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Attorneys at Law

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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 62
ARBITRATION CLAUSES IN IC AGREEMENTS: THE WINDS ARE SHIFTING

Recently, the First Circuit Court of Appeals in a case of first impression (*Oliveira v. Prime*)[1] further demonstrated the importance of choice of law provisions in Independent Contractor Service Agreements ("ICSAs") as they relate to arbitration. The decision comes on the heels of the Ninth Circuit's ruling in *Swift*[2] and in direct conflict with the Eighth Circuit's holding in *Green*[3] relating to the enforceability/applicability of arbitration clauses in agreements between Independent Contractors ("ICs") and motor carriers.

The court in *Oliveira* was faced with the question of who should make the decision as to the applicability/enforceability of an arbitration provision when a federal court is confronted with a motion to compel arbitration under the Federal Arbitration Act ("FAA") in a case where the parties delegated, in their ICSA, questions of arbitrability to the arbitrator.

The FAA was enacted in 1925 and intended to provide a federal policy favoring arbitration agreements with the limited exception in Section 1 of the FAA regarding "contracts of employment of transportation workers". The court in *Oliveira* reviewed this exception and held that the determination regarding whether the Section 1 exemption applied to a contract must be made by a federal court and not an arbitrator, before compelling arbitration under the FAA. The decision follows the Ninth Circuit's holding earlier this year in *Swift*, but is contrary to the weight of district-court authority in at least 12 other cases.

In *Swift*, despite provisions that explicitly referred to drivers as "independent contractors" and language stating that drivers had the right to daily autonomy, the court found that various terms of the agreement, including indefinite duration; allowing for at-will termination; controlling delivery schedules; and unilateral ability of Swift to modify the terms of the agreement, were ultimately indicative of an employer-employee relationship. Thus, the court determined that *Swift's* Contractor Agreement was a contract of employment of a transportation worker and the underlying arrangement was exempt from the FAA.

In contrast is the 2011 *Green* case, in which the court analyzed an airport shared-ride shuttle service that classified its drivers as franchisees rather than employees and required them to sign Unit Franchise Agreements specifying the rights and obligations of the parties. The drivers claimed that they should be classified as employees rather than franchisees and therefore exempt from the FAA. The court held that the parties implicitly agreed to allow the arbitrator to determine the threshold question of arbitrability when incorporating the rules of the American Arbitration Association ("AAA") into the parties' agreement. Thus, the court refused to address the issue and dismissed the case.

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In *Oliveira*, a motor carrier, Prime, offered an apprenticeship program to persons seeking to become CDL drivers. At the conclusion of the program, Prime informed the driver that he/she would make more money as an IC rather than a company driver; directed the driver to a company in Prime's building (Abacus Accounting) to choose a name and form an LLC; then directed the driver to an office of another company in Prime's building (Success Leasing) to lease a truck before being directed to Prime's store to purchase $5,000 worth of equipment and fuel on store credit.

The plaintiff alleged that Prime exerted significant control over his work by requiring him to transport Prime's shipments, mandating that he complete Prime's training courses and controlling his schedule to the point where he was unable to work for any carrier other than Prime.

After reviewing the operative facts, the First Circuit examined the standard established in *Green*, which held questions of arbitrability are for the arbitrator to decide when the parties to the contract have expressly delegated such duties to the arbitrator and quickly dismissed *Green* as flawed, and relied upon *Swift*. The court reasoned that the question of the court's authority to act under the FAA is an "antecedent determination" for the district court to make before it can compel arbitration under the FAA. If the FAA does not apply due to the employment exemption, then the court has no jurisdiction to compel arbitration under the FAA. Therefore, it is up to the court, and not the arbitrator, to decide the threshold question of arbitrability in the First Circuit.

Additionally, in determining the applicability of the exemption for contracts of employment of transportation workers, the *Oliveira* court examined the ordinary meaning of Section 1 of the FAA. The Court agreed with the plaintiff that the phrase "contract of employment" simply means "agreements to do work." The court disagreed with Prime's argument that federal policy favoring arbitration should trump plain text. The court concluded that when ambiguities arise, the plain meaning of the text shall control, stating "contracts of employment" found in Section 1 of the FAA supports the conclusion that the phrase means agreements to perform work and includes ICSAs. Accordingly, the court held that the federal policy favoring arbitration could not overcome this plain meaning and therefore, transportation worker agreements that establish or purport to establish an independent contractor relationship, such as ICSAs, are on their face, contracts of employment and exempt from the FAA.

The holdings in *Oliveira* and *Swift* allow the courts in such jurisdictions to review the facts of the actual IC/motor carrier relationship before the matter even reaches an arbitrator, despite the intentions of the parties upon execution of an ICSA. Thus, the two decisions send the message that "boilerplate" ICSAs are dangerous and emphasize the importance of: (1) reviewing and carefully drafting the choice of law provision in an ICSA as it relates to arbitration; and (2) remaining alert to the underlying operational conduct between the motor carrier and the IC.

An alternative approach to consider, rather than dealing with the FAA and the nuances of the Section 1 employment exemption, is whether it would be more beneficial to alter the ICSA to specify an applicable state law as the governing law for all issues, including arbitration, to a state that has a liberal policy in favor of arbitration and does not contain a transportation worker exemption similar to the FAA.

If you have any questions about your agreements or the applicability of the FAA, Benesch's Transportation and Logistics team would be glad to assist.

[1] *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017).

[2] *Van Dusen v. Swift Transp. Co.*, 830 F.3d 893 (9th Cir. 2016).

[3] *Green v. SuperShuttle International, Inc.*, 653 F.3d 766 (8th Cir. 2011).

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