

FEBRUARY 5, 2021

Second Circuit Arbitral Award: 2020 in Review

By Hon. Henry Pitman (Ret.)

Regardless of whether one is a proponent or opponent of mandatory arbitration clauses, they have become ubiquitous. According to a March 2015 study performed by the Consumer Financial Protection Bureau, 53% of credit card agreements and 99.9% of all mobile phone agreements contain mandatory arbitration provisions (Consumer Fin. Prot. Bureau, Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(A) (2015), https://files.consumerfinance.gov/f/201503_cfb_arbitration-study-report-to-congress-2015.pdf). A 2017 survey found that approximately half of all private-sector non-union employees are subject to mandatory arbitration agreements. The same survey also found that as the size of the employer increased, the likelihood of a mandatory arbitration agreement also increased. The survey found that 62% of employers with 1,000



to 4,999 employees required arbitration of employee grievances and that 68% of employers with more than 5,000 employees required such arbitration (Alexander J.S. Colvin, *The Metastasis of Mandatory Arbitration*, 94 Chi.-Kent L. Rev. 3, 9, 11 (2019)). Given the warm reception the Supreme Court of the United States has given to arbitration clauses (see *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018) (upholding arbitration agreements that waive an employee's right to participate in

a collective action); *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 470-71 (2015) (Federal Arbitration Act preempts an invalid state law); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (Federal Arbitration Act preempts a state rule permitting consumers to demand class-wide arbitration), the prevalence of such clauses will likely increase.

Given the frequency with which arbitration clauses appear in commercial relationships, it is incumbent upon attorneys—both litigators and

transactional attorneys—to have at least some familiarity with how the courts have addressed arbitration-related issues. To that end, the following is a summary of the United States Court of Appeals for the Second Circuit's jurisprudence on arbitration-related issues during 2020. I have broken the cases down into seven categories based on the primary issue before the court: (1) the standard and scope of review of an arbitral award, (2) the effect of an arbitral award, (3) the existence of an arbitration



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agreement, (4) arbitrability, (5) the adequacy of arbitration as a dispute resolution mechanism, (6) discovery issues related to arbitration and (7) appealability of an order compelling arbitration. Where a summary order's recitation of the facts did not provide a complete understanding of the case, I have referred to the district court's decision to fill any gaps.

I. Standard and Scope of Review of an Arbitral Award

National Retirement Fund v. Metz Culinary Mgm't, Inc., 946 F.3d 146 (2d Cir. Jan. 2, 2020), *cert. denied*, No. 19-1336, 2020 WL 5882286 (Oct. 5, 2020): The vast majority of the opinion deals with the arcane subject of the correct interest rate assumptions to be applied in calculating withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 as it relates to the Employee Retirement Income Security Act (ERISA). However, in reaching its decision, the Second Circuit briefly noted that an arbitrator's legal conclusions are subject to *de novo* review, while an arbitrator's findings of fact enjoy a presumption of correctness that can be overcome only by a "clear preponderance" of the evidence.

Savine v. Interactive Brokers, LLC, 799 F. App'x 97 (2d Cir. Apr. 3, 2020) (summary order): The unsuccessful party to an arbitration conducted in the United Kingdom sought to vacate the award, and the district court dismissed the petition for lack of subject matter jurisdiction.

The Second Circuit explained that under its precedents interpreting the Convention on the Recognition and Enforcement of Foreign

Arbitral Awards ("the New York Convention"), the country in which the award is made has "primary jurisdiction" to set aside or vacate an arbitral award; the courts of signatory states have "secondary jurisdiction" and can only decide whether to enforce the foreign award. Thus, in response to appellant's claim that the award was contrary to United States securities laws, the district court had the power to enforce or refuse to enforce the award; it did not have the power to set aside or vacate the award. Thus, the district court's dismissal was affirmed.

Barnard College v. Transport Workers Union, 801 F. App'x 40 (2d Cir. Apr. 16, 2020) (summary order): Barnard was the unsuccessful party in an arbitration brought by a security guard alleging wrongful termination. The guard had been terminated for sexual harassment; the arbitrator found that the termination lacked just cause and ordered reinstatement despite also expressly finding that the guard had engaged in humiliating and hurtful behavior. Barnard objected to the award, arguing that requiring reinstatement violated the public policy against sexual harassment in the workplace.

Although the court noted that an arbitral award may be vacated if it violates a public policy, it went on to explain that vacatur is appropriate only when the award itself, as opposed to the underlying reasoning, violates public policy. The court went on to state that an arbitral award requiring reinstatement violates the policy against sexual harassment only when the subject of the award has engaged in multiple acts of harassment. In the case

before the court, the guard was charged with a single act of harassment, and although other, similar charges were pending, they had not been proven. Thus, the court found that the arbitrator could properly find the guard to be a first offender for whom reinstatement was not precluded.

EB Safe, LLC v. Hurley, 19-3859-cv, 2020 WL 6140616 (2d Cir. Oct. 20, 2020) (summary order): The losing party in an arbitration objected to the prevailing party's petition to confirm the award on the grounds that the fee award was in "manifest disregard" of the law and that the award was procured through fraud, namely, perjured testimony. The Second Circuit affirmed the district court's decision confirming the award. Noting the judiciary's limited role in reviewing arbitration awards, the court stated that a challenge to an arbitration award alleging manifest disregard of the law required a showing that (1) the law that was allegedly ignored was clear and clearly applicable to the disputed issue, (2) the law was applied incorrectly and infected the outcome and (3) the arbitrator knew of the law and its applicability to the matter in issue. With respect to the contention that the award had been procured by fraud, the court reaffirmed long-standing precedent that such a challenge can succeed only where it is "abundantly clear" that the prevailing party offered perjured testimony, that the unsuccessful party could not have reasonably discovered the fraud prior to the issuance of the award and that the perjured testimony related to a material issue.

Pagaduan v. Carnival Corp.,

No. 19-3400-cv, 2020 WL 6939738 (2d Cir. Nov. 25, 2020) (summary order): Plaintiff, who was injured while serving as a crew member on one of defendant's vessels, sought non-enforcement or vacatur of a Philippine arbitral award that granted him \$5,100 in sickness allowance and \$510 in attorneys' fees but denied any further relief. Plaintiff claimed that he was entitled to relief under Article V(1)(b) of the New York Convention because he was not given proper notice of the arbitration or was otherwise unable to present his case and under Article V(2)(b) because recognition and enforcement of the award would be contrary to the public policy of the United States.

The Second Circuit affirmed the denial of plaintiff's motion. With respect to plaintiff's first claim, the court pointed out that plaintiff had made the tactical decision in the arbitral proceeding to focus primarily on subject matter jurisdiction. Although this decision may have limited his ability to address the merits of his claim, it did not cause him to be unable to present his case. With respect to plaintiff's policy argument, the court pointed out that the New York Convention's "emphasis on enforcing international arbitral awards and 'considerations of reciprocity' requires that the 'public policy defense should be narrowly construed'" and applied only where enforcement of the foreign arbitral award "would violate our most basic notions of morality and justice." The court found that the fact that the law applied in the foreign arbitration may have provided for lesser remedies than United States law did not meet this standard.

II. Binding Effect of Arbitration Awards

Ninety-Five Madison Co. v. Vitra Int'l AG, No. 20-1432, 2020 WL 7086186 (2d Cir. Dec. 4, 2020) (summary order): A landlord and a commercial tenant entered into a settlement agreement in which the landlord approved the tenant's making certain alterations and the parties agreed to arbitrate "all disputes arising out of or relating to the interpretation and enforcement of the agreement and tenant's alterations" and expressly waived any right to appeal the arbitrator's decision. A subsequent arbitration found that the landlord had breached the settlement agreement, thereby excusing the tenant's obligations under the lease.

The landlord subsequently sued the tenant's guarantor for the tenant's breaches of the lease that occurred both before and after the settlement. The Second Circuit affirmed the dismissal of the complaint. The court found that claims based on breaches allegedly committed before the settlement were barred by the settlement agreement. With respect to breaches allegedly committed after the settlement agreement, the court found that collateral estoppel precluded the landlord from relitigating the claims that were decided by the arbitrator. The court rejected the landlord's claim that it did not have a full and fair opportunity to litigate its claims in the arbitration because there was no discovery or live testimony in the arbitration and no right of appeal from the award, finding that the landlord had voluntarily waived these rights in the settlement agreement.



III. Existence of an Agreement to Arbitrate

Agarunova v. Stella Orton Home Care Agency, Inc., 794 F. App'x 138 (2d Cir. Feb. 24, 2020) (summary order): Plaintiff alleged that a former employer had violated the Fair Labor Standards Act and the New York Labor Law. Plaintiff was a former member of a union that had entered into a collective bargaining agreement ("CBA") in 2012 that required arbitration of disputes concerning the interpretation and application of the CBA but did not require arbitration of disputes arising under federal and state laws. In 2014, the union and the employer entered into a memorandum of understanding to continue negotiations to implement an alternative dispute resolution ("ADR") procedure to address claims under federal and state laws, and in December 2015, after plaintiff had ceased to be represented by the union, the union, and the employer agreed to an ADR procedure

for such claims.

The court affirmed the district court's decision denying the employer's motion to compel arbitration, finding that the 2014 memorandum of understanding was nothing more than an unenforceable agreement to agree. With respect to the 2015 agreement, the court found that plaintiff was not bound by it because she was no longer represented by the union at the time it was signed.

China Shipping Container Lines Co. v. Big Port Serv. DMCC, 803 F. App'x 481 (2d Cir. Mar. 5, 2020) (summary order), *cert. denied*, No. 20-128, 2020 WL 6701086 (Nov. 16, 2020): This declaratory judgment action matter arose out of an attempt by Big Port to re-litigate a decision of a Singaporean court, which held that there was no binding arbitration agreement between China Shipping and Big Port with respect to a dispute concerning the sale of fuel oil. Most of the opinion deals with

the district court's decision to accord the foreign judgment comity. Of interest here was Big Port's argument that the liberal federal policy in favor of arbitration warranted revisiting the Singaporean court's decision. The Second Circuit rejected the argument, explaining that arbitration can be ordered only where there is an enforceable agreement to arbitrate. Because the existence of an agreement to arbitrate was the precise issue decided by the Singaporean court, Big Port had received all the process to which it was entitled, and the federal policy in favor of arbitration was not sufficient to warrant re-litigating the issue.

Trina Solar US, Inc. v. Jasmin Solar PTY Ltd., 954 F.3d 567 (2d Cir. Apr. 2, 2020): JRC, acting as agent for Jasmin, entered into a contract with Trina to purchase solar panels. The contract contained an arbitration clause requiring that any disputes or controversies arising out of or in

connection with the contract between the parties be submitted to binding arbitration. A dispute arose concerning Trina's performance, and Trina commenced and arbitration against JRC and Jasmin. Jasmin took the position that it was not bound by the arbitration clause, refused to participate in the arbitration and subsequently moved to vacate the award entered against it for lack of subject matter jurisdiction. The district court denied Jasmin's motion and confirmed the award; the Second Circuit reversed this aspect of the district court's decision.

The court considered whether Jasmin was bound by the arbitration clause on two different theories: agency and the direct benefits theory of estoppel. The court's analysis under the agency theory was extremely fact specific. After noting that an agent for a disclosed principal may enter into a contract that, by its terms, excludes the principal as a party and that such an exclusion does not require any particular form of words, the court considered the language and structure of the contract to determine whether Jasmin was excluded as a party. The contract referred to JRC and Trina as the only parties to the contract and mentioned Jasmin only once as a guarantor of JRC's payment obligation. In addition, the court found that if Jasmin was a party to the contract, the express reference to it as a guarantor would lead to the odd result that it was guaranteeing itself. The contract also provided that it could be terminated by written notice from one party to another party. If Jasmin were a party to the contract, this provision would suggest that

the contract could be terminated by a notice from JRC to Jasmin—a result that the court found the parties could not have intended. Finally, the contract's third-party-beneficiary clause provided that the contract did not create any rights on the part of any person not a party to the contract. The court found that this language, in conjunction with the other language in the contract identifying JRC and Trina as the only parties to the contract, was further evidence of an intent to exclude Jasmin as a party.

With respect to the direct-benefits theory, the court noted that in order for a non-signatory to be bound by an arbitration clause, this theory required that the benefits to that party must flow directly from the agreement rather than indirectly from the contractual relation of the parties to the agreement; i.e., the non-signatory must invoke the contract to obtain its benefit, or the contract must expressly confer a benefit on the non-signatory. The court found that neither of these conditions were met; thus, Jasmin was not bound under this theory.

Nicosia v. Amazon.com, Inc., 815 F. App'x 612 (2d Cir. June 4, 2020) (summary order): Plaintiff asserted claims with respect to a 2013 purchase from Amazon, and Amazon moved to compel arbitration. Plaintiff opposed the motion, arguing that he never received notice of or consented to the arbitration clause in Amazon's conditions of use. The court concluded that plaintiff had actual knowledge of the arbitration clause no later than September 2014, when Amazon raised the arbitration clause in the instant litigation.

The court went on to explain that plaintiff's continuing to make purchases on Amazon after September 2014 constituted consent to the arbitration clause. Finding that the issue had been forfeited, the court found it unnecessary to reach the question of the retroactivity of plaintiff's consent.

The district court, however, noted that Second Circuit precedent teaches that consent to an arbitration clause that does not contain an express limitation to future disputes should be applied to pre-existing claims (*Nicosia v. Amazon.com, Inc.*, No. 14 CV 4513 (SLT)(LB), 2017 WL 10111078 at *10 (E.D.N.Y. Aug. 18, 2017) (Report and Recommendation), adopted at, 384 F. Supp. 3d 254 (E.D.N.Y. 2019), citing *Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir. 1972); and *Reid v. Supershuttle Int'l, Inc.*, No. 08 CV 4854 (JG), 2010 WL 1049613, at *5 (E.D.N.Y. Mar. 22, 2010)). Thus, the district court reasoned that by virtue of plaintiff's continued purchases on Amazon after 2014, when he had actual notice of the arbitration clause, plaintiff was required to arbitrate his claims with respect to his 2013 purchase.

ABM Indus. Grps. LLC v. Int'l Union of Operating Engineers, 968 F.3d 158 (2d Cir. July 29, 2020) (*per curiam*): An employer sought to confirm an arbitration award that required two employees to repay certain benefit payments erroneously paid pursuant to a CBA. The award resulted from an arbitration that arose out of a claim initially made by the employees that they were

owed certain vacation credits, and their union filed a grievance seeking these benefits. In response, the employer asserted that the employees had actually received benefits to which they were not entitled. The union and the employer agreed to arbitrate the conflicting claims. The employees resisted confirmation of the award in favor of the employer, arguing that they were entitled to the benefit payments and that they were not bound by the CBA because they had not signed it, notwithstanding the facts that their union had identified them as "Grievants" in the arbitration and had made submissions expressly on their behalf.

Although the district court had accepted the employees' arguments, the Second Circuit reversed and confirmed the award. The court held that the employees directly manifested their intent to be represented by their union by authorizing the union to submit their claim for unpaid benefits to arbitration. Based on the foregoing, and on principles of federal labor law, the court found that the employees had consented to the union's acting as their agent in the arbitration, and that the employees were bound by the result of the arbitration.

Arnaud v. Doctor's Assocs. Inc., 821 F. App'x 54 (2d Cir. Sep. 15, 2020) (summary order): A patron of a well-known chain of sandwich shops brought a class action claiming that he had received unsolicited text messages in violation of the Telephone Consumer Protection Act. Defendant responded by seeking arbitration, arguing that by clicking on an "I'M IN" button on defendant's website that en-

abled plaintiff to obtain a free sandwich under certain conditions, plaintiff had agreed to an arbitration clause set out on a separate web page accessible by a hyperlink on the promotional page.

The Second Circuit affirmed the denial of defendant's motion to compel arbitration. The court noted that, in such a situation, a consumer is bound by the terms and conditions only if he has actual notice or "inquiry notice"; a consumer will be placed on "inquiry notice" only where web page design renders the existence of such additional terms reasonably conspicuous. The court found that the terms and conditions were not reasonably conspicuous because the link to them was in a small font, at the bottom of the promotional page, and was introduced by no language other than the shorthand "T&Cs."

Dylan 140 LLC v. Figueroa, No. 20-461-cv, 2020 WL 7251003 (2d Cir. Dec. 10, 2020): Plaintiff, a building owner, entered into a CBA with a union under which the plaintiff was required to make contributions to benefit funds for certain employees. The funds in issue were jointly administered, multi-employer labor-management trust funds. The underlying dispute in the case was plaintiff's liability for its failure to make contributions on behalf of a particular part-time employee. The building owner commenced a declaratory judgment action under ERISA and the Labor Management Relations Act ("LMRA"). Prior to the commencement of the declaratory judgment action, the funds had commenced an arbitration. The issues on appeal were the building owner's

claims that (1) the declaratory judgment action should take precedence over the arbitration as the first-filed proceeding and (2) it was not required to arbitrate disputes with the funds because the funds were not parties to the CBA, notwithstanding the fact that the CBA identified the funds as third-party beneficiaries and expressly gave them the right to commence a litigation or arbitration to collect delinquent contributions.

The Second Circuit affirmed the district court, rejecting both of the building owner's contentions. The court first noted that the language of the CBA, when correctly interpreted, expressly provided the funds with the right to commence an arbitration seeking delinquent contributions. Second, the court explained that there was no principle of law according priority to a litigation filed before an arbitration and, in any event, the arbitration in this case was actually commenced prior to the commencement of the litigation. Finally, the court noted that although the district court did not err in looking to the Federal Arbitration Act ("FAA") and the case law under it for guidance on certain procedural issues, it went on to note that the FAA did not directly apply to actions brought under Section 301 of the LMRA.

IV. Arbitrability

Belton v. GE Capital Retail Bank, 961 F.3d 612 (2d Cir. June 16, 2020), *petition for cert. filed*, No. 20-481 (Oct. 14, 2020): Plaintiffs had opened accounts with defendant credit card companies; the cardmember agreements contained arbitration clauses. Plaintiffs' accounts became

delinquent, and the issuing banks "charged off" the debts and sold them to third parties. The banks also reported the status of the debts to the major credit reporting companies as charged off, indicating delinquent and outstanding debts. Plaintiffs subsequently filed a petition in bankruptcy and obtained orders discharging all debts; these orders operated as an injunction against any attempt to collect the discharged debts pursuant to 11 U.S.C. § 524(a)(2). Despite the discharge, the banks continued to report the debts as charged off without mentioning the bankruptcy discharge. The debtors moved to hold the banks in contempt, arguing that their refusal to update their credit reports constituted an attempt to collect a discharged debt in violation of the Section 524(a)(2) injunction. The banks responded by seeking to compel arbitration pursuant to

held that only the bankruptcy court has the authority to enforce the Section 524 injunction and that permitting arbitration of such claims would be in "inherent conflict" with the Bankruptcy Code. The issue in *Belton* was whether the intervening Supreme Court decision in *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018), which addressed, among other things, when other federal statutes might displace the broad provisions of the FAA, warranted reconsideration of *Anderson*.

The *Belton* court concluded that *Epic* did not impugn the continuing vitality of *Anderson*. The court held that a claim alleging a violation of a bankruptcy court's discharge order is not an arbitrable dispute and that only the court that issued the discharge order can enforce it through a contempt citation.



the terms of the cardmember agreements. Both the bankruptcy court and the district court denied the banks' motion.

Two years earlier, in *In re Anderson*, 884 F.3d 382 (2d Cir. 2018), *cert. denied*, 139 S.Ct. 144 (2018), the Second Circuit had answered virtually the identical question and

V. Adequacy of Arbitration as a Dispute Resolution Mechanism

DiCesare v. Town of Stonington, 823 F. App'x 19 (2d Cir. Aug. 14, 2020) (summary order): A former municipal employee claimed that he had been wrongfully terminated in retaliation for his exercise of his First Amendment rights

and that he was denied due process in connection with his termination proceedings. After noting that plaintiff had received notice of certain charges of misconduct and had been afforded a right to respond before his termination, the court found that a plenary arbitration proceeding commenced by plaintiff after his termination and pursuant to the applicable CBA satisfied due process.

VI. Discovery

Washington National Ins. Co. v. Obex Group LLC, 958 F.3d 126 (2d Cir. May 1, 2020): Claimant commenced an arbitration alleging fraud in connection with a reinsurance agreement and subpoenaed testimony and documents for use at the hearing from a non-party witness. The witness refused to comply with the subpoena, and claimant filed a petition seeking enforcement of the subpoena pursuant to Section 7 of the FAA. The witness offered a number of arguments in opposition to the subpoena, none of which were successful.

The witness first argued that the court lacked subject matter jurisdiction because, among other things, the parties in the underlying arbitration were not completely diverse and the amount in controversy did not exceed \$75,000. With respect to the argument that complete diversity was lacking, the court held that the relevant inquiry is whether complete diversity exists among the parties to the petition to enforce the subpoena—not with respect to the parties to underlying arbitration. The court further held that a co-claimant, whose presence would have destroyed complete diversity in the en-

forcement proceeding, was not a necessary party. With respect to the witness' argument concerning the jurisdictional amount, the court noted that the amount in controversy in the underlying arbitration was \$134 million and that claimant had alleged the documents in issue had a value in excess of \$75,000. Because the witness had not demonstrated to a legal certainty that the amount in controversy was actually smaller, the court rejected the argument concerning the amount in controversy.

The non-party witness next argued that the subpoena was improper because it sought pre-hearing discovery. This argument was based on claimant's offer to waive the witness' appearance at the hearing if the documents were produced prior to the hearing. Although the court reaffirmed its prior holding that a Section 7 subpoena could not be used for pre-hearing discovery, it went on to hold that a Section 7 subpoena that validly sought production at the hearing was not rendered invalid by the claimant's offer to accept the documents prior to the hearing and to waive the witness' appearance at the hearing.

Third, the witness argued that the district court improperly failed to rule on its Federal Rules of Civil Procedure Rule 45 objections; namely, that the subpoena was unduly burdensome and sought matter that was privileged or otherwise protected. The court also rejected this argument, finding that the objections could be raised before the arbitrator. The court, however, left open the questions of whether the district court had the authority to rule on such objections and whether leaving the Rule

45 objections to the arbitrator would deprive the non-party witness of any avenue for judicial review, finding that those issues were not before it.

Finally, the witness claimed that because the arbitrators had previously held a hearing in the Eastern District of Pennsylvania, venue in the Southern District of New York, where claimant filed its petition, was improper. The court rejected this argument, noting that the arbitration agreement provided for arbitration in New York, New York, and that the subpoena was returnable at a law office located in Manhattan. The court found the fact that the arbitrators had previously sat in Pennsylvania in connection with another summons was not relevant.

Sampedro v. Silver Point Capital, L.P., 958 F.3d 140 (2d Cir. May 1, 2020): This matter involved an issue under 28 U.S.C. § 1782, which provides, in pertinent part, that "upon the application of any interested person," a district court "may order [a person] to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." Sampedro and his brother were terminated from their employment with a Spanish company, Codere, S.A., and they commenced an action in the Commercial Court of Madrid. Codere was the only defendant in the action. Shortly thereafter, Sampedro and his brother also commenced an arbitration before the International Chamber of Commerce (ICC) arising out of the same facts and seeking the same relief that was sought in the Commercial Court. The appellants before the Second Circuit, directors

and significant shareholders of Codere, were named as respondents in the ICC arbitration. The district court had granted Sampedro discovery from appellants pursuant to Section 1782, without limiting the use of that discovery to the Spanish litigation, but had denied appellants the right to take reciprocal of discovery from Sampedro. The denial of this reciprocal discovery was the issue before the Second Circuit. Appellants argued that the district court erroneously concluded that only the Spanish litigation was relevant to the Section 1782 application and failed to consider the ICC arbitration.

The Second Circuit began its analysis by noting that district courts have broad discretion in addressing applications under Section 1782 so long as that discretion is exercised in a manner consistent with the purposes of the statute, namely, providing assistance to participants in international litigation and encouraging foreign countries to provide similar assistance to courts in the United States. The court went on to explain that although a grant of discovery under Section 1782 may be conditioned on the applicant's providing reciprocal discovery, it was not required to do so. The court noted that the district court justifiably found that Sampedro had not commenced the Spanish litigation as a ruse to obtain discovery for the ICC arbitration, and that nothing in Section 1782 required a court to consider proceedings, such as the ICC arbitration, that were not the subject of the 1782 application. Thus, the court found that requiring the district court to permit reciprocal discovery would

be adding a condition not required by the language of the statute. With respect to appellants' fallback argument—that their interest in the Spanish litigation justified reciprocal discovery—the court noted that the denial of reciprocal discovery was not an abuse of discovery because appellants, as non-parties to the Spanish litigation, would not be able to use the discovery in the Spanish litigation. In conclusion, the court found that appellants had failed to show that the district court had abused the broad discretion granted to it under Section 1782.

In re Guo, 965 F.3d 96 (2d Cir. July 9, 2020): This matter also involved an issue under Section 1782. The issue in *Guo* was whether a proceeding before the China International Economic and Trade Arbitration Commission ("CIETAC") constituted a "foreign or international tribunal" within the meaning of Section 1782. The Second Circuit had previously held that Section 1782 was not applicable to "arbitral bod[ies] established by private parties" (*National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) ("*NBC*")) and the parties from whom discovery was sought in *Guo* opposed the petitioner's application, arguing that CIETAC was a private arbitral body. The issue was a difficult one because CIETAC was not a purely private entity, nor did it have all the attributes of a judicial body. The

People's Republic of China established CIETAC as a part of the China Council for the Promotion of International Trade ("CCPIT"), CIETAC's administrative leadership was appointed by the CCPIT and both CIETAC and CCPIT received some funding from the Chinese government. CCPIT played no role in selecting CIETAC's list of arbitrators, and potential arbitrators were not required to have any connection with the Chinese government, although Chinese law did set certain minimum standards for arbitrators. CIETAC's jurisdiction was limited to disputes in which the parties had agreed to CIETAC arbitration and to certain disputes with Chinese governmental entities.

Most of the court's analysis in *Guo* dealt with the question of whether *NBC* was still good law after the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), which held that an application under Section 1782 did not require that (1) a foreign action be pending at the time of the application, (2) the information be discoverable under the law of the foreign jurisdiction and (3) the information sought would be discoverable in a domestic litigation analogous to the foreign proceeding. After concluding that *Intel* did not impair the continued validity of *NBC*, the court found that CIETAC was a private international commercial arbitral body and

thus outside the scope of Section 1782. The court explained that determining the status of an arbitral body as either private or governmental did not turn on the body's origin, but instead required consideration of a range of factors, including the body's degree of state affiliation and functional independence and the extent to which the parties controlled the body's jurisdiction. "In short," the court stated, "the inquiry is whether the body in question possess the functional attributes most commonly associated with private arbitration." The court then went on to analyze the relationship between CIETAC and the Chinese government and the manner in which CIETAC obtained jurisdiction over a dispute, and concluded that because it functioned almost identically to private arbitration panels, it did not constitute a "foreign or international tribunal" within the meaning of Section 1782.

Johnson v. National Football League Players Ass'n, 820 F. App'x 51 (2d Cir. July 17, 2020) (summary order): Johnson was suspended for 10 games without pay as a result of a positive drug test, and the suspension was affirmed in arbitration. Johnson's petition to vacate the award was denied, and he appealed, arguing that the arbitrator improperly denied his request for certain discovery. After noting that review of LMRA arbitration awards is "among the most deferential in the law," the court found that

arbitrator's decision was well within his broad discretion and that there was no fundamental unfairness given that plaintiff had notice of the discipline that was contemplated and had full and fair opportunity to present his arguments in opposition.

VII. Appealability of Order Compelling Arbitration

Zimmerman v. UBS AG, 789 F. App'x 914 (2d Cir. Jan. 14, 2020) (summary order): Plaintiff brought suit against several defendants for violations of the securities laws. The district court dismissed the claims against certain defendants, and it granted the motion of the remaining defendant to compel arbitration, stayed the proceedings and administratively closed the case until the arbitration was completed.

The Second Circuit dismissed the appeal for lack of subject matter jurisdiction because there was no appealable "final order." The court found that the order was not appealable under Section 16(a)(1) of the FAA because it was not an order affecting an award or partial award, nor was it appealable under Section 16(a)(3) because it was not final. The Second Circuit explained that the district court stayed proceedings pending the conclusion of the arbitration and that the administrative closure of the case had no jurisdictional significance.