JAMS Institute
Learning From Each Other

June 15, 2022

ADR Case Update 2022 - 11

U.S. Supreme Court

- **AIRLINE CARGO RAMP SUPERVISOR EXEMPT FROM FAA ARBITRATION**

  Southwest Airlines Co. v. Saxon
  2022 WL 1914099
  Supreme Court of the United States
  June 6, 2022

  Southwest Airlines ramp supervisor Latrice Saxon trained, supervised, and frequently assisted ramp agents in physically loading and unloading airplane cargo. When Saxon brought a putative class action against Southwest for failing to pay overtime wages, Southwest moved to compel arbitration under Saxon's employment contract. Saxon opposed, arguing that her contract fell within the FAA Section 1 exemption of workers "engaged in" interstate commerce. The court dismissed, holding that the exemption applied only to workers engaged in "actual transportation," not those who handled goods. The Court of Appeals reversed, holding that the act of loading cargo for interstate transport fell within the FAA exemption. Southwest appealed.

  The Supreme Court of the United States affirmed, finding that airline cargo workers play a direct and necessary role in the free flow of goods across borders. The Court rejected Saxon's argument that all airline employees qualify for the FAA exemption. The FAA speaks not of "employees" but of "workers," and the conduct of the worker, not the employer, is controlling. Under the common and ordinary meanings of the exemption's terms, a "worker" is one who performs work, and "engaged" means occupied, employed, or involved. By these definitions, an employee performing the work of loading and unloading cargo from a vehicle carrying goods in interstate transit is a worker "actively engaged" in the transportation process. This conclusion is supported by Section 1's exemption of "maritime transactions" relating to foreign commerce, defined to include "wharfage" agreements. That provision recognizes that access to a wharf – the maritime version of a cargo-loading facility -- is an essential part of the shipping industry. If access to a cargo-loading facility is crucial to foreign commerce, "it stands to reason" that an individual who loads cargo onto a vehicle traveling across borders "is himself engaged in such commerce."

Federal Circuit Courts

- **EMPLOYEE'S DENIAL OF E- SIGNING ARBITRATION AGREEMENT CREATES TRIABLE ISSUE OF FACT**

  Barrows v Brinker Restaurant Corporation
  2022 WL 1739560
  United States Court of Appeals, Second Circuit
  May 31, 2022

  Restaurant worker Savannah Barrows brought a putative class action against her former employer, Brinker, for employment law violations. Brinker moved to dismiss and compel arbitration under an Arbitration Agreement it claimed Barrows had signed electronically during her onboarding process. Brinker supported its motion with evidence that 1) the Agreement and receipt were completed on a Brinker computer on a day Barrows was working; 2) the platform requires each new employee to initially log in to the system with a temporary password comprised of work location, birth month and year, and last four social security digits, and then to establish a new, unique password required each time the employee executes a document; 3) restaurant management testified that they had never filled out onboarding documents for Barrows or any other employee. Brinker also produced a paper arbitration agreement signed by Barrows's co-worker and fellow claimant, Michael Mendez, under which Mendez conceded that his individual claims were arbitrable. In response, Barrows submitted a sworn statement that she had never completed any electronic paperwork, never used the restaurant computers, and never saw or signed any arbitration agreement. The court granted Brinker's motion and dismissed Barrows's suit, finding that Barrows's evidence was insufficient to create a triable issue of fact. Barrows appealed.

  The United States Court of Appeals, Second Circuit vacated and remanded. The party seeking to compel arbitration bears the initial burden of proving the existence of an arbitration agreement, and the court must draw all reasonable inferences in favor of the non-moving party. Brinker met its initial burden by producing an Arbitration Agreement that appeared to bear Barrows's electronic signature. The burden then shifted to Barrows to counter with at least some evidence. The court erred in completely discounting the evidentiary value of Barrows's sworn declaration. Her testimony, made in "specific, exacting terms, and under penalty of perjury," constituted "some evidence" that she had not agreed to arbitration. Brinker controlled the computer involved, had access to all the information necessary to log in as Barrows initially, and her co-worker's paper agreement undercut Brinker's claim that its onboarding process was entirely electronic. Drawing inferences in favor of Barrows, these facts, combined with her testimony, established a triable issue of fact to be resolved below.

- **NON-SIGNATORY COULD NOT ENFORCE ARBITRATION AGREEMENT**

  Hinkle v Phillips 66 Company
  2022 WL 1711660
  United States Court of Appeals, Fifth Circuit
  May 27, 2022

  Troy Hinkle signed an Arbitration Agreement with Cypress Environmental Management, a staffing company for the pipeline industry, when he was hired as a pipeline inspector. Cypress sent Hinkle to work for Phillips 66, and, after working several months with no overtime pay, Hinkle filed a collective action against Phillips for FLSA violations. The court granted Cypress's permissive intervention, and both Cypress and Phillips moved to compel arbitration. Phillips, a non-signatory to the Agreement, argued that the delegation clause required the arbitrator to determine whether Phillips could enforce arbitration based on intertwined claims estoppel. Cypress argued that it could compel arbitration as an "aggrieved party" to the Hinkle-Phillips dispute under FAA Section 4. The court dismissed both motions to compel, and Cypress and Phillips appealed.

  The United States Court of Appeals, Fifth Circuit affirmed. Phillips' right to enforce the Hinkle-Cypress Agreement was a formation issue properly before the court, not the arbitrator. Phillips was not a signatory to the Agreement, nor was it an agent for Cypress. The mere fact that Phillips and Cypress were on the same side of the dispute did not require Hinkle to arbitrate against a non-signatory. Cypress, in turn, had no rights to enforce arbitration of a dispute between Hinkle and Phillips. The Court rejected Cypress's argument that it was an "aggrieved party" because it could be held jointly liable with Phillips. A party is considered "aggrieved" only "where the arbitration may not proceed under the provisions of the contract without a court order." Here, Hinkle promised only to arbitrate claims against Cypress, and Hinkle's refusal to arbitrate against Phillips did not breach that agreement.

- **COMPANY COULD NOT ENFORCE ARBITRATION AGREEMENT MADE UNDER FALSE IDENTITY**

  CCC Intelligent Solutions Inc v Tractable Inc.

2022 WL 1948753
United States Court of Appeals, Seventh Circuit
June 6, 2022

CCC, the industry leader in software used by insurance companies to estimate vehicular damage costs, licensed its software to JA Appraisal, which represented itself as a "small, independent appraiser." The License Agreement forbade assignment of the license without CCC's consent and represented that JA Appraisal was "acting on its own behalf" and not "as an agent for or on behalf of any third party." CCC later discovered that JA Appraisal was a false identity created by an agent of CCC's primary competitor, Tractable. Using the JA Appraisal license, Tractable had disassembled CCC's product and incorporated CCC's algorithms and features into its own product, making it essentially a CCC clone. CCC sued Tractable, and Tractable moved to compel arbitration under the License Agreement, arguing that "JA Appraisal" was another business name for Tractable and, alternatively, that fraud was an enforcement defense to be decided by the arbitrator. The court denied the motion, holding that Tractable was not a party to the License Agreement. Tractable appealed.

The United States Court of Appeals, Seventh Circuit affirmed. Tractable was not a party to the License Agreement and held no right to enforce arbitration. "JA Appraisal" was not another name for Tractable: it was not recognized in the industry as a name under which Tractable did business, and Tractable's counsel conceded that there was no way that CCC could have known that Tractable was acting under that name. The Court rejected Tractable's attempt to reframe the issue as "fraud in the inducement" to be determined by the arbitrator. CCC was not claiming that Tractable misled CCC about some aspect of the company or the agreement; rather, CCC did not know that it was contracting with Tractable at all.

- **SIGNATORY DID NOT HAVE "APPARENT AUTHORITY" TO SIGN CONTRACT CONTAINING ARBITRATION AGREEMENT**

GP3 II, LLC v Litong Capital, LLC
2022 WL 1814760
United States Court of Appeals, Eighth Circuit
June 3, 2022

Litong signed a Contract to procure pipes for GP3, an investment vehicle for a water pipelines Project. The Contract showed Ron Green, the Project developer's president, as the signatory for GP3, identifying Green as a "partner." The Project fell through, and GP3 sued Litong for fraud. Litong moved to compel arbitration under the Contract. GP3 opposed, claiming no knowledge of the Contract. Green denied signing the Contract or ever having the authority to do so. The court denied Litong's motion, finding no valid agreement between the parties as, even assuming that Green did sign the Contract, he lacked authority to sign on behalf of GP3. Litong appealed.

The United States Court of Appeals, Eighth Circuit affirmed. The parties agreed that Green had no actual authority to sign the Contract for GP3, and Litong failed to show that Green acted with apparent authority. Under Missouri law, apparent authority is based on whether the principal knew and acquiesced in the actions of the alleged agent based on facts existing at the time of the transaction. The Court rejected Litong's evidence that, subsequent to the Contract, Green represented himself as GP3's agent and that GP3 acquiesced to the Contract by causing a letter of credit to be issued with Litong as the beneficiary. Post-Contract evidence was irrelevant to determining apparent authority, and Litong failed to raise any claim of subsequent ratification. At the time of the signing, Litong relied solely on a third-party broker's representation that Green owned part of GP3. Absent any evidence that GP3 knew or approved of Green acting as its representative at the time, the court did not err in concluding that Green lacked apparent authority to sign the Contract.

- **WHETHER ARBITRATION AGREEMENT SUPERCEDED IS ISSUE TO BE DECIDED BY ARBITRATOR**

Benchmark Insurance Company v Sunz Insurance Company
2022 WL 1916542
United States Court of Appeals, Eighth Circuit
June 6, 2022

Payday Inc. entered into a Program Agreement with a Sunz subsidiary for the future purchase of large deductible workers' compensation insurance policies. The Agreement included a binding arbitration clause and stated that, in the event of a conflict between the Agreement and an insurance policy issued pursuant to the Agreement, the insurance policy would control. In the course of a complex litigation involving two insurance companies, one affiliate, and 35 insureds, Payday filed breach of contract counterclaims against Sunz, claiming that Sunz had acted improperly in administering its policies and increasing collateral requirements. When Sunz moved to compel arbitration under the

Agreement, Payday argued that the Agreement had been superseded by its subsequently purchased insurance policy. The court denied the motion, and Sunz appealed.
The United States Court of Appeals, Eighth Circuit reversed and remanded. The insurance policy could not be read without the Agreement, which set forth the policy's terms and conditions, including the disputed collateral requirements. The Agreement was the source of Sunz's alleged liability, and, in that Agreement, both parties had agreed to binding arbitration. Payday's claim that its insurance policy superseded the Agreement was a validity challenge to be decided by the arbitrator.

-
- **ARBITRATOR TO DECIDE WHETHER DODD-FRANK ACT BARRED ENFORCEMENT OF ARBITRATION PROVISION**

  Attix v. Carrington Mortgage Services, LLC
  2022 WL 1682237
  United States Court of Appeals, Eleventh Circuit
  May 26, 2022

  William Attix paid his mortgage loan servicer, Carrington, via Speedpay, a third-party automated phone payment service provider. To proceed through the automated system, Attix was required to agree, by the press of a phone key, to a $10 convenience fee and to Terms and Conditions, located on Speedpay's website, requiring mandatory AAA arbitration of disputes against Speedpay and/or Carrington. The arbitration provision included a delegation clause stating that the arbitrator would decide "what is subject to arbitration unless prohibited by law." Attix filed a putative class action against Carrington, alleging that the Speedpay service violated the FDCPA and Florida law by collecting convenience fees for mortgage payments. Carrington moved to compel arbitration under the Terms and Conditions. The court denied the motion, holding that the arbitration agreement was unenforceable under the Dodd-Frank Act, which prohibits pre-disputes arbitration and waiver provisions of federal actions connected with residential mortgages. Carrington appealed. The United States Court of Appeals, Fifth Circuit reversed and remanded with instructions that the court compel arbitration to determine arbitrability. The parties "clearly and unmistakably" agreed to delegate arbitrability through the provision's broad delegation clause and by incorporating AAA Consumer Arbitration Rules stating that the arbitrator "shall have the power to rule on his or her own jurisdiction." It was, therefore, for the arbitrator to determine whether Dodd-Frank rendered the arbitration provision unenforceable. The Court rejected Attix's argument that the phrase "unless prohibited by law" limited the scope of the delegation, i.e., that the arbitrator should decide arbitrability unless the question was whether the arbitration was prohibited by law. This interpretation contradicted the "plain and natural reading of the clause" that all questions of arbitrability were delegated to an arbitrator.

-
- **NEW YORK CONVENTION GOVERNED ACTION TO VACATE NON-DOMESTIC ARBITRATION AWARD**
-
- *Corporacion AIC v Hidroelectric Santa Rita S.A.*
  2022 WL 1698350
  United States Court of Appeals, Eleventh Circuit
  May 27, 2022

  Hidroelectrica and AICSA, both Guatemalan companies, contracted for AICSA to construct a hydroelectric plant in Guatemala. AICSA began construction, but the project experienced such significant local backlash, including a blockade and threats against the workers, that Hidroelectrica terminated the project under the contract's force majeure clause. The parties sought arbitration of damages and reimbursement claims, and, in an arbitration in Miami, Florida, arbitrators awarded Hidroelectrica reimbursement. AICSA sued to vacate in the Southern District of Florida, claiming that the panel had exceeded its powers. The court, following Eleventh Circuit precedent, denied the motion, holding that a motion to vacate a non-domestic arbitration award must be resolved under the New York Convention, which does not provide for vacation on excess of authority grounds. AICSA appealed.

  The United States Court of Appeals, Eleventh Circuit affirmed, making clear that it was reaching the wrong result. Acting as a three-judge panel, the Court had no choice but to follow Eleventh Circuit precedent to hold that the motion to vacate could be reviewed only according to the standards of the New York Convention. The arbitration at hand, conducted in the U.S. between two foreign parties, was a "non-domestic" arbitration under both the Convention and the FAA, requiring courts to reconcile the provisions of both. The Convention provides that it "must be enforced according to its terms over all prior inconsistent rules of law," while FAA Chapter 2 provides that non-domestic arbitrations are governed by the same rules as domestic arbitrations "to the extent that" those rules do not conflict with Chapter 2 of the Convention. The Court previously interpreted these provisions to mean that a non-domestic arbitration award could be vacated only based on the seven defenses set forth in the Convention, none of which included excess of authority. This precedent was now "out of

line" with subsequent cases of the Supreme Court and other circuits. The Court advised the Eleventh Circuit to overturn its decisions (in Inversiones and Industrial Risk Insurers) en banc and hold that under a correct understanding of Supreme Court precedent, the exceeding powers ground is a valid basis for vacating under both the NY Convention and the FAA.

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