

January 5, 2022

ADR Case Update 2022 - 1

Federal Circuit Courts

- **TRIAL NEEDED TO DETERMINE WHETHER VALID ARBITRATION AGREEMENT EXISTS**

Adaeze Duncan v. International Markets Live, Inc.
2021 WL 5856037
United States Court of Appeals, Eighth Circuit
December 10, 2021

International Markets Live (IML), which provides tools for and information about trading foreign currencies and cryptocurrencies, contracts with Independent Business Owners (IBOs) through its website. After Adaeze Duncan became an IBO with IML by registering through IML's website, she sued IML in state court, asserting claims of breach of contract, promissory estoppel, unjust enrichment, equitable estoppel, and fraudulent misrepresentation. IML removed the case to federal court, answered Duncan's complaint, filed counterclaims, and then moved to compel arbitration, asserting that Duncan would have been required to agree to the arbitration provision in an IBO Agreement when she registered. Viewing the record in the light most favorable to Duncan, the district court found a genuine dispute of material fact as to whether the parties had agreed to arbitrate and denied the motion. IML appealed.

The United States Court of Appeals for the Eighth Circuit remanded to the district court for a trial to determine whether an arbitration agreement existed. The party seeking to compel arbitration bears the burden of proving that there was a valid and enforceable agreement. The district court found that material facts remained in dispute as to whether the parties agreed to arbitrate. Because §4 mandates that a trial be held to determine whether the parties entered a valid arbitration agreement, the next step should have been to hold a trial.

- **SUMMARY JUDGMENT STANDARD APPLIED TO MOTION TO COMPEL ARBITRATION**

Air-Con, Inc. v Daikin Applied Latin America, LLC
2021 WL 6012458
United States Court of Appeals, First Circuit
December 20, 2021

Air-Con signed a distribution agreement (Agreement) with Daikin Industries (Industries) to sell Daikin brand air conditioning and refrigeration equipment in Puerto Rico and the Caribbean. The Agreement included an arbitration provision and a non-assignability clause. Soon after, Air-Con began an ongoing and exclusive distribution relationship with Industries wholesaler Daikin Applied (Applied), which was not memorialized by any written document. The relationship lasted fifteen years, at which point Applied began to sell to Air-Con's competitors at lower prices. Air-Con sued Applied for violating the established terms of their exclusive distribution relationship, and Applied moved to compel arbitration pursuant to the Agreement. Alternatively, Applied argued that Air-Con was bound by the arbitration clauses in Applied's individual purchase and sale agreements. Air-Con opposed, arguing that its relationship with Applied was unwritten and entirely separate from the Agreement. The court held that the Agreement was controlling, relying specifically on Air-Con's description of its relationship with Applied, which the court found to accord with the terms and duration of the Agreement. Air-Con appealed.

The United States Court of Appeals for the First Circuit reversed. The Court's primary concern was the standard of review, not yet established in the First Circuit, for a motion to compel arbitration. Citing the FAA and neighboring circuits, the Court held that district courts should apply the summary judgment standard, placing the burden of proof on the moving party and drawing all reasonable inferences in favor of the non-movant. The court below erred by construing Air-Con's allegations in favor of Applied and placing the burden of disproving the existence of a valid arbitration agreement on non-movant Air-Con. Applying de novo review, the Court found the Agreement's non-assignability clause controlling: since Allied had produced no evidence of a valid assignment, Allied held no rights under the Agreement. The Court also rejected Allied's arguments based on the arbitration clauses in its sales agreements. Each such provision applied only to disputes arising from that individual sale and not to allegations relating to the distribution relationship as a whole.

- **CONFIDENTIALITY PROVISION IN MEDIATION AGREEMENT PROTECTED PARTY'S CONFIDENTIAL COMMUNICATIONS TO MEDIATOR**

Target Corporation v ACE American Insurance Company
Case No. 20-cv-2400 (PJS/JFD)
United States District Court, D. Minnesota
December 22, 2021

Following mediation of a trademark infringement lawsuit brought by Universal Standard, Inc. (USI), Target requested coverage of defense and settlement costs from its insurer, ACE. After ACE denied Target's claim, Target sued ACE for a declaratory judgment and breach of contract. Anticipating that Target would seek to reallocate some of the settlement amount to losses covered by its policy, ACE initiated discovery, requesting Target to produce a broad range of documents from the USI action. In its response, Target withheld six documents relating to Target's confidential communications with the mediator, citing MN General Rule of Practice 114.08, which assures confidentiality and non-discoverability of statements and documents produced in non-binding mediation. ACE moved to compel production of these documents, disputing the applicability of Rule 114.08. ACE also argued that Target had waived confidentiality under the Common Interest and Confidentiality Agreement (CIC) it had with ACE, subject matter waiver, and at-issue waiver. The parties moved to compel discovery.

The Court denied ACE's motion to compel discovery. The Court found no need to address Rule 114.08, holding instead that Target's communications with the mediator were covered under the Mediation Agreement's broad protection of "the entire mediation process." It rejected ACE's claims that the documents were subject to discovery under the CIC Agreement. While the CIC Agreement enabled production of confidential materials to a court or arbitrator subject to the Agreement's confidentiality provision, nothing in the CIC Agreement required Target to produce confidential materials to ACE. The Court found that while a limited waiver "may apply" to documents Target already produced to ACE pursuant to the CIC Agreement, production of those documents did not create subject matter waiver, as the Mediation Agreement established privilege for all communications relating to the entire mediation process. Finally, the Court rejected ACE's at-issue waiver argument, as Target's counsel testified during the motion hearing

that her comment that a proposed statement of undisputed facts “did not tell the whole story” referred to her lack of knowledge relating ACE’s side of the case.

California

- **PARTY FORFEITED RIGHT TO DISQUALIFY ARBITRATOR**

Goodwin v Comerica Bank, N.A.
2021 WL 5917930
Court of Appeal, First District, Division 4, California
December 15, 2021

Goodwin sued Comerica for failing to protect his account from identity theft. The case went to arbitration before a JAMS neutral, who timely served a disclosure statement listing, among other previous arbitrations, the Hernandez case, involving Goodwin’s lawyers and reported as “Settled Prior to Final Award.” Arbitration proceeded without objection, leading to an interim award for Goodwin. Goodwin filed a fees motion; Comerica opposed. While preparing its opposition, Comerica discovered that the arbitrator had issued an interim order favorable to clients of Goodwin’s lawyers prior to the reported settlement. Comerica made no disqualification motion following this discovery and, more than a month later, the arbitrator issued a final award for Goodwin. When Goodwin sued to confirm his award, Comerica moved to vacate on grounds that failure to disclose the Hernandez interim award constituted a material omission or material misrepresentation statutorily exempt from the general rule requiring a disqualification motion to be made within 15 days of the disclosure statement. The court ruled for Comerica and vacated Goodwin’s award. Goodwin appealed.

The Court of Appeal, First District, Division 4, California reversed. Declining the issue of materiality, the Court held that Comerica should have moved for disqualification within 15 days after discovering the relevant facts and before the final arbitration ruling. By failing to do so and instead waiting to object only in the wake of an adverse outcome, Comerica forfeited its right to demand disqualification.

Washington State

- **ARBITRATION AGREEMENT NOT PROHIBITED BY STATUTE GOVERNING LONG-TERM CARE RESIDENTS’ RIGHTS**

Drummond v Bonaventure of Lacey, LLC
2021 WL 5896691
Court of Appeals of Washington, Division 2
December 14, 2021

Drummond, a resident in Bonaventure’s assisted living facility, died following a medication error made by facility staff. When Drummond’s estate sued Bonaventure for wrongful death, Bonaventure moved to stay the proceedings and compel arbitration pursuant to an arbitration agreement signed when Drummond was admitted to the facility. The court denied Bonaventure’s motion, holding that the arbitration agreement was prohibited by RCW 70.129.105, which prohibits a long-term care facility from requiring residents to sign waivers “of potential liability for losses of personal property or injury” or of other “residents’ rights.” Bonaventure appealed.

The Court of Appeals of Washington, Division 2, reversed and remanded. The Court rejected Drummond’s argument that statutory language relating to residents’ enjoyment of “basic civil and legal rights” encompassed the right to a jury trial and that RCW 70.129.105 prevented long-term care facilities from requesting or requiring arbitration agreements from their clients. Where possible, courts avoid interpreting statutes in a manner that calls their constitutionality into question. The FAA preempts any state law prohibiting an arbitration agreement “solely because it is an arbitration agreement,” including laws that “covertly” undermine arbitration agreements.

Interpreting RCW 70.129.105 to prohibit certain arbitration agreements because they implicate the right to a jury trial would trigger a preemption problem under the FAA and, in turn, violate the supremacy clause.

Georgia

- **ARBITRATOR DID NOT MANIFESTLY DISREGARD THE LAW**

Adventure Motorsports Reinsurance, Ltd. et al. v Interstate National Dealer Services
2021 WL 5893247
Supreme Court of Georgia
December 14, 2021

Mountain Adventures (Dealer), a motorsports vehicle dealership owned by Ryan Hardwick, sold motorsports vehicle contracts, which were underwritten by Interstate National Dealer Services (INDS). Adventure Motorsports Reinsurance (Reinsurer), also owned by Hardwick, held funds in reserve to cover repair claims and, under Hardwick's contract with INDS, was entitled to all of the underwriting profit realized at the expiration of the service contracts. When the Reinsurer realized that INDS was not remitting the entire Contract Cost as claims reserves, the parties proceeded to arbitration pursuant to the arbitration clause in their contract. After the arbitrator found in favor of the Dealer and the Reinsurer, INDS filed a motion to vacate the award, and the claimants filed a motion to confirm. The court confirmed the award, and INDS appealed. The Court of Appeals reversed on the grounds that the arbitrator manifestly disregarded the law in rendering the award. The Dealer filed a writ of certiorari.

The Supreme Court of Georgia reversed and remanded. In Case No. S21G0015, the Court reversed the decision reversing the order confirming the arbitration award on the basis that the arbitrator manifestly disregarded the law. Manifest disregard for the law must be both evident and intentional, a showing that requires evidence in the transcript of the arbitration proceeding or the arbitrator's written findings or other concrete evidence in the record that would indicate intent of the arbitrator to disregard the appropriate law. Nothing in the record of this arbitration hearing or the arbitrator's written findings of fact and conclusions of law supported a determination that the arbitrator purposefully intended to disregard applicable law. The arbitration award drew its essence from the contracts. In Case No. S21G0008, the Court vacated the decision dismissing as moot the Dealer and Reinsurer's appeal from the trial court's failure to enforce a delayed-payment penalty provided in the arbitration award. Whether the appeal was moot depended on the Court of Appeals' decision on remand regarding INDS's claim of error.

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

Contact Information

David Brandon
Program Manager
JAMS Institute
415-774-2648

DBrandon@jamsadr.com