January 6, 2021

ADR Case Update 2021 - 1

Federal Circuit Courts

- **COURT HAD SUBJECT MATTER JURISDICTION OVER MOTION TO VACATE**

  Hale v. Morgan Stanley Smith Barney, LLC
  2020 WL 7349246
  United States Court of Appeals, Sixth Circuit
  December 15, 2020

  Believing he was wrongly reprimanded on numerous occasions, Hale initiated an arbitration action against Morgan Stanley, claiming negligence, defamation, breach of fiduciary duty, and intentional infliction of emotional distress. After the arbitrator issued an award denying all of Hale's claims and awarding Hale $0, Hale sued to vacate the award. The court granted Morgan Stanley's motion to dismiss on jurisdictional grounds, holding that it lacked diversity and federal question jurisdiction over the suit. Hale appealed.

  The United States Court of Appeals for the Sixth Circuit reversed and remanded. Parties attempting to establish diversity jurisdiction must show that the matter in controversy exceeds the sum or value of $75,000, and there is complete diversity of citizenship between the disputing parties. It is undisputed that the parties in this case were diverse in citizenship. When a petitioner disputes an issued arbitration award, courts only need to review the relief requested in the complaint to determine the amount in controversy. Though Hale was awarded $0 in the arbitration, he asked for $14.75 million in his complaint.

- **CBA REQUIRED PARTY TO ARBITRATE BENEFIT FUNDS DISPUTE**

  Dylan v. Figueroa as Trustee and the Trustees of the "Funds" (for Pension, Safety, Retirement)
  2020 WL 7251003
  United States Court of Appeals, Second Circuit
  December 10, 2020

Dylan, the owner and operator of a residential rental apartment building in NYC is a party to a multi-employer CBA with SEIU Local 32 BJ (the Union) and the Realty Advisory Board on Labor Relations (RAB). Under the CBA terms, Dylan is required to contribute to the employee benefit fund for eligible employees. After an audit of the fund determined that Dylan owed unpaid contributions for Figueroa, a part-time worker, Dylan brought an action for declaratory relief under ERISA and the LMRA. The Funds moved to dismiss or stay the proceeding pending arbitration. The Funds had already commenced arbitration a month before Dylan's filing – though Dylan contends that it did not receive notice of arbitration until after it filed its declaratory judgment action. The court adopted the Magistrate Judge's Report and Recommendation to convert the Funds' motion to dismiss into a motion to compel arbitration. The court then granted the motion and dismissed the action without prejudice. Dylan appealed.

The United States Court of Appeals for the Second Circuit affirmed. The presumption of arbitrability of disputes arising out of a CBA does not apply where a benefit fund (or its trustees) asserts its interests as a third party beneficiary to the CBA. In that case, the court must look to the CBA for evidence of intent on the part of the parties to require arbitration of disputes between the trustees and the employers. This CBA evidenced such an intent, requiring Dylan to arbitrate disputes regarding benefit fund contributions if and when the Funds' Trustees chose to initiate arbitration against it. While Dylan asserted that it should not be required to arbitrate because it filed its declaratory judgment action in court before the Funds initiated arbitration, it cited no support for the contention that a first to file rule had any application in the context of simultaneous litigation and arbitration disputes. Even if a provision in the CBA did support Dylan's position, it would be irrelevant in this case where the Funds did file a notice of arbitration first. Because the Funds adequately initiated arbitration, regardless of timing, Dylan was required to arbitrate by the CBA terms.

- **ARBITRATOR DID NOT EXCEED AUTHORITY**

A&A Maintenance Enterprise, Inc., v. Ramnarain (the Union)
2020 WL 7379100
United States Court of Appeals, Second Circuit
December 16, 2020

The Union represented the workers at the Long Island University Old Brookeville campus. In 2016, LIU contracted out that work to A&A, which became the employer of the Union workers and assumed an existing CBA. A&A and the Union entered into a successor CBA, which required Union membership after 30 days but allowed A&A to hire substitute employees to fill in for employees on disability or workers' comp or extended leave. The Union rejected a provision that would have permitted A&A to use non-union temporary employees at will for up to 90 days. After the Union alleged that A&A violated the CBA through its failure to comply with the substitute employee article, the parties submitted the dispute to arbitration. The Union framed the issue as whether A&A violated the CBA by utilizing temp employees – a term undefined in the CBA and broader in scope than substitute employees – to perform bargaining work. After the arbitrator found for the Union and issued a relief award of $1,702,263.81, A&A sued to vacate the award, arguing that the arbitrator exceeded his authority by adopting the Union's formulation of the issue and misapplying the provisions of the CBA. The Union removed the case to U.S. District Court and cross-petitioned to confirm the award. The court denied A&A's petition and granted the Union's. A&A appealed.

The United States Court of Appeals for the Second Circuit affirmed. A&A's contention that the arbitrator exceeded his authority when he considered issues beyond substitute employees, such as temporary and probationary, was a red herring. Given that the dispute concerned "'the interpretation, application or claimed violation of the stated terms or provisions of [the CBA],' precisely the type of dispute that the parties had previously agreed to submit to arbitration if not resolved through the grievance process, A&A could not frustrate the arbitration process by refusing to agree on the form of the issue to be submitted to arbitration." A&A's argument that the award should be vacated because the arbitrator essentially rewrote the CBA in ruling that A&A violated the CBA by using temporary employees was similarly meritless. The Court disagreed with A&A's assertion that the arbitrator ignored the management rights, new employee, and probationary period clauses of the CBA, finding that the arbitrator squarely addressed the

management rights clause and reasonably found that A&A's actions could not be justified through the probationary period and new employee clauses.

California

- **MERITLESS MOTION TO VACATE INCURS SANCTIONS**

  Malek Media Group v. AXQG
  2020 WL 7382190
  Court of Appeal, Second District, Division 3, California
  December 16, 2020

  Matthew Malek (Malek Media Group) joined with Anita Gou (AXQG) to start Foxtail, a film production company. The relationship between Malek and Gou soured after Malek repeatedly withdrew funds without authorization, deprived Foxtail of an ownership interest in a new film, and sent sexually explicit text messages to his temporary assistant. Gou sought to terminate the relationship with Malek, and AXQG filed a demand for arbitration with JAMS. The parties selected Ambassador David Huebner as the arbitrator. After an arbitration lasting 7 days with 17 witnesses and over 800 exhibits, the arbitrator issued a "comprehensive" 96-page award, finding in favor of AXQG on its claims for breach of the Foxtail agreement and breach of fiduciary duty. The arbitrator gave AXQG the sole authority to wind down Foxtail in light of Malek's gross negligence, willful misconduct, and propensity for destructive delay and awarded attorneys' fees and costs to AXQG. AXQG petitioned to affirm the award. Malek petitioned to vacate, asserting that the arbitrator was obligated to disclose his affiliation with GLAAD "once made aware of Malek's Catholic background." Malek claimed that "GLAAD and the Catholic Church were antagonistic to each other and, by extension, the arbitrator against Malek, casting doubt on the arbitrator's impartiality." Malek also argued that the arbitrator failed to hear or consider evidence. The court summarily rejected Malek's arguments, confirmed the award, and entered judgment in favor of AXQG. MMG appealed.

  The Court of Appeal, Second District, Division 3, California affirmed. The Court found that MMG could not credibly argue that the arbitrator was required to disclose his affiliation with GLAAD when that information was irrelevant to the present dispute over Malek's managerial misconduct. The Court found that the arbitrator did not fail to hear evidence material to the final award. While MMG speculated that the arbitrator made a calculated decision to exclude MMG's witness, Stephen Epacs, MMG did not cite to anything in the record showing that it attempted to call Epacs as a witness. While MMG argued that the arbitrator cut off its counsel's cross-examination of Salafia, the temporary assistant, MMG presented no factual support for the argument. The lack of support notwithstanding, MMG's argument still failed because, as the arbitrator noted, Salafia's interpretation of Malek's text messages did not impact the final award. While MMG asserted that the arbitrator failed to hear evidence on the authenticity of an exhibit consisting of a chain of emails, the record demonstrated that the arbitrator heard evidence regarding the exhibit. He considered the evidence but disagreed with MMG's conclusion that it carried any weight or impeached the credibility of AXQG's witnesses' testimony or documentary evidence. Concluding that MMG's appeal was objectively and subjectively frivolous, the Court imposed sanctions on MMG and its counsel.

Colorado

- **MEDIATOR'S EMAIL MAY NOT BE USED TO PROVE EXISTENCE OF AGREEMENT**

  Tuscany Custom Homes, LLC v. Westover
  No. 19CA1724
  Colorado Court of Appeals
  December 31, 2020

  The Westover Defendants and Tuscany entered into contracts whereby Tuscany would construct

a home and sell it to Westover Defendants, who would, in turn, sell the house to John and Cynthia Platenak. Tuscany sued the Westover Defendants for breach of contract, and the parties proceeded to mediation. The mediator encountered technical difficulties with his computer during the mediation, and the parties concluded the mediation without signing any document memorializing the agreement. The mediator followed up with an email outlining the terms of the agreement and requesting "that all counsel review…and email their assent to the …terms of settlement." The parties exchanged emails, during which Tuscany and the Platenaks agreed that the terms of the mediator's email were correct. Tuscany drafted and distributed a draft agreement, which Tuscany and the Platenaks signed, but the Westover Defendants did not. Joined by the Platenaks, Tuscany filed a motion to enforce the settlement, alleging that an oral settlement agreement was formed and attaching the mediator's email and the draft agreement as proof of the agreement and its terms. Tuscany and Platenak deposed the mediator, who testified that the parties reached a settlement agreement during the mediation and that the terms in his email reflected the substance of that agreement. The court granted the motion to enforce the settlement agreement, and the Westover Defendants appealed.

The Colorado Court of Appeals reversed and remanded with directions. The Colorado Dispute Resolution Act provides that a party "shall not voluntarily disclose…any information concerning a mediation communication." A party cannot prove the existence or terms of an agreement reached at mediation unless it is reduced to writing and fully executed, or the party can present other, admissible evidence of the agreement. The mediator's email was not fully executed and constituted a confidential mediation communication. The Draft Agreement, offered into evidence to prove the oral agreement, constituted information concerning a mediation communication. The remaining evidence was insufficient to support the finding that the parties formed an enforceable contract at the mediation.

New Jersey

- **UBER COULD NOT ENFORCE TERMS AND CONDITIONS, INCLUDING ARB AGREEMENT**

  Christopher Kauders and Another v. Uber Technologies, Inc. & Another
  SJC-12883
  Supreme Judicial Court of New Jersey
  January 4, 2021

  Christopher and Hannah Kauders sued Uber and Rasier LLC, asserting that three Uber drivers refused to provide Chris Kauders with rides because he was blind and accompanied by a guide dog. Each of the plaintiffs registered with Uber through its cellular phone app. Citing provisions in its terms and conditions, Uber sought to compel arbitration. The plaintiffs opposed arbitration on various grounds, including that there was no enforceable arbitration agreement. The judge granted Uber's motion, and the parties arbitrated their dispute. Although the arbitrator concluded that Kauders was the victim of the drivers' discriminatory acts, the arbitrator ruled for Uber on all of the plaintiffs' claims because the drivers were independent contractors. Therefore, Uber was not liable for the drivers' actions. Three weeks later, the U.S. Court of Appeals for the First Circuit issued a decision in *Cullinane v. Uber*, concluding that the same registration process at issue did not create a contract because it did not provide reasonable notice to users of the terms and conditions. Several months later, after Uber moved to confirm the arbitration award, the judge who had granted the motion to compel arbitration allowed a motion for reconsideration and reversed his earlier decision, concluding that there was no enforceable contract requiring arbitration. Uber appealed, contending that the judge had no choice but to confirm once the plaintiffs failed to challenge the award within thirty days.

  The Supreme Judicial Court of New Jersey, finding that there was no enforceable agreement between Uber and the plaintiffs and therefore the dispute was not arbitrable, remanded the case. First, the Court found that the issue of arbitrability was preserved for appeal. At the same time, the Court found that the judge's action to allow a motion for reconsideration on the order compelling arbitration six months after the award and several months after Uber filed its motion to confirm reflected an abuse of discretion. In such a case, the Court would typically remand the case to the Superior Court for further proceedings. However, in the interest of judicial economy,

the Court looked at whether Uber's terms and conditions constituted an enforceable contract with the plaintiffs – and found that they did not. The app's registration process did not provide users with reasonable notice of the terms and conditions and did not obtain a clear manifestation of assent to the terms. As a result, Uber could not enforce the terms and conditions against the plaintiffs, including the arbitration agreement.

- **ATTORNEYS MUST EXPLICITLY EXPLAIN ARB CLAUSE IN FEE AGREEMENT**

  Delaney v. Dickey
  2020 WL 7483754
  Supreme Court of New Jersey
  December 21, 2020

  When Brian Delaney hired law firm Sills, Cummis, & Gross, the firm provided Delaney a retainer agreement stating that any dispute about the firm's legal services or fees would be determined by arbitration. The firm also provided Delaney an attachment indicating that the arbitration would be confidential and conducted by JAMS. While the Sills attorney did not provide a hard copy of the JAMS rules (which were hyperlinked in the attachment), he did offer to answer any questions that Delaney had about the agreement. After Delaney terminated his relationship with Sills and refused to pay legal fees, Sills invoked the arbitration provision. Delaney later sued the firm for professional malpractice and moved to stay the fee dispute, pending the malpractice action. The Chancery Division ruled that the fee dispute and malpractice action were subject to the arbitration provision. The Appellate Division reversed, and the firm petitioned for certification, which was granted.

  The Supreme Court of NJ affirmed as modified and remanded. The arbitration provision satisfied the requirements for a typical consumer or commercial agreement. However, the heightened professional and fiduciary duties of an attorney demand more – an explanation of the differences between an arbitral and judicial forum so a client can make an informed decision about whether arbitration is to his/her advantage. Such a disclosure stands on equal footing with disclosures required in explaining other material provisions in the retainer agreement and the treatment, thus, does not offend the FAA. While this ruling was foreshadowed by ABA Formal Opinion 02-425 and opinions by courts and ethics committees in other jurisdictions, the Court acknowledged retroactive application might not have been reasonably anticipated. Thus, the Court applied the holding prospectively except regarding Delaney, who was allowed to proceed with his malpractice action. The Court did not find that the Sills attorneys violated the RPC and accepted their representations that they acted in good faith.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.