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United States

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A. Legislation and rules

A.1 Legislation

The United States is a federal jurisdiction with arbitration-related legislation existing at both the federal (national) and state levels. The Federal Arbitration Act ("FAA") of 1925 continues to be the controlling Federal statute regarding arbitration and reflects a well-established national policy in favor of arbitration. There has been no federal legislation passed this year that amends or alters the FAA. However, in the wake of the United States Supreme Court's decision in *Epic Systems Corp. v. Lewis* (summarized below), there have been legislative efforts to limit the power of arbitration agreements in the consumer and employment contexts, including the Arbitration Fairness Act of 2018 (s. 2591) and the Ending Forced Arbitration of Sexual Harassment Act of 2017 (H.R. 4734). It remains to be seen whether such legislation will pass.

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A.2 Institutions, rules and infrastructure

Arbitral institutions in the United States include JAMS (formerly Judicial Arbitration and Mediation Services), which is headquartered in Irvine, California, but maintains offices in 27 locations throughout North America and the United Kingdom; the International Institute for Conflict Prevention & Resolution ("CPR"), headquartered in New York City; and the ICDR, which is an affiliate of the AAA and maintains administrative offices in New York City, Houston, Texas, Miami, Florida, and Singapore. None of these institutions amended their rules over the past year.

B. Cases

B.1 United States Supreme Court confirms legality of class action waivers used in conjunction with employment arbitration agreements

In a landmark decision, the United States Supreme Court held in *Epic Systems Corp. v. Lewis*[4] that, under the FAA, individual agreements to arbitrate between employees and their employers (and class action waivers included with those agreements) must be enforced, regardless of any right those employees might otherwise have to seek class action relief.

The opinion resolved three cases pending before the Supreme Court, all of which had been brought by various employees seeking class action relief against their employer in spite of the presence of an arbitration clause requiring individualized arbitration in their employment agreements. The employees advanced two primary arguments as to why the arbitration clauses in their employment agreements should be disregarded. First, the employees contended that the FAA's saving clause, which provides that courts may refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," was applicable to their cases because the National Labor Relations Act ("NLRA") prohibits

[4] 138 S. Ct. 1612 (2018).

any restrictions of an employee's right to "engage in concerted activities." Thus, the employees argued that the defense of illegality (under the NLRA), as a "ground[] exist[ing] at law … for the revocation" of their arbitration agreements, triggered the FAA's saving clause, allowing for the agreements to be disregarded. Alternatively, the employees argued that, even if the FAA's saving clause did not apply, the NLRA's right to concerted action held primacy over the FAA's requirement that arbitration agreements be enforced—a position espoused in 2012 by the National Labor Relations Board—and the NLRA rather than the FAA control.

Referring to the FAA's directive requiring courts to enforce arbitration agreements as "emphatic," the court denied the employees' claims, requiring that their disputes be resolved through individual arbitration rather than by means of class action litigation. In rejecting the employees' first argument under the FAA's saving clause, the court noted that "[n]ot only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures … including [the parties'] intention to use individualized rather than class or collective action procedures." The court, relying on earlier precedent, held that the FAA's saving clause, by its terms, only recognized "defenses that apply to 'any' contract." Accordingly, "the clause offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from … an agreement to arbitrate.'"

The court then turned to the employees' second argument, that the NLRA's prohibition of restrictions on concerted activity overrides the FAA's requirement that arbitration agreements be enforced. The court began to address this argument with the observation that, "[w]hen confronted with two Acts of Congress allegedly touching on the same topic, this court is not at 'liberty to pick and choose among congressional enactments' and must instead 'strive to give effect to both.'" Accordingly, "[a] party seeking to suggest that two statutes cannot be harmonized … bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow,'"

which is "clear and manifest." Noting that the concept of class action litigation was nonexistent at the time the NLRA was passed, and that the term "concerted activities" in the context of the rest of the NLRA, did not appear to include class actions, the court refused to find such a clear a manifest intention, and refused find conflict between the NLRA and the FAA. Accordingly, the employees' claims were dismissed.

B.2 United States Appeals Court refuses to vacate award for arbitrator's failure to issue subpoena and awards attorneys' fees against party seeking vacatur.

In *Hyatt Franchising LLC v. Shen Zhen New World I, LLC*,[5] the United States Court of Appeals for the Seventh Circuit resolved multiple disputes between parties to an arbitration concerning the enforceability of the arbitral award under sections 10(a)(3) and 10(a)(4) of the FAA, as well as the responsibility for attorneys' fees arising after the award was rendered. Hyatt Franchising LLC ("Hyatt") and Shen Zhen New World I, LLC ("Shen Zhen") had entered into a contract providing for the renovation of a Los Angeles hotel in 2012. Three years later, Hyatt commenced arbitration proceedings against Shen Zhen for breach of the parties' agreement, in which the arbitrator awarded Hyatt USD 7.7 million in damages and USD 1.3 million in attorneys' fees. When Hyatt sought enforcement, Shen Zhen disputed the award's validity on two grounds.

First, Shen Zhen contended that the award should be vacated under section 10(a)(3) of the FAA, which allows an arbitral award to be vacated "where the arbitrators were guilty of misconduct … 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." Shen Zhen contended that the arbitrator's refusal to issue a third-party subpoena requiring the deposition of its former counsel amounted to a "refusal to hear evidence." The court rejected this argument and noted in doing so that "[t]he statutory phrase 'refusing

[5] 876 F.3d 900 (7th Cir. 2017).

to hear evidence' concerns the conduct of the hearing, not the conduct of discovery. Indeed, nothing in the Federal Arbitration Act requires an arbitrator to allow any discovery. Avoiding the expense of discovery under the Federal Rules of Civil Procedure and their state-law equivalents is among the principal reasons why people agree to arbitrate." Accordingly, the court held that a section 10(a)(3) challenge based on a refusal to hear evidence must be based upon the arbitrator's conduct at the hearing. Shen Zhen also argued that the arbitrator had "misbehaved" by failing to disqualify Hyatt's counsel DLA Piper, after it hired Shen Zhen's former counsel, thus triggering section 10(a)(3)'s "any other misbehavior" clause. The court again disagreed with Shen Zhen, noting that the allegations of misbehavior pertained to Hyatt's counsel's alleged conduct, not any alleged misbehavior by the arbitrator, and "only misbehavior by the arbitrator comes within the residual clause of § 10(a)(3)."

Third, Shen Zhen argued that the arbitrator disregarded federal and state franchise law, and, in doing so, "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made," justifying an order to vacate under section 10(a)(4) of the FAA. In response to this contention, the court noted that, "Arbitrators 'exceed[] their powers' under section 10(a)(4) if they order the parties to violate the rights of persons who have not agreed to arbitrate—if, for example, an arbitrator purports to allow businesses to fix prices, to the detriment of consumers. But when an arbitrator does only what the parties themselves could have done by mutual consent, section 10(a)(4) does not intervene." Accordingly, the court rejected Shen Zhen's third argument for vacating the award.

Finally, the court briefly addressed the attorneys' fees incurred by Hyatt in the course of confirming the arbitral award and responding to Shen Zhen's arguments and appeals seeking an order to vacate. The court held that "commercial parties that have agreed to final resolution by an arbitrator, yet go right on litigating, must pay their adversaries' attorneys' fees." The court continued, "an entity that insists on

multiplying the litigation must make the other side whole for rounds after the first," round—the arbitration. The court instructed Shen Zhen to pay Hyatt's fees, inviting Hyatt to "apply for an appropriate order" should the parties not agree on the appropriate amount.

B.3 United States Appeals Court requires higher burden of proof for evident partiality of a party-appointed arbitrator.

A recent opinion from the United States Court of Appeals for the Second Circuit has confirmed a complaining party must sustain a higher burden to prove evidence partiality on the part of a party-appointed arbitrator, who, per the court, is "expected to espouse the view or perspective of the appointing party." In *Certain Underwriting Members of Lloyds of London v. Insurance Company of the Americas*,[6] certain underwriting members of Lloyds of London (i.e., the "Underwriters") sought to vacate a USD 1.5 arbitral award rendered against them in a reinsurance dispute with Insurance Company of the Americas ("ICA") under section 10(a)(2) of the FAA, on the ground "there was evident partiality" in ICA's party-appointed arbitrator, Alex Campos.

In arguing for an order to vacate, the Underwriters pointed out that Campos was President and CEO of a human resources firm which (i) shared an office with ICA in Arizona and (ii) had hired a director of ICA, who was a witness in the arbitration, as its CFO. Further, Campos allegedly failed to disclose these and other dealings with ICA that might bear on his partiality. Instead, Campos merely disclosed that he "had some potential business dealings with [ICA's Chairman] about ten years ago that never really materialized."

The United States District Court for the Southern District of New York, hearing the Underwriters' argument in the first instance, found that the undisclosed relationships were "significant enough to demonstrate evident partiality," noting that it was "troubl[ed]" by the apparent willfulness of the non-disclosures. Analyzing the issues

[6] 892 F.3d 501 (2d Cir. 2018).

under the "reasonable person" standard, under which evident partiality would be found "where a reasonable person would conclude that an arbitrator was partial to one party to the arbitration," the District Court found evident partiality and vacated the arbitral award. ICA appealed the District Court's decision.

The Appeals Court began its analysis by noting that "the FAA does not proscribe all personal or business relationships between arbitrators and the parties," and that, the standards for disclosure set forth in the ethical rules of various arbitral institutions are not necessarily the same standards required by the FAA for confirming an award. On the contrary, the court "require[s] a showing of something more than the mere 'appearance of bias' to vacate an arbitral award," as well as a "direct connection between [the arbitrator] and the outcome of the arbitration." The court noted the competing goals reflected in partiality decisions, between ensuring candor and transparency and encouraging participation of arbitrators with sufficient industry experience and subject matter expertise. As the court observed, "the best informed and most capable potential arbitrators are repeat players with deep industry connections ... Familiarity with a discipline often comes at the expense of complete impartiality." The court added that "[t]he principles … that counsel tolerance of certain undisclosed relationships between arbitrator and litigant are even more indulgent of party-appointed arbitrators, who are expected to serve as *de facto* advocates."

With this in mind, the court decided, for the purpose of considering a section 10(a)(2) evident partiality challenge to an arbitral award, to apply a different standard for a party-appointed arbitrator than the "reasonable man" standard used in evaluating partiality of neutral arbitrators. Under its new test, evident partiality based on nondisclosure of party relationships by a party-appointed arbitrator may only be found if (i) the arbitrator's non-disclosure "violates the arbitration agreement" (which, in this case required that the arbitrators be "disinterested") or (ii) "the party-appointed arbitrator's partiality had a prejudicial effect on the award." Consistent with its decision, the

court remanded the issue of evident partiality for analysis under this standard.

B.4 United States District Court refuses to confirm arbitral award requiring foreign sovereign to recognize an energy concession in its own territorial waters.

In a rare exception to US Courts' general inclination to summarily confirm arbitral awards, in *Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Natural Gas*,[7] the United States District Court for the District of Columbia denied a request by upstream energy company Hardy Exploration & Production (India), Inc. to confirm an arbitral award rendered against the Government of India.

In 1997, Hardy Exploration & Production (India), Inc. ("HEPI") entered into a contract with the Government of India ("India") that would allow HEPI to search for and potentially extract hydrocarbons from an area off of India's southeastern coast (the "Block"). A dispute arose thereafter between the parties regarding the time period within which HEPI was required to begin operations. India filed a petition in the Delhi High Court to invalidate the award and HEPI filed a petition to enforce the award with the same court. After years of delay in the Delhi courts, HEPI filed a petition in the District Court to enforce the remaining portions of the award. India responded by arguing that the US proceedings should be stayed pending the outcome of the proceedings in the Delhi High Court. India further argued that, if the US proceedings were not stayed, the district court should refuse to enforce the award on US public policy grounds.

The District Court first denied India's request to stay the US enforcement proceedings. In doing so, the court considered: (1) the general objectives of arbitration; (2) the status of foreign proceedings and the estimated time for those proceedings to be resolved; (3) whether the award sought to be enforced would receive greater

[7] 314 F. Supp. 3d 95 (D.D.C. 2018).

scrutiny in the foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceedings; (5) a balance of the possible hardships to the parties; and (6) any other circumstances that could shift the balance in favor of or against adjournment. The court found that these factors weighed in favor of denial.

Having refused to stay the proceedings, the court next considered whether to enforce the award. India argued that requiring the return of the Block to HEPI would violate US public policy by divesting India of possession and control of its own territorial waters and natural resources. India further argued that an award of interest for disobedience of the tribunal's injunctive decree would act as a punitive measure against India, and would similarly violate US public policy.

The court acknowledged that there is a strong US public policy favoring confirmation of foreign arbitration awards and that a party opposing an award bears the heavy burden of demonstrating that confirmation would violate the "most basic notions of morality and justice." The court was therefore required to balance two important policy values here: respect for the sovereignty of other nations and respect for foreign arbitral agreements. The court acknowledged that that the United States had a public policy interest in respecting the rights of other nations to control the extraction and processing of natural resources within their own sovereign territories and found that "forced interference with India's complete control over its territory violates public policy to the extent necessary to overcome the United States' policy preference for the speedy confirmation of arbitral awards." The court also concluded that, because the award's components were so intertwined, confirmation of the interest portion would also violate US public policy.

B.5 New York Appellate Court reverses vacatur of award for manifest disregard.

The decision reached by the Commercial Division of the New York Supreme Court in *Daesang Corporation v. The NutraSweet Company*,[8] which was reported in last year's edition of this Yearbook, has been reversed by the Appellate Division of the New York Supreme Court.[9] As previously reported, the trial court had set aside a USD 100 million arbitration award on the basis that the arbitrators had manifestly disregarded New York law when they rejected NutraSweet's counterclaims for breach of contract and fraudulent inducement.

The Appeals Court's primary reason for reversing the Trial Court was its opinion that the alleged errors committed by the arbitral tribunal, while they "might reasonably be criticized on the merits," did not rise to the level of manifest disregard of New York law, a "concept that means more than a simple error in law." The Appeals Court noted that the tribunal had determined the breach-of-contract counterclaim to have been waived, and that, given US Supreme Court precedent, such "an arbitral decision even arguably construing or applying the [procedural record] must stand, regardless of a court's view of its (de)merits." With respect to the fraud-in-the-inducement counterclaim, the arbitral tribunal had considered both parties' arguments raising conflicting case law before deciding the issue and "made a good-faith effort to apply the facts of [the] case to the[] standard proffered by NutraSweet." As a result, the FAA did not allow vacatur of an award for manifest disregard with respect to either counterclaim.

[8] 55 Misc. 3d 1218(A), 58 N.Y.S.3d 873 (Sup. Ct. 2017).
[9] *Daesang Corp. v. NutraSweet Co.*, 85 N.Y.S.3d 6 (App. Div. 1st Dept. 2018).