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ADR Case Update 2022 - 10

U.S. Supreme Court

- **PREJUDICE TO OPPOSING PARTY NOT REQUIRED TO FIND ARBITRAL WAIVER**

  Morgan v Sundance, Inc.
  2022 WL 1611788
  Supreme Court of the United States
  May 23, 2022

  Taco Bell employee Robyn Morgan filed a collective action for wage theft against franchise owner Sundance, Inc. After litigating the case for eight months, Sundance moved to compel arbitration under the arbitration agreement Morgan had signed when applying for her job. Morgan opposed on waiver grounds. The district court determined that Sundance had waived its right to arbitration based on the three-part test established by the Eighth Circuit: whether Sundance 1) was aware of its right to arbitrate; 2) acted inconsistently with that right; and 3) prejudiced the other party through its inconsistent actions. On appeal, the Eighth Circuit reversed, finding the third element of the test unmet. The court concluded that Morgan was not prejudiced by Sundance's actions, as the parties had not yet begun formal discovery or contested any matters on the merits. Morgan petitioned for, and was granted, certiorari.

  The Supreme Court vacated and remanded, holding unanimously that the Eighth Circuit was wrong to condition waiver of the right to arbitrate on a showing of prejudice. Waiver is the intentional relinquishment of a known right and, in all other legal contexts, is determined solely based on the actions of the waiving party. The Court has long stated that the FAA establishes a federal "policy favoring arbitration," and nine circuit courts, including the Eighth, have invoked this policy as justification for adding a third prong to the traditional waiver test: whether actions otherwise sufficient to find waiver caused prejudice to the opposing party. This "bespoke" rule misconstrues the meaning of a "policy favoring arbitration." The policy was intended to make arbitration agreements as enforceable as other contracts, not for courts to "devise novel rules to favor arbitration over litigation." FAA Section 6 provides that any application of the FAA "shall be made and heard in the manner provided by law for the making and hearing of motions." This directs the judiciary to apply "usual federal procedural rules" to arbitration cases and, put another way, bars courts from using "custom-made" rules to "tilt the playing field" in favor of arbitration. The Court directed the Eighth Circuit, on remand, to determine the appropriate standard for

finding relinquishment of arbitral rights, whether through traditional waiver analysis or another procedural framework such as forfeiture.

Federal Circuit Courts

- **EMAIL SERVICE OF PETITION TO VACATE WAS INEFFECTIVE**

  Dalla-Longa v Magnetar Capital LLC
  2022 WL 1493463
  United States Court of Appeals, Second Circuit
  May 12, 2022

  During arbitration of a wrongful termination action, Damian Dalla-Longa and his former employer Magnetar agreed to email exchange of all correspondence, motions, and other arbitral communications. Following the panel's award for Magnetar, Dalla-Longa sued to vacate, serving notice to Magnetar by email on the last day of the filing deadline. Magnetar moved to dismiss, arguing that the email exchange agreement did not apply to Della-Longa's motion to vacate and that his email, therefore, did not constitute timely service of notice. The court agreed and, additionally, declined to excuse the service defect on equitable grounds. Della-Longa appealed.

  The United States Court of Appeals, Second Circuit affirmed, holding that an agreement governing communications during arbitration did not constitute written consent to email service of notice in a subsequent lawsuit. The Court rejected Della-Longa's argument that AAA Employment Rule 38(b), entitled "Service of Notice," authorized email service of notice of his action to vacate. That provision applies only to "papers, notices, or process necessary or proper for the initiation or continuation of an arbitration." A motion to vacate is not required to initiate or continue an arbitration; it is a voluntary motion to initiate a separate proceeding following the conclusion of arbitration. Under Fed. R. Civ. R. 5, a party may serve papers by email if the person being served has "consented" to service by email "in writing." There was no consent here. Della-Longa failed to show any equitable reason excusing his failure to serve his petition properly, and the court did not abuse its discretion in declining to grant equitable relief.

- **COURT CONFIRMED AWARD WHERE ARBITRATOR "ARGUABLY" CONSTRUED CONTRACT**

  Industrial Steel Construction, Inc. v Lunda Construction Company
  2022 WL 1509537
  United States Court of Appeals, Eighth Circuit
  May 13, 2022

  General contractor Lunda Construction hired Industrial Steel Construction (ISC) to provide structural steel for a bridge project. Their Contract included an arbitration clause and provided that AAA Construction Industry Rules would "govern all procedural matters not specified" in the Contract. The Contract entitled ISC to costs and "reasonable" attorneys' fees if ISC was required to bring any action to collect payment, with the word "reasonable" added by hand in red ink. In the event of breach, delays, or defective goods, the Contract authorized Lunda to seek damages, but the parties had crossed out language allowing recovery of "incidental and consequential" damages "including attorneys' fees and liquidated damages." ISC sued Lunda for breach of contract and unjust enrichment, and the court ordered the parties to arbitration. The arbitrator found that ISC had delivered defective work and awarded Lunda reimbursement costs, attorneys' fees, expert costs, and arbitration costs. When Lunda sued to confirm the award, the court vacated the award of attorneys' fees and expert costs, holding that it exceeded the arbitrator's authority, but confirmed the remainder of the award. Lunda appealed.

  The United States Court of Appeals, Eighth Circuit vacated and remanded with instructions to confirm the award in full. The sole question for review was whether the arbitrator "even arguably" construed the contract. Here, the arbitrator arguably did so, setting forth extensive findings of facts and conclusions of law and specifically citing his authority to award attorneys' fees and costs under AAA Construction Rule 48. So long as an arbitrator's reasoning provides "an

interpretive route" to their conclusions, the court may not vacate or modify that award, even if the court disagrees with those conclusions.

- **VALIDITY OF CONTRACT AND ISSUE OF PREEMPTION WERE FOR THE ARBITRATOR TO DECIDE**

  Unite Here Local 30 v. Sycuan Band of the Kumeyaay Nation
  United States Court of Appeals, Ninth Circuit
  2022 WL 1594948
  May 20, 2022

  The Sycuan Tribe, which operates the Sycuan Casino Resort on its reservation, entered into a Gaming Compact with the State of California. The Compact required Sycuan to adopt and maintain an attached Tribal Labor Relations Ordinance (TLRO). The TLRO provided that if a union came forward with an offer of various promises set forth in Section 7(b), Sycuan would automatically be committed to certain accommodations such as providing employee lists and facilitating dissemination of union information. The TLRO stated that a union's offer of Section 7(b) promises would be "deemed an offer to accept the entirety of this Ordinance as a bilateral contract between the Tribe and the union" and that "the Tribe agrees to accept such offer." Unite Here sent a letter to Sycuan stating its intention to organize casino employees, offering the required 7(b) promises and requesting that Sycuan provide its commensurate accommodations. When Sycuan failed to do so, United Here sued to compel arbitration. Sycuan opposed, arguing that there was no bilateral agreement between the parties; that the alleged agreement lacked sufficiently definite terms to create agreement; and, alternatively, that the TLRO was unenforceable because it was preempted by the NLRA. United Here moved for a judgment on the pleadings to compel arbitration, which the court granted. Sycuan appealed.

  The United States Court of Appeals, Ninth Circuit affirmed, holding that the contract was immediately formed upon Sycuan's receipt of Unite Here's letter. In the Compact, Sycuan promised California that it would adopt and maintain the TLRO, under which Sycuan agreed to automatically enter into a bilateral contract with any union that stepped forward with Section 7(b) promises. The TLRO was essentially an open-ended offer by Sycuan to any union to enter into a bilateral contract. The contract terms were definitively established in the TLRO, leaving little ambiguity, and nothing was left to negotiate between the parties. United Here accepted Sycuan's offer by letter, offering its Section 7(b) promises as consideration. Sycuan was mistaken in contending that if the NLRA preempted the TLRO, there was no enforceable promise to arbitrate. A defense that a law invalidates a contract with an arbitration provision is an issue for the arbitrator to decide. Sycuan challenged the contract as a whole, so the preemption argument was also for the arbitrator to decide.

California

- **DELAY IN ARBITRATION ENFORCEMENT NOT INHERENTLY PREJUDICIAL**

  Quach v California Commerce Club, Inc.
  2022 WL 1468016
  Court of Appeal, Second District, Division 1, California
  May 10, 2022

  After the California Commerce Club fired Peter Quach from his floor supervisor job at a Club casino, Quach sued for wrongful termination. The Club responded that Quach "should be compelled to arbitrate" but proceeded with discovery until thirteen months later when, claiming it had just located Quach's signed Arbitration Agreement, the Club moved to compel arbitration. The court denied the Club's motion, holding that the Club had waived its arbitration rights by delaying enforcement and prejudicially requiring Quach to proceed with a "large amount of written discovery" and incur other litigation costs. The Club appealed.

  The Court of Appeal, Second District, Division 1, California, reversed and remanded. Even deferring to the trial court under a substantial evidence standard of review, the Court found

Quach's showing of prejudice inadequate. A party's delay in enforcing arbitration is not inherently prejudicial; the question is whether that delay substantially undermined the opposing party's ability to take advantage of the efficiency and benefits due from arbitration. Here, the Club moved to compel arbitration seven months before the trial date, while the parties were still engaged in pre-trial discovery and before the court had begun proceedings or reached a decision on the merits. Quach made no showing that he had spent time or money on litigation discovery that he would not also have spent in arbitral discovery or that the Club has used the litigation process to collect evidence unavailable in arbitral discovery.

- **EMPLOYER DID NOT ESTABLISH AGREEMENT TO ARBITRATE**

  Trinity v Life Insurance Company of North America
  Court of Appeal, Second District, Division 7, California
  2022 WL 1617986
  May 17, 2022

  Claims adjuster Fiona Trinity sued LINA, a Cigna subsidiary, for wrongful termination and discrimination. LINA moved to compel arbitration based on the arbitration provision in the Cigna employee handbook distributed online to its employees. When LINA introduced the newest handbook, it emailed all employees, asking them to log into the handbook site with their unique name and password to complete an Acknowledgment Statement by checking a box next to the statement and clicking a "Done" button. Cigna's employee relations general manager, Michael Reagan, was given a list of all employees who failed to complete the Acknowledgment and sent each such employee a "take action" email notifying them that they would be terminated unless they completed the Acknowledge Statement. Reagan produced an auto-generated document stating that Trinity had checked the box and the "Done" button. Trinity, however, testified that she never saw or agreed to Cigna's Arbitration Agreement and that she would never have taken the job had she been told she was waiving her legal rights. When asked to produce the emails allegedly sent to Trinity, Reagan said that he did not believe they had been found; that if Trinity had deleted them, "they'd be gone,"; and that their emails were "so old, they may be unattainable." The court denied LINA's motion to compel, finding that LINA had failed to prove that Trinity agreed to the arbitration provision. LINA appealed.

  The Court of Appeal, Second District, Division 7, California affirmed. The evidence did not compel a finding that Trinity had agreed to arbitrate. LINA had met its initial prima facie burden of proof by explaining the Acknowledgment Statement process and producing the auto-generated record. After Trinity's testimony shifted the burden of proof back to LINA, Reagan provided only speculative explanations of why LINA was unable to produce the emails allegedly sent to Trinity. He demonstrated no understanding of how email records were generated, stored, or retrieved; how the auto-generated acknowledgment document was generated; or whether others had access to those documents or the ability to alter them. Such testimony was insufficient to show by a preponderance of the evidence that an agreement had been formed.

- **EMPLOYEE ARBITRATION AGREEMENTS INAPPLICABLE TO CITY'S ENFORCEMENT ACTION UNDER UNFAIR COMPETITION LAW**

  The People v Maplebear Inc.
  2022 WL 1565000
  Court of Appeal, Fourth District, Division 1, California
  May 18, 2022

  The San Diego City Attorney brought an enforcement action against Instacart under the Unfair Competition Law, claiming that Instacart maintained an unfair advantage over its competitors by misclassifying its Shoppers as contractors to avoid the need to pay benefits. Instacart moved to compel arbitration under the Contractors Agreements signed by its Shoppers who, Instacart argued, were the real parties in interest. The trial court denied the motion, and Instacart appealed.

  The Court of Appeal, Fourth District, Division 1, California affirmed. The City was indisputably not a party to any arbitration agreement with Instacart and was not acting to vindicate the rights of individual Shoppers. The City was instead acting in its law enforcement capacity to seek civil

penalties for Labor Code violations that gave Instacart an unfair advantage over its competitors. The Court rejected Instacart's claim that the lower court was de facto creating a law-enforcement exception to the FAA. The FAA prevents courts from invalidating arbitration agreements based on state laws that disfavor arbitration; it does not require courts to expand the contours of the agreement to compel non-parties to arbitration.

Case research and summaries by Deirdre McCarthy Gallagher and Rene Todd Maddox.