February 3, 2021

ADR Case Update 2021 - 3

Federal Circuit Courts

- **CONFIRMATION OF ARBITRAL AWARD UPHELD**

  LLC SPC Stileks v. The Republic of Moldova
  2021 WL 137251
  United States Court of Appeals, District of Columbia Circuit
  January 15, 2021

  Energoalliance contracted to sell electricity to a utility owned by the Republic of Moldova. After the utility fell behind on payments, Energoalliance sued in Moldovan courts to collect the debts and, when unsuccessful, initiated arbitration proceedings under the UN Commission's Rules on International Trade Law (UNCITRAL) pursuant to the Energy Charter Treaty (ECT). The arbitral tribunal issued an award in favor of Energoalliance in the amount of 593 million Moldovan lei in damages and 540,000 U.S. dollars in attorneys' fees. Energoalliance initiated enforcement proceedings in multiple jurisdictions, including the U.S. Moldova successfully challenged the award in the Paris Court of Appeal, which annulled the award. Energoalliance appealed, and the Court of Cassation, France's highest civil court, reinstated the award. As this was unfolding, Moldova asked the district court for a stay. After entering a stay, the court then lifted it upon the Court of Cassation's ruling. Moldova challenged jurisdiction; however, the district court confirmed its jurisdiction and the arbitral award. Moldova appealed.

  The United States Court of Appeals for the District of Columbia Circuit affirmed in part and vacated and remanded in part. The Court rejected Moldova’s claims that the district court lacked jurisdiction under the Foreign Sovereign Immunities Act (FSIA) and that, even if the court had jurisdiction, it was an error to confirm the arbitral award during the pendency of foreign proceedings. The award was made under a treaty, the ECT, as required for the FSIA arbitration exception to apply. Under Article 26 of the ECT, parties agreed to arbitrate under UNCITRAL's rules, which provided that the arbitral tribunal shall have the power to rule on its own jurisdiction. The arbitral tribunal determined that Energoalliance's claim fell within the ECT. The district court

acted within its discretion to lift the stay; failure to do so might have forced Stileks (which owned the right to the arbitration award) to sit on its award for several additional years. The award of pre-judgment interest was appropriate; petitions under the New York Convention are deemed to arise under the laws of the U.S., and pre-judgment interest is an element of complete compensation in U.S. law. The court abused its discretion in converting the award from Moldovan lei to U.S. dollars. Energoalliance asked the tribunal for an award in Moldovan lei; after the lei depreciated substantially, it asked the court for a dollar-denominated award. Had Energoalliance asked for a dollar-denominated award from the beginning, Moldova might have been able to hedge against the risk of a depreciating lei. The court should have considered the extent of Moldova's reliance.

- **NON-SIGNATORY COULD NOT EQUITABLY ESTOP PARTY FROM AVOIDING ARBITRATION**

  Setty v. Sugandhalaya LLP
  2021 WL 192820
  United States Court of Appeals, Ninth Circuit
  January 20, 2021

  Setty, individually and as a general partner in a partnership (collectively, SS Bangalore), sued Sugandhalaya LLP (SS Mumbai), a nonsignatory to the partnership agreement containing an arbitration agreement, alleging fraud. SS Mumbai's motion to compel arbitration was denied. The U.S. Court of Appeals for the Ninth Circuit affirmed, holding that SS Mumbai could not equitably estop SS Bangalore from avoiding arbitration. The U.S. Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of G*E Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC.*

  On remand, the United States Court of Appeals for the Ninth Circuit affirmed. Applying federal substantive law to determine the arbitrability of federal claims by or against non-signatories to an arbitration agreement, the Court looked to ordinary contract and agency principles. For equitable estoppel to apply, the dispute's subject matter must be intertwined with the contract providing for arbitration. SS Bangalore's claims were not clearly intertwined with the Partnership Deed providing for arbitration. Moreover, any allegations of misconduct by Nagraj Setty (a signatory to the Partnership Deed) were not intertwined with SS Bangalore's claims against SS Mumbai.

Colorado

- **ARBITRATION AGREEMENT UNENFORCEABLE UNDER HEALTH CARE AVAILABILITY ACT**

  Johnson v. Rowan Inc.
  No. 19CA1211
  Colorado Court of Appeals
  January 28, 2021

  When Randall and Patricia Johnson admitted their seriously ill daughter, Christal, to Rowan Community long-term care, they were handed a stack of forms to sign, including an arbitration agreement. After Christal's death, the Johnsons sued Rowan for negligence, violation of the Colorado Consumer Protection Act, fraud, and civil conspiracy. The Johnsons challenged Rowan's motion to compel arbitration, asserting the agreement was unenforceable because a Rowan representative did not countersign it, and Rowan had allegedly not provided them a written copy of the agreement, in violation of the Health Care Availability Act. The court held that the agreement was unenforceable, and Rowan appealed.

  The Colorado Court of Appeals affirmed. To ensure that a patient enters into a health care arbitration agreement voluntarily, the Health Care Arbitration Act sets forth several requirements, including a statement in the agreement regarding the patient's right to seek legal counsel and to rescind within 90 days; bold, clear disclosure language; and a written copy of the agreement to the patient. Rowan did not substantially comply with the Act's written copy requirement, which is

integral to the Act's purpose of ensuring that the patient enters into a health care arbitration agreement voluntarily. Without a written copy, a patient cannot review the agreement in a stress-free setting and may not understand the right to legal counsel or to rescind. Rowan's failure to sign the agreement also compromised the Act's purpose – to give the patient a meaningful opportunity to rescind. Without the health care provider's signature, the rescission period never commenced.

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