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Hon. Michelle R.
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ADR UPDATE

COURTS, NOT ARBITRATORS, DECIDE ARBITRABILITY

Coinbase, Inc. v. Suski, 144 S. Ct. 1186 (2024)

Coinbase operates a cryptocurrency exchange platform. Its users must sign an agreement when creating their accounts that contains an arbitration agreement with a delegation clause: the arbitrator must decide all disputes under the contract, including whether a given dispute is arbitrable. Users who participated in a Coinbase sweepstake sued Coinbase in a class action. The sweepstake contract contained a forum selection clause stating that California courts “shall have sole jurisdiction of any controversies regarding the [sweepstakes] promotion.” Coinbase contended that the arbitrator decides arbitrability. The users contended that the courts decide arbitrability.

This case tackled the issue of who decides arbitrability where there are multiple seemingly conflicting contracts. The U.S. Supreme Court noted: “Courts shall not assume parties have agreed to arbitrate ‘arbitrability’ unless there is clear and unmistakable evidence that they did so.”¹

It then held that where the parties have agreed to two contracts—one delegating arbitrability to the arbitrator and the other, either explicitly or implicitly, sending arbitrability disputes to the courts—the court, rather than the arbitrator, must decide which contract governs.

COURT CANNOT COMPEL NON-SIGNATORIES TO ARBITRATE

Soltero v. Precise Distribution, Inc., 322 Cal. Rptr. 3d 133 (2024)

Nelida Soltero signed an employment contract with a temporary staffing agency, Real Time Staffing Services, LLC. The contract contained an arbitration clause that defined

“the company” to include multiple entities, but not its clients. Real Time placed Soltero as a temporary worker with one of its clients, Precise Distribution, Inc. Soltero had no arbitration agreement with Precise. She worked at Precise from October 2017 through January 2021.

Subsequently, Soltero filed a wage and hour class action against Precise; Real Time was not named as a defendant. Precise filed a motion to compel arbitration. Although Precise was not a signatory, it argued it was entitled to compel arbitration based on theories of equitable estoppel, third party beneficiary, and agency.

The appellate court explained and dispensed with each of the issues raised in the case, as summarized here.

Equitable estoppel: To rely on this doctrine, the claims plaintiff asserts against the non-signatory must depend upon or be inextricably intertwined with the underlying contractual obligations contained in the arbitration clause. In her complaint, Soltero does not mention or rely on her employment agreement.

Third party beneficiary: For the court to find that the non-signatory is a third party beneficiary to the arbitration agreement, Precise would have to show that the arbitration clause was made expressly for its benefit. To the contrary, the arbitration clause in this case expressly excludes clients, and Precise was a client.

Agency: The court of appeal noted that a principal-agent relationship does not arise as a matter of law whenever a staffing agency provides a client with a temporary worker. To find such a relationship, there must be evidence that the staffing agency and the client exercised control over one another. Agency was not alleged in the complaint and no evidence of control was offered.

SEVERING UNCONSCIONABLE PROVISIONS BASED ON TOTALITY OF CIRCUMSTANCES

Ramirez v. Charter Communications, Inc., 16 Cal. 5th 478 (2024)

This case centered on several provisions in an arbitration agreement. It required the employee losing a motion to compel arbitration to pay the employer's attorney's fees, required the employee to pay the employer's attorney's fees without a finding that employee's claim was frivolous or groundless, and shortened the time limits for filing claims.

The trial court concluded the agreement's provisions were unconscionable, and declined to enforce it. It also found a lack of mutuality in which claims could be arbitrated, and found a provision limiting discovery to be unconscionable. The court denied the motion to compel. It found that two or more provisions of the agreement were procedurally and substantively unconscionable, and refused to sever the conscionable provisions without conducting further inquiry to determine whether the unconscionable provisions should be severed.

The court of appeal affirmed on the same basis. The California Supreme Court remanded for the court of appeal to reconsider severance.

A unanimous California Supreme Court found that the provision limiting discovery was not unconscionable when the agreement could be read to give the arbitrator discretion to order further discovery. It analyzed the arbitrator's authority over discovery more broadly than the court of appeal.

The supreme court noted: "The assessment of whether a discovery clause is unconscionable should focus on general factors that can be examined without relying on subsequent developments." It held that, as the agreement gave the arbitrator the authority to resolve all discovery disputes in a manner allowing a full and equal opportunity to discovery and present relevant and material evidence, the agreement would permit the arbitrator to expand discovery limitations of the agreement if necessary to satisfy *Armendariz v. Foundation Health Psychcare Services, Inc.*² It directed that on remand, this finding should be part of the reconsideration of *Charter Communications, Inc.*'s request to sever the offending provisions.

The supreme court also noted there is no bright line numerical rule prohibiting severance when an arbitration agreement has two or more unconscionable provisions. It held that even if an agreement contains multiple

unconscionable provisions, as here, a court must analyze whether they may be severed and the remainder of the agreement enforced. A court need not sever just because there are two or more unconscionable provisions, nor is it required to sever an unconscionable term even if there is only one such term.

The California Supreme Court explained that courts are to look at the various purposes of the contract. If its central purpose is tainted with illegality, the contract as a whole cannot be cured. If the illegality is collateral to the main purpose of the contract, and the unlawful provision can be excised without augmenting or rewriting the contract such that the agreement can be cured, then the court should determine whether the unconscionability should be cured through severance or restriction in the interests of justice. In making that determination, a court may consider whether severing the unconscionable terms would "function to condone an illegal scheme and whether the defects in the agreement indicate that the stronger party engaged in a systematic effort to impose arbitration on the weaker party not simply as an alternative to litigation, but to secure a forum that works to the stronger party's advantage. If the answer to either question is yes, the court should refuse to enforce the agreement." The decision allowed that a court may also consider the deterrent effect of each option.

Further, while acknowledging the trial court's discretion under California Civil Code section 1670.5 to refuse to enforce the contract, the California Supreme Court found that if the contract contains a severance clause, a court should consider that to be an expression of the parties' intent that the agreement be cured if possible.

Finally, though *Charter Communications, Inc.* argued that denying a motion to compel arbitration based upon unconscionability contravenes the Federal Arbitration Act (FAA),³ the California Supreme Court disagreed. It underscored that the FAA seeks to treat the interpretation and enforcement of arbitration provisions equally with other contracts, not more enforceable than other contracts.

In conclusion, the court underscored: "The approach adopted here is not hostile to arbitration."

EVIDENCE FAILED TO ESTABLISH 'INAUTHENTIC' ARBITRATION AGREEMENT

Ramirez v. Golden Queen Mining Co., LLC, 102 Cal. App. 5th 821 (2024)

Carlos Ramirez filed a class action lawsuit against his employer, Golden Queen Mining Company, alleging unfair competition, as well as various violations of the California Labor Code.

In opposition to Golden Queen's motion to compel arbitration, Ramirez declared that he did not recall being given the arbitration agreement, the related handbook agreement, or the other documents that Golden Queen presented with its moving papers. His declaration did not say whether he reviewed the arbitration agreement and related papers presented, and did not state whether the handwritten signature on them was or was not his.

On appeal from the denial of the employer's motion, the court of appeal, while agreeing with prior decisions that individuals are capable of recognizing their own handwriting, found that the employee's failure to deny that a signature is his or her own, and merely declaring an inability to recall signing, is insufficient to create a dispute as to the signature's authenticity.

The case was remanded to the trial court to determine the issue of unconscionability raised in the opposition to the motion to compel arbitration.

AGREEMENT OF INFINITE DURATION DEEMED SUBSTANTIVELY UNCONSCIONABLE

***Cook v. University of Southern California*, 102 Cal. App. 5th 312 (2024)**

Pamela Cook filed a complaint against her former employer, the University of Southern California (USC), alleging discrimination and harassment based on race, failure to accommodate her disabilities, and actual and constructive termination. USC moved to compel arbitration.

The arbitration agreement, which stated it would survive the term of employment, required the employee to arbitrate all claims against the employer, its officers, trustees, agents, affiliates, and employees—regardless of whether the claims arose from the employment relationship.

The court of appeal affirmed the denial of the motion, finding that because the agreement was of infinite duration and broad in scope, applying to all claims whether or not employment-related, it was substantively unconscionable. There was also a lack of mutuality. The court further held that, since signing the agreement was a condition of employment, there was a degree of procedural unconscionability as well.

Due to the trial court's finding that the unconscionable provisions permeated the agreement and were not severable, the court of appeal affirmed the trial court's denial of the motion to compel arbitration.

EMPLOYEE NOT BOUND BY 'PROMPTLY AND CLEARLY REJECTED' AGREEMENT

***Mar v. Perkins*, 102 Cal. App. 5th 201 (2024)**

Winston Mar was an employee of Sierra Constellation Partners, LLC. When Sierra modified its employment agreement to require employees to arbitrate their disputes, Mar promptly rejected the arbitration provision and made clear that he refused to be bound by an arbitration agreement. Mar worked for Sierra for another 19 months before resigning. He then filed suit against Sierra and its CEO, Lawrence Perkins, for buyout of his partnership interest in the LLC. Defendants filed a motion to compel arbitration.

The court of appeal noted that where an employer modifies an arbitration agreement to require employees to arbitrate and clearly communicates that it is a condition of future employment and that continued employment constitutes assent, the employees are generally bound. However, where an employee, as here, promptly rejects arbitration and clearly refuses to be bound, there is no mutual assent to arbitrate.

Thus, the court affirmed the trial court's denial of the motion to compel arbitration.

AIRPLANE FUEL TECHNICIAN EXEMPT FROM FAA'S ARBITRATION PROVISIONS

***Lopez v. Aircraft Serv. Int'l, Inc.*, 2024 U.S. App. LEXIS 17784 (9th Cir. , July 19, 2024)**

Aircraft Service International appealed the district court's denial of its motion to compel arbitration of a wage and hour action brought under California law by Danny Lopez, who was employed by Aircraft Service as a fuel technician. Lopez argued that he was a transportation worker engaged in foreign or international commerce and therefore exempt from the arbitration provisions of the Federal Arbitration Act.⁴

Held: A technician who places fuel in a plane used in foreign or interstate commerce is a transportation worker because the worker plays "a direct and necessary role in the free flow of goods across borders."⁵ Lopez was thus

exempt from the FAA's arbitration requirements. The district court's order was affirmed.

ENDNOTES

- * Hon. Michelle R. Rosenblatt (Ret.) has been a mediator and arbitrator on a wide range of civil disputes with ADR Services, Inc. since 2016, when she retired from the bench after 23 years of judicial service. She taught judicial education throughout her career on the bench and is a frequent participant in continuing education programs. She also served for five years as editor of the California Judges Association magazine, *The Bench*.
- 1. Quoting *AT&T Technologies, Inc. v. Comm. Workers*, 475 U. S. 643, 649 (1986).
- 2. *Armendariz v. Foundation Health Psychcare Serv., Inc.*, 24 Cal. 4th 83 (2000).
- 3. 9 U.S.C. ch. 1.
- 4. 9 U.S.C. § 1.
- 5. Citing *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 at 458 (2022).