JAMS Institute

LEARNING FROM EACH OTHER

March 3, 2021

ADR Case Update 2021 - 5

Federal Circuit Courts

- **ARBITRATION BOARD APPLIED THE GOVERNING CBA, ACTED WITHIN SCOPE**

  Union Pacific v. Internatl Assoc of Sheet Metal, Air, Rail, Transportation Workers (SMART)
  2021 WL 608938
  United States Court of Appeals, Eighth Circuit
  February 17, 2021

  Union Pacific Railroad fired engineer Matthew Lebsack after he defecated on a train-car connector. An arbitration board reinstated him, citing his lengthy record with the company and mitigating circumstances, including health and marital problems. Union Pacific sought to vacate the award, and Lebsack's union, SMART, sought to enforce the award. The court upheld Lebsack's reinstatement and enforced the award. Union Pacific appealed.

  The United States Court of Appeals for the Eighth Circuit affirmed. The Board applied the governing CBA and acted within the scope of its authority. Rule 82 of the CBA, which governed the dispute, did not contain any express restrictions on the arbitrator's ability to review and modify a remedy chosen by Union Pacific. Union Pacific's assertion that the remedy created new prerequisites (medical and psych evaluations) to the CBA's discipline requirements that conflicted with existing timing requirements lacked merit because the award only addressed Lebsack's case.

- **CONSUMER MAY SECURE PUBLIC INJUNCTIVE RELIEF IN ARBITRATION UNDER MEMBERSHIP AGREEMENT**

  DiCarlo v. MoneyLion
  2021 WL 647502
  United States Court of Appeals, Ninth Circuit
  February 19, 2021

  DiCarlo brought a putative class action lawsuit against MoneyLion, which operates a smartphone app that offers financial services to its customers, asserting that MoneyLion violated California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA) when it refused to allow her to cancel her membership after she fell behind on fees, deposits, and payments on her credit-builder loan. The court dismissed the complaint and compelled arbitration under an arbitration provision in the Membership Agreement. DiCarlo appealed, insisting that the arbitration provision violated CA law by prohibiting public injunctive relief.

The United States Court of Appeals for the Ninth Circuit affirmed. CA's legal requirement that contracts allow public injunctive relief is known as the McGill rule. MoneyLion insisted that DiCarlo could get public injunctive relief in the arbitration; however, DiCarlo disagreed, asserting that she could secure public injunctive relief only by acting as private attorney general, which the Agreement explicitly prohibited. In this case, the Agreement authorized the arbitrator to award all injunctive remedies available in an individual lawsuit under CA law. Public injunctive relief is available under CA law in individual lawsuits – not just private attorney general lawsuits. It follows that DiCarlo may secure that relief in arbitration under the Agreement.

California

- **ARBITRATION NOT PRECLUDED**

  Subaru of America v Putnam Automotive
  2021 WL 485439
  Court of Appeal, First District, Division 2, California
  February 10, 2021

  Subaru and Putnam had two agreements: a Burlingame Dealer Agreement for the sale and service of cars at Burlingame and a Satellite Service Agreement for service operations at a satellite facility in San Francisco. The Satellite Agreement contained an arbitration provision. When Subaru did not approve Putnam's proposed relocation of the Satellite Facility and said it would not renew the Satellite Agreement, Putnam filed two administrative protests, and Subaru petitioned to compel arbitration. The court found that the Satellite Agreement did not come within the Motor Vehicle Franchise Contract Arbitration Fairness Act, and Putnam was compelled to arbitrate its claims. The court also denied Subaru's request to compel Putnam to dismiss its Board protests because discontinuing the Satellite Agreement might be found to modify the Dealer Agreement, an agreement that would come under the Fairness Act's exception to arbitration. The arbitrator issued a final award in which he found that Subaru carried its burden to show good cause for terminating the agreement. The court granted Subaru's petition to confirm the award, and Putnam appealed.

  The Court of Appeal, First District, Division 2, California affirmed, finding that the Satellite Agreement did not come within the exception to arbitration of the Fairness Act because it did not come within the definition of motor vehicle franchise contract for the sale and service of cars. Contrary to Putnam's assertion that the contracts should be considered in conjunction, the language in the Purpose portion of the Satellite Agreement explicitly reflected the parties' mutual intent that it was a separate contract from the Dealer Agreement. Putnam's argument that the New Motor Vehicle Board had exclusive jurisdiction to adjudicate whether good cause existed to continue a franchise agreement ignored the language to the contrary in the New Motor Vehicle Board Act, providing "this subdivision does not, however, prohibit arbitration before an independent arbitrator." Putnam's assertion that the Satellite Agreement's arbitration provision was illegal under two provisions in the California Vehicle Code was equally unavailing as neither provision barred arbitration. Putnam's argument that the arbitrator exceeded his powers when he made a good cause determination contrary to public policy under the New Motor Vehicle Board Act, and the Fairness Act was without merit because the exceptions to arbitration in both Acts applied to motor vehicle franchise contracts and the Satellite Service Agreement was not such a contract. Subaru did provide Putnam with the required notice of the reasons for terminating the agreement.

- **AWARD VACATED AFTER ARBITRATOR'S REFUSAL TO DISQUALIFY HIMSELF**

  Roussos v. Roussos
  2021WL 567366
  Court of Appeal, Second District, Division 7, California
  February 16, 2021

  Harry and Ted Roussos were co-trustees of two trusts, with ownership interests in multiple interrelated companies. The parties' arbitration agreement provided that Judge John Shook

would arbitrate all issues with binding authority over them. The parties proceeded to arbitration, and Ted, after seeing Judge Shook's disclosure report, served a notice of disqualification, asserting that Shook's prior rulings and awards, as well as past relationships with Ted's prior attorney and Harry and his wife's attorney, could impact his neutrality. The arbitrator denied Ted's disqualification request and proceeded with the arbitration. In his final award regarding the companies' leadership, Shook appointed Harry's choice as the acting director for all of the Roussos entities. Harry petitioned to confirm, and Ted moved to vacate. The court granted the petition to confirm, and Ted appealed.

The Court of Appeal, Second District, Division 7, California reversed and remanded with instructions. Judge Shook was a "proposed neutral arbitrator" subject to disclosure and disqualification requirements of the California Arbitration Act. Ted had a right to disqualify Judge Shook without cause – but despite his notice, the arbitrator refused to disqualify himself. The parties to an arbitration agreement cannot contract away their statutory right to disqualify an arbitrator. Section 1281.9 of the California Arbitration Act makes clear that the arbitrator shall be disqualified upon the timely service of a notice of disqualification based on the disclosure statement, without requiring a showing of good cause.

New York

- **ARBITRATION PANEL DID NOT MANIFESTLY DISREGARD INDIAN GAMING REGULATORY ACT (IGRA**)

Seneca Nation of Indians v. State of New York
2021 WL 667557
United States Court of Appeals, Second Circuit
February 22, 2021

Seneca Nation and New York entered into a Compact under which the Nation received exclusive rights to maintain the gaming machines in Western NY in exchange for graduated revenue sharing payments to NY. The Compact provided for an initial term of 14 years and, absent objection, automatic renewal for an additional period of 7 years; the Compact did not expressly address the terms of any State contribution in the seven-year renewal period. When the Compact automatically renewed, the parties disagreed on the revenue sharing provisions during the renewal period. The parties proceeded to an arbitration panel with three arbitrators, one chosen by the Nation (Washburn), one selected by NY (Gutman), and one chosen by the two arbitrators (Sheridan). The panel majority found the renewal provision ambiguous as to the Nation's obligation to pay during the renewal period and examined the parties' pre-execution negotiations, post-execution communications, and submissions from both parties to DOI before determining that it would be commercially unreasonable to find the word "renew" would extend the Nation's exclusivity without obligating the Nation to provide any continuing consideration to NY. Washburn dissented. The Nation moved to vacate, and NY moved to confirm. The court confirmed the award, and the Nation appealed.

The United States Court of Appeals for the Second Circuit affirmed. The Nation asserted that the arbitration panel manifestly disregarded the IGRA's requirement of DOI Secretarial review of payments for the renewal term. The panel did not manifestly disregard the IGRA. It addressed the requirement in its decision and explained that this award did not require independent secretarial approval because it merely interpreted a term in a compact that the Secretary had already approved. The primary jurisdiction doctrine did not apply to require referral to DOI. Invoking primary jurisdiction would unnecessarily prolong the case and undermine the FAA's goal to promote the speedy and efficient resolution of disputes.

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