

DECEMBER 2023
NEWS AND EVENTS

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Hello December! You are the last month, so be the BEST month!

Our monthly newsletter wraps up a great year of featured new members, conferences, speakers and our North America Branch First Annual Retreat in Santa Fe, New Mexico. Congratulations to all those who have contributed to our success! This year we feature a Chair's Report from David E. Sharp, a new Arbitration Decision of Interest and outstanding monthly featured members as we include as often as possible. My thanks again to David Sharp, Lonnie Schooler, Julie Sullivan, and my legal assistant, Lisa Berry, for their contributions to this year's NAB newsletter. Please note the dates for next year's

Annual Retreat in San Diego – April 19–21, 2024. Thank you and Merry Christmas to everyone.

*Steven J. Cologne FCI Arb
NAB Newsletter Editor
Vice Chair / Communications*

A Message from NAB Chair, David E. Sharp FCI Arb



Dear All,

As we enter the last month of 2023, I want to invite you all to the Annual General Meeting, **December 12 at 10 a.m. Eastern** on Zoom (registration [here](#)). Registration for the 2024 Annual Members' Retreat in San Diego, **April 19–21, 2024**, will be sent later this week.

Your help for next year is requested. Please email me with any ideas for improving the NAB experience or for programming—webinars, in-person events, collaborative events with other organizations or Branches, social/networking events, etc. NAB also needs volunteers to help with the Newsletter, social media, and website. I am at dsharp@sharplawhouston.com.

Join me in thanking **Lonnie Schooler FCI Arb** who has completed his service as Texas Chapter Chair and in congratulating **Lisa Powell FCI Arb** and **Denise Peterson FCI Arb** who are the new Co-Chairs of Texas Chapter.

Thank you and congratulations to **Ava Borrasso C. Arb, FCI Arb** (NAB's Vice Chair/ Membership) and **Bryan Branon ACI Arb** (CI Arb's Relationship Manager for the Americas) for organizing the sold out Kickoff Event for the Miami International Arbitration Society's Arbitration Week, to **Gary Birnberg FCI Arb** for Moderating a

panel at the event, Cecilia Flores Rueda FCIArb for being on a panel at the event, and Ava Borrasso C.Arb, FCIArb for presenting at the event. NAB collaborated with JAMS in presenting the event. JAMS also hosted our successful ARF in Miami and JAMS' Sherman Humphrey deserves special thanks for his efforts.

Finally, best wishes to each of you for any of the December holidays that you are celebrating.

Arbitration Decision of of Interest

Supreme Court to Resolve Scope of Arbitral Delegation Clauses

by Lionel M. Schooler FCIArb
Jackson Walker LLP*

Introduction. A new arbitration decision is looming before the United States Supreme Court.

During the 2022 Term, the Supreme Court issued its decision in *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023), holding that because Federal Arbitration Act Section 16(a) grants a right of interlocutory appeal by a proponent of arbitration when a district court denies a motion to compel arbitration, the district court is then obligated to stay its proceedings while such an appeal is ongoing. The controversy focusing upon the substantive issue of the arbitrability of the underlying claims was not addressed in *Bielski*. Even so, while the petition in *Bielski* was pending before the Supreme Court, the United States Court of Appeals for the Ninth Circuit tackled the merits of the controversy regarding arbitrator delegation in *Suski v. Coinbase, Inc.*, 55 F.4th 1227 (9th Cir. 2022). The Ninth Circuit upheld a lower court decision superseding delegation of arbitrability to an arbitrator based upon the wording of a subsequent agreement.

In *Coinbase, Inc. v. Suski*, No. 23–3, the Supreme Court has now granted certiorari to resolve a circuit split over whether an initially signed agreement delegating the issue of arbitrability to an arbitrator can be superseded by a subsequent agreement that refers solely to a judicial choice of forum.

Background Facts. Coinbase operates a cryptocurrency exchange platform. This platform enables users to transact business in different currencies. As an online service provider, Coinbase requires any such user to agree in advance to the terms of Coinbase's User Agreement. That Agreement requires arbitration to resolve any dispute arising out of or relating to the Agreement or the services provided, and further delegates to an arbitrator the authority to address the arbitrability of disputes about enforcing, revoking, validity or scope of the underlying Agreement.

Coinbase later sponsored a sweepstakes offering digital currency prizes to participants. This sweepstakes contained a set of official rules which included a forum selection clause specifying that "California courts shall have sole jurisdiction of any controversies regarding the promotion of the sweepstakes."

Participants in the sweepstakes subsequently filed a class action in San Francisco, contending that Coinbase's promotion of the sweepstakes violated California law. These participants and the putative class apparently did not dispute that they had agreed to one or another version of the User Agreement.

Given the terms of that Agreement, Coinbase moved to compel arbitration of the entire proceeding, advocating not only that all of the claims in question were subject to arbitration but also that a determination about arbitrability was specifically delegated to the arbitrator.

The District Court disagreed. It addressed the issue of arbitrability itself, determining that the perceived conflicts between the two agreements had not been delegated to an arbitrator to decide. It then proceeded to review the above quoted forum selection clause in the second agreement, ruling that this clause superseded the arbitration delegation terms in the previously signed User Agreement.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the lower court's ruling. 55 F.4th 1227. The Ninth Circuit rejected Coinbase's argument that the issue of proper forum was within the scope of the original arbitration clause, and thus delegated to the arbitrator to decide. The Court held that "scope" pertains to the width of the application of that agreement, not to the reach of a subsequent superseding agreement. Therefore, it ruled that the lower court had properly reviewed this issue itself, rather than refer it to an arbitrator for review.

The *Suski* Court went on to hold that pursuant to California law, the original User Agreement and the subsequent Sweepstakes' Rules were in conflict. It therefore ruled that the District Court correctly held that the forum selection clause from the subsequent agreement superseded the arbitration clause from the prior agreement. While it recognized that the Sweepstakes Rules did not explicitly revoke the arbitration clause in the User Agreement, it nevertheless held that the forum selection clause reflected the parties' intent not to be governed by the arbitration clause when addressing sweepstakes controversies.

Conflicts Among the Circuits on Arbitrator Delegation. The issue in the *Suski* case focuses specifically upon: who decides whether a subsequent contract has narrowed an arbitration agreement that contains a delegation clause?

This question has been addressed in conflicting ways by federal appeals courts around the country. The First and Fifth Circuits have held that when the parties have delegated determinations to an arbitrator, it is the arbitrator who must decide whether a subsequent contract has narrowed or superseded an existing arbitration agreement. See *Bosse v. New York Life Ins. Co.*, 992 F.3d 20 (1st Cir. 2021); *Agere Systems, Inc. v. Samsung Electronics Co.*, 560 F.3d 337 (5th Cir. 2009). By contrast, the Third and Ninth Circuits have adopted the opposite approach. See *Field Intelligence Inc. v. Xylem Dewatering Solutions, Inc.*, 49 F.4th 351 (3d Cir. 2022); *Suski v. Coinbase, supra*.

Guidelines of Prior Supreme Court Decisions. The Supreme Court has held that a delegation clause empowers an arbitrator to decide threshold questions about the arbitration clause itself, such as the scope of the arbitration clause as an agreement or as a touchstone covering a particular controversy. See *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2012). In its petition for certiorari, Coinbase contends that this "stand alone" stature insulates a challenge to an arbitration clause from a challenge to the entire contract, or even solely to the arbitration agreement itself. See *Buckeye Check Cashing, Inc. v. Cardegna* 546 U.S. 440 (2006). It further contends that if there is no specific challenge to a delegation clause, a court is without power to decide the issue of arbitrability. See *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019).

Conclusion. By granting certiorari, the Supreme Court has communicated a willingness to address a vexing issue in arbitration law: the extent to which parties can delegate arbitrability to an arbitrator, and the circumstances under which such a delegation can be overridden. Practitioners and arbitrators should await with interest the outcome of this appeal.

*Mr. Schooler is the immediate Past Chair of the Texas Chapter of the North American Branch of the Chartered Institute of Arbitrators.

New Email Address? If your email address changes, please remember to advise

memberservices@ciarb.org and communications@ciarbnab.com

Upcoming Events & Featured Programs



SAVE THE DATES – April 19–21, 2024, for the Second Annual NAB Members' Retreat in San Diego, California

NAB will hold its Second Annual Members' Retreat in San Diego, California from **Friday, April 19 – Sunday, April 21, 2024**. The event will take place at Humphreys Half Moon Inn on Shelter Island. It will be a chance to meet and network with other NAB members and enjoy all the sights San Diego has to offer! Additional details and a registration link will be available later this week. Check out a video of the venue here:

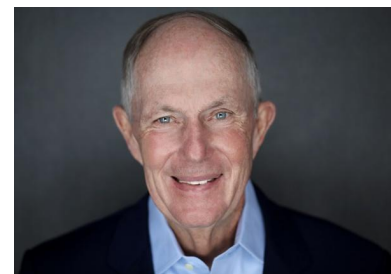
<https://video214.com/play/PiuW3jU7z1uzcBA21Cbviw/s/dark>



The December "Ask the Arbitrator" event will be **Thursday, December 7** at 1:00 p.m. EST/10:00 a.m. PST: "Science Scholar Turned ADR Luminary: Bridging Disciplines for Success" and will feature International Arbitrator, **Harrie Samaras FCI Arb** and will be moderated by **Cariana M. Jones**, a Juris Doctor (J.D.) candidate at the University of Pittsburgh School of Law. Ms. Jones will interview **Ms. Samaras** to gain insights into her professional journey. **This program is free.** Register here for the event:

https://us06web.zoom.us/webinar/register/WN_WQxq8sDLTl6Q6AAE_9W7iA

NAB is proud to serve as a co-sponsor in four webinars presented by Nivalion and Wöss & Partner. The webinars are limited to 75 minutes each from **September to December 2023**, and will present current trends and considerations of this emerging area of law and practice, including the associated risks. NAB Members **Dr. Herfried Wöss** and **Kevin O'Gorman** are part of the distinguished panel of speakers. Details and the full webinar program are available here: [Climate Change in Arbitration and Litigation](#)



The Sixth Annual **Schiefelbein Global Dispute Resolution Conference** will convene top lawyers, counsel for global corporations, internationally-recognized arbitrators and mediators, academics, and leaders at arbitration institutions to engage in discussions on timely issues in international dispute resolution. Les Schiefelbein, a Chartered Institute of Arbitrators Fellow, provided an endowment to the Sandra Day O'Connor College of Law at Arizona State University to establish the Schiefelbein Global Dispute

Resolution Program. The Program is in two parts– an annual Global Dispute Resolution Conference and scholarships for law students to gain knowledge, experience and the necessary professional contacts to prepare them for careers in the global dispute resolution community. The conference will be held on **January 11, 2024**, at the Sandra Day O'Connor College of Law in Phoenix. Click [here](#) for more information and to register.

Join the Membership Match Program

Participate in NAB's **Membership Match Program**. The program aims to add value to Associates and Members through mentoring with Fellows. Once a match is secured, the goal is to meet virtually for 30 minutes, 10 times per year to address issues unique to the mentees. The match is intended to last one year from inception but may be subject to renewal. Please contact CI Arb NAB, Vice Chair of Membership, **Ava Borrasso C.Ar, FCI Arb** at ajb@ajborrassolaw.com if you are interested in participating as a mentor or mentee.



Lonnie Schooler FCI Arb has completed his service as Texas Chapter Chair. Thank you Lonnie!

Congratulations to **Lisa Powell FCI Arb** and **Denise Peterson FCI Arb** who are the new Co-Chairs of Texas Chapter!

The Miami ARF, organized by **John Pinney FCI Arb** and Vice Chair/Training was very successful. Thank you to the distinguished faculty of **Gary Birnberg FCI Arb**, **Cristina Cardenes FCI Arb**, **Gaela Gehring Flores FCI Arb**, **Joan Sterns Johnsen FCI Arb**, **Jim Reiman FCI Arb**, **Cecilia Flores Rueda FCI Arb**, and **Mauricio Gomm Santos FCI Arb**.

Bryan Branon ACI Arb (CI Arb's Relationship Manager for the Americas) organized the sold out Kickoff Event for the Inaugural Miami Arbitration Week event held at Hogan Lovells in Miami on November 8.

Ava Borrasso C.Ar, FCI Arb provided opening welcome remarks, **Gary Birnberg FCI Arb** moderated the Panel Discussion, and **Cecilia Flores Rueda FCI Arb** served as a panelist at the Kickoff Event.

International Arbitrator **Stephen Smith, FCI Arb** was the panelist for the November 15 Ask the Arbitrator: "Arbitration and Mediation Mastery: A Spotlight on– Stephen Smith, FCI Arb." A recording is now available on the [NAB Website](#).

NAB Members: Don't miss an opportunity to promote yourself by publishing in Lexology! Lexology has a broad reach. If you wrote something that you are legally allowed to have published without copyright or other legal restrictions, send it to our Lexology contact, **Ava Borrasso C.Ar, FCI Arb** at Ajb@ajborrassolaw.com.

You can now invite non-members who might be interested to sign up for the newsletter at [CI Arb North America Branch Newsletter](#).

FEATURED MEMBERS

This month's Featured Members are: **Chika Anyichie, Christina L. Beharry, Jeffery Daar, H. Vincent Draa, Elizabeth Ann Morgan, DeAndra Roaché and Joshua B. Simmons.** Learn about them below and on the homepage of NAB's website [NAB Website](#).



Chika Anyichie (Seattle, WA)

Chika Anyichie PhD, FCIArb serves as an arbitrator with Financial Industry Regulatory Authority (FINRA), possessing extensive experience in legal business regulation, compliance, program policy implementation, litigation, and data management. Her diverse background encompasses involvement in United States Federal Government operations, Non-Governmental Organizations (NGOs), and the Private Sector. She holds a PhD in International Arbitration Law from University of Aberdeen, LLM with Merit in International Business Law from University of Central Lancashire, U.K and LL.B in Law from Imo State University, Owerri, Nigeria. She admitted as Barrister and Solicitor of Supreme Court of Nigeria. She possesses an unparalleled legal foundation. A life-long learner, she ventured to Cornell University to pursue a Master Certificate in Human Resources Management, reflecting her unwavering commitment to professional development. She is a Fellow of the Chartered Institute of Arbitrators (FCIArb), a testament of her standing in the field of arbitration. Chika's expertise extends beyond legal matters, as she is a prolific author of numerous articles in Business and Arbitration Law. She is a member of Arbitral Women and served as a representative in United Nations Commission on International Trade Law (UNCITRAL), working group II: Dispute Settlement, 72nd session, 2020.



Christina L. Beharry (Washington, DC)

Christina Beharry FCIArb is a Partner in Foley Hoag's International Litigation and Arbitration Department and co-partner in charge of the firm's Washington, D.C. office. She has represented clients globally in disputes involving various industries including aviation, mining, oil and gas, real estate, renewable energy, manufacturing, agriculture, forestry, healthcare, and telecommunications. In addition, Ms. Beharry publishes regularly on international arbitration and has edited a book titled Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration. Prior to joining Foley Hoag, she practiced in the Trade Law Bureau of the Canadian Department of Foreign Affairs and International Trade in Ottawa. She holds law degrees from the London School of Economics, Cambridge University, and Columbia University.

Jeffery Daar (Los Angeles, CA)

Jeffery Daar FCIArb is based in Los Angeles and has more than 25 years of extensive experience in international litigation and arbitration disputes involving many countries in Europe, Asia



and Latin America. Jeff is a panelist for the AAA/ICDR. He is the immediate Past Chair of the Alternative Dispute Resolution Committee of the California Lawyers Association, an organizer of California International Arbitration Week, and a Past Chair of both The State Bar of California International Law Section and the International Law Section of the Los Angeles County Bar Association. Jeff is currently President of the Los Angeles City Ethics Commission, has served on the Board of Airport Commissioners for the Los Angeles World Airports, and was Chairperson of the Los Angeles Rent Adjustment Commission.



H. Vincent Draa (Chicago, IL)

Vincent Draa FCIArb is an arbitrator with 40 years of experience as an international lawyer focusing on M&A and other complex commercial transactions. He served for 20 years as general counsel for the international operations of Tenneco Inc. and W.W. Grainger Inc. Vincent is Of Counsel to Kochhar & Co., a leading Indian law firm

and an Adjunct Professor at Loyola University (Chicago) School of Law where he developed and teaches a course in Cybersecurity Management. He is a Certified Fraud Examiner. He is a Fellow of the Chartered Institute of Arbitrators, a panelist for the American Arbitration Association, an arbitrator for the Better Business Bureau and a member of the bench at New Era ADR. Vincent is a Fellow of the American Bar Association's Dispute Resolution Section and Vice-Chair of the ABA's Commercial Finance ADR subcommittee.



Elizabeth Ann Morgan (Philadelphia, PA)

"Betty" Morgan FCIArb offers neutral services as an arbitrator, mediator and early dispute analyst. Ms. Morgan has substantial experience with patent litigation, trademark and copyright law, trade secret litigation, restrictive covenants, wage and hour litigation, Title VII, the ADA, ADEA and FMLA. She also has experience with franchise disputes, contract disputes, banking disputes, construction litigation and securities industry practices. Ms. Morgan is the past chair of the American Intellectual Property Law Association ADR Committee. Ms. Morgan is a member of the

commercial, employment and consumer panels of the American Arbitration Association. She serves on the technology, trademark, employment and entertainment panels of the International Institute for Conflict Prevention and Resolution. She is a FINRA arbitrator and a mediator with the World Intellectual Property Organization and the International Trademark Association.



DeAndra Roaché (Bowie, MD)

DeAndra Roaché FCIArb is an arbitrator, mediator, DRB member with a full-time domestic and international ADR practice. She specializes in labor, employment, and construction disputes, and she serves on numerous major arbitration and mediation panels. Ms. Roaché is an adjunct professor at the University of Arizona's law school where she teaches Mediation. She also serves on the Dispute Resolution Board Foundation's Region 1 (US, Canada, Caribbean) Board of Directors and chairs its Mid-Atlantic Region of DRB

Practitioners. She has co-chaired DRB Working Groups for the CPR Institute and is an architect of their Dispute Board Model Rules. Prior to starting her ADR practice, she worked at large global law firms in Washington, DC before amassing extensive experience in the Labor/Collective Bargaining, Arbitration and Mediation processes unique to the Railroad industry as a labor relations professional in the Washington,



Joshua B. Simmons (Washington, DC)

Josh Simmons FCIArb is a Partner at Wiley Rein LLP, where he represents clients in high-stakes international disputes. He has extensive experience in treaty and commercial arbitration proceedings around the world. He has represented foreign sovereigns and international investors across a broad range of industries, including energy, natural resources, technology, and financial services. He also advises companies on national security law, public international law, and transnational litigation in U.S. courts. He teaches international arbitration as an

Adjunct Professor at the University of Virginia School of Law. Prior to joining Wiley Rein, Josh practiced international arbitration at Covington & Burling and Three Crowns. He has also served as an Attorney-Adviser and Senior Adviser in the Office of the Legal Adviser at the U.S. Department of State.

News About Members

This newsletter has expanded to report news about Members. If you have something to report, please email that information to newsletter@ciarbnab.com. To ensure the newsletter goes out the first business day of each month, it is requested that information for the January 2024 newsletter be submitted by December 20, 2023.

When participating in a program or event of another organization, please remember to include in event fliers and publications, if possible, your post-nominal designations such as **FCIArb**. In addition to showcasing credentials you have earned, doing so helps all members by raising recognition of CIArb and, by association with you, helping to demonstrate that CIArb members are highly qualified individuals who have been credentialed by what in our opinion is the world’s leading ADR credentialing organization.

* * *

Get involved with one (or more) of the NAB Committees. Communications (and its social media subcommittee), Programs, and Training would definitely appreciate help. Contact information is on the website or email communications@ciarbnab.com to get directed to the right person(s).

Student Members, please share the information about free student memberships with those of your classmates who have not joined. More details are available on our [website](#).

Facebook – Follow and like NAB’s Facebook Page: [Chartered Institute of Arbitrators North America Branch - Home | Facebook](#). Interact with posts and comment on our monthly “What Do You Think?” feature about developments in ADR.

Twitter – Follow and interact with [NAB’s Twitter account](#).

Instagram – Follow [NAB on Instagram](#) and help grow our presence on Instagram.

Finally, don’t forget to join NAB’s members only [Linkedin Group](#). It is open to all CIArb members. There, you can post questions, articles, and anything that might be of interest to members and comment on our monthly “What Do You Think?” feature about ADR. Also, check out NAB’s public LinkedIn page: [Chartered Institute of Arbitrators - NAB | LinkedIn](#)



STEVEN J. COLOGNE
FCI Arb

NAB Vice Chair /
Communications



JULIA SULLIVAN
FCI Arb

Vice Chair / Social
Media Subcommittee

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