards,



assuring both the actual and apparent impartiality of a neutral arbitrator is crucial to the legitimacy of arbitration as a dispute resolution mechanism. Courts are empowered to act where that impartiality can reasonably be questioned. Here, the arbitrator's credibility finding rested on unacceptable misconceptions about English proficiency and language acquisition. These misconceptions, in turn, give rise to a reasonable impression of possible bias on the part of the arbitrator requiring reversal of the judgment and vacating the arbitration award, even though this issue was not raised earlier before the trial court.

Where employee left to work for competitor, trial court should have stayed proceeding until completion of arbitration when common factual questions existed as to misappropriation of trade secrets by former employee and competitor.

In *Mattson Technology, Inc. v. Applied Materials, Inc.* (Nov. 1, 2023) 96 Cal. App. 5th 1149, Canfeng Lai left Applied Materials for a new job at Mattson Technology. Before leaving, he emailed himself a number of files containing Applied trade secrets. Applied sued both Lai and Mattson for violating the Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.) and, as against Lai, for breaching his employment contract. The court granted Lai's motion to compel arbitration under the arbitration clause in his employment contract, but rejected Mattson's claim that it, too, was entitled to arbitrate. It then denied Mattson's motion to stay the litigation pending Lai's arbitration, and issued a preliminary injunction to protect Applied's confidential information pending the proceedings. Mattson appealed.

Reversed in part. The trial court correctly found that Mattson, as a nonparty to Lai's employment contract with Applied, could not compel Applied to arbitrate against it. It also properly issued the preliminary injunction. However, it erred in declining to stay the litigation against Mattson pending arbitration of its claims against Lai. Code of Civil Procedure Section 1281.4 provides that where arbitration has been ordered, courts may stay the proceeding until arbitration has been completed. Though courts may allow for nonarbitrable matters to proceed, the party seeking such action has the burden of proving that its claim is independent from the arbitrable issues. Here, the facts demonstrated that the trade secret claims against both defendants were intertwined and, therefore, unseverable. They shared common factual questions about Lai's activities during his last week at Applied and Mattson's purported involvement in those activities.

In H-2A Temporary Agricultural Program, that allows employers to recruit foreign workers, arbitration clause is a material term that must be included in job description submission to Department of Labor.

In *State of California v. Alco Harvesting LLC* (Nov. 22, 2023) 97 Cal.App.5th 456, Alco Harvesting LLC used the H-2A Temporary Agricultural Program, which allows employers to recruit foreign agricultural workers when the domestic labor market cannot meet employers' needs. The United States Department of Labor (DOL) must certify an employer's participation in the H-2A program. This process requires the employer to submit a "job order" describing "the material terms and conditions" of the jobs for which it seeks foreign workers. Plaintiff and respondent Jesus Guzman is a foreign worker hired by Alco to work at farms

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owned by appellant Betteravia Farms. He later brought employment claims against appellants. Alco moved to compel arbitration pursuant to an arbitration agreement presented to and signed by Guzman at his orientation in Mexico. The trial court found the agreement void and denied the motion. It considered arbitration a “material term and condition” of Guzman's employment, and as such, a job requirement that Alco should have disclosed during the H-2A certification process.

Affirmed. The trial court correctly noted Alco had not listed mandatory arbitration as one of the material terms of employment when it sought DOL certification to hire Guzman and other temporary workers under the H-2A program. This violated federal regulations requiring disclosure of such terms and prevented Alco and Betteravia from enforcing any subsequent arbitration agreement imposed on the workers.

Ninth Circuit clarifies steps necessary to challenge arbitration agreement's delegation clause and criteria to consider.

In *Bielski v. Coinbase, Inc.*, 87 F.4th 1003 (9th Cir. Dec. 5, 2023), Abraham Bielski filed an action in district court against Coinbase, Inc., an online cryptocurrency exchange, under the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693–1693r, and Regulation E, 12 C.F.R. §§ 1005.1–1005.20, for failing to investigate the unauthorized transfer of \$31,000 from his account. Coinbase moved to compel arbitration under the arbitration provision in his User Agreement that included a delegation clause, delegating to the arbitrator questions regarding arbitrability of the dispute. The district court denied the motion, finding both the delegation provision and the arbitration agreement unconscionable and inseverable. Coinbase timely appealed.

Reversed. In order to challenge a delegation provision to ensure that a court can review its challenge, the party resisting arbitration must specifically reference the delegation provision and make arguments challenging it; a court need not first evaluate the substance of the challenge, as required by the Sixth and Eleventh Circuits. Agreeing with the Third and Fourth Circuits, this Ninth Circuit panel held that a party may use the same arguments to challenge both the delegation provision and the arbitration agreement, so long as the party articulates why the argument invalidates each specific provision. Because Bielski specifically challenged the delegation provision, the district court correctly considered that challenge.

In evaluating an unconscionability challenge to a delegation provision under California law, a court must be able to interpret that provision in the context of the arbitration agreement as a whole, which may require examining the underlying agreement as well. Here, the district court correctly considered the whole context surrounding the delegation provision in its analysis of the provision's validity.

Finally, the delegation provision in context was not unconscionable. The clause's low levels of procedural and substantive unconscionability failed to tip the scales to render it unenforceable. Accordingly, the district court erred in refusing to enforce the delegation provision. Coinbase's motion to compel arbitration should have been granted.

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Motion to compel arbitration denied because Health and Safety Code Section 1363.1 requirements for health care service plans not met.

In *Baglione v. Health Net of California, Inc.* (Dec. 6, 2013) 2023 WL 8446102, Plaintiff Salvatore Baglione obtained medical insurance with Defendant Health Net of California, Inc., through his employer, Santa Clara County. His Health Net enrollment forms included an arbitration clause. Plaintiff sued Health Net, alleging breach of contract after Health Net refused to pay for medication necessary to treat his chronic health condition. Health Net moved to compel arbitration. The trial court denied the motion, finding Health Net failed to comply with the mandatory arbitration disclosure requirements of Health and Safety Code Section 1363.1(d). Health Net appealed.

“Section 1363.1 establishes mandatory disclosure requirements for health services plans that require binding arbitration.”

Affirmed. Section 1363.1 establishes mandatory disclosure requirements for health services plans that require binding arbitration. The enrollment forms did not comply with Section 1363.1, subdivisions (a) and (c), both of which require clarity of disclosure. Subdivision (a) provides: “The disclosure shall clearly state whether the plan uses binding arbitration to settle disputes, including specifically whether the plan uses binding arbitration to settle claims of medical malpractice.” Subdivision (c) provides: “The disclosure shall clearly state whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other disputes relating to the delivery of service under the plan, or both[.]” In addition, Health Net’s agreement with the County failed to comply with Section 1363.1(d), which requires that the disclosure be displayed immediately before the signature line provided for the representative of the group contracting with a health service plan. In light of the multiple failures to comply with Section 1363.1, the trial court correctly denied Health Net’s motion to compel arbitration.

Nursing home’s confidentiality provision in admission agreement rendered arbitration clause unenforceable.

In *Haydon v. Elegance at Dublin* (Dec. 19, 2023) 2023 WL 8743357, Sally Ann Haydon required assisted living care at Elegance of Dublin due to her age and dementia. In the admission process, Haydon signed an agreement with confidentiality and arbitration clauses. She sued Elegance at Dublin and related entities under the Elder Abuse and Dependent Adult Civil Protection Act (“Act,” Welf. & Inst. Code, § 15600 et seq.), alleging sexual assault by a caregiver. Defendants moved to compel arbitration. In opposition, Haydon claimed she lacked capacity to agree to arbitration and that the arbitration provision was unconscionable. The trial court denied the motion finding a “high degree of procedural unconscionability” because Haydon “was presented with a 44-page prolix [a]greement to sign under time pressure,” and the agreement was “formatted and drafted in a difficult-to-understand manner.” The court also found the agreement and arbitration clause were “set in what appear[ed] to be small 8 or 10-point single-spaced text” and the multiple signature blocks were “confusing.” The court found that “[t]he odd manner in which [Haydon] signed the main signature block implie[d] that she was in fact confused by this.” The court also found a “high degree of substantive unconscionability” based on three components of the arbitration provision and the applicable JAMS rules. It concluded the arbitration provision could not be enforced due to unconscionability. Defendants appealed.

“Here, the agreement’s confidentiality provision prohibited disclosure of the arbitration’s existence, content, or results, thereby forcing Haydon to keep her claims hidden.”



“Thus, the confidentiality provision was substantively unconscionable to a high degree.”

Affirmed. Substantial evidence supported the trial court’s finding of both procedural and substantive unconscionability. Substantive unconscionability arises when contracts impose a one-sided or harsh result. Here, the agreement’s confidentiality provision prohibited disclosure of the arbitration’s existence, content, or results, thereby forcing Haydon to keep her claims hidden. That would defeat the Act’s purpose of protecting a vulnerable population and unreasonably benefit Defendants, while discouraging other victims from pursuing claims. Thus, the confidentiality provision was substantively unconscionable to a high degree. The agreement was procedurally unconscionable because it was formatted and drafted in a manner that was difficult to understand. The trial court correctly refused to compel arbitration.

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