July 27, 2022

ADR Case Update 2022 - 13

Federal Circuit Courts

- **LOWER COURT TO SEVER OFFENDING PORTIONS OF ARBITRAL AWARD**

  Esso Exploration and Production Nigeria Limited v Nigerian National Petroleum Corporation
  2022 WL 2542031
  United States Court of Appeals, Second Circuit
  July 8, 2022

  Pursuant to a Production Sharing Contract (PSC), Esso provided development funds for Nigerian National (NNPC) to extract oil from the Erha oil field. The PSC required NNPC to "lift" amounts of extracted oil to pay for taxes, royalties, and Esso's operating costs. Esso disputed NNPC's lift allocations and commenced arbitration in Nigeria as required by the PSC's arbitration clause. The arbitration panel held for Esso, finding that NNPC had "overlifted" tax and royalty oil and improperly reduced the amount of cost oil owed to Esso. Just before the award issued, Nigeria's Federal Inland Revenue Service (FIRS) successfully sued to enjoin the arbitration. The court held that the entire dispute was not arbitrable, as "any determination of the issues raised" would impact FIRS's ability to assess and collect taxes. Based on this holding, NNPC sued for and was granted nullification of the award. On appeal in both actions, the appellate courts upheld set-aside of the tax issues as non-arbitrable and, in the NNPC action, the court reinstated the award as to the remaining issues. Esso then petitioned to enforce the award in U.S. district court. After determining that the Nigerian court rulings did not "offend notions of justice" in the U.S., the court extended judicial comity to the Nigerian court's set-aside of the tax issues and declined to enforce the award in its entirety. Esso appealed.

  The United States Court of Appeals, Second Circuit affirmed in part, vacated in part, and remanded. The New York Convention obligates U.S. courts sitting in secondary jurisdiction to enforce foreign arbitral awards subject to multiple exceptions, including a "set-aside" exception. When an authority in the country of primary jurisdiction has set aside the award, the court should extend comity to that authority and decline to enforce the judgment unless doing so would violate public policy, a high standard requiring a showing that setting aside the award would be "repugnant to fundamental notions of what is decent and just in this country." As Esso failed to

make such a showing, the court properly afforded comity to the Nigerian courts. The court erred, however, in failing to enforce those portions of the award that had been reinstated by the Nigerian appellate court. Acknowledging that the delineation of the award remained unclear, the Court remanded for the lower court to "determine the contours of the Nigerian judgments and enter an enforcement order consistent with those judgments."

- **ARBITRATOR TO DECIDE WHETHER NON-SIGNATORY CAN ENFORCE ARBITRATION AGREEMENT**

  Becker v Delek US Energy, Inc.
  2022 WL 2448287
  United States Court of Appeals, Sixth Circuit
  July 6, 2022

  Michael Becker was hired as an electrical inspector by Cypress Environmental Management, a staffing company for the pipeline industry. Cypress categorized Becker as an overtime-exempt administrative employee, set his day rate, issued his paychecks, and, in its onboarding process, required him to sign an arbitration agreement containing a delegation clause. Cypress sent Becker to work at Delek US Energy, where he worked 12 to 15-hour days, 7 days a week. Becker sued Delek for FLSA violations, seeking back pay for overtime work. The court granted Cypress permissive intervention, and both Cypress and Delek moved to compel arbitration. The court dismissed both motions, concluding that arbitrability was a question for the court, not the arbitrator. Cypress and Delek appealed.

  The United States Court of Appeals, Sixth Circuit reversed. Whether a non-signatory can enforce an arbitration agreement is a question of enforceability rather than formation and is properly decided by the arbitrator. The Court declined to consider whether Delek, as a non-signatory, could enforce the delegation clause. A court may consider a delegation clause challenge only if a party makes that challenge specifically based on different factual or legal grounds than the challenge to the arbitration agreement as a whole. Here, Becker conceded that Delek's non-signatory status was his only basis for challenging both the arbitration agreement and the delegation clause. As Delek, therefore, failed to raise a specific challenge, the delegation clause remained valid and enforceable.

- **FILING OF EMPLOYEE APPEAL DID NOT DIVEST ARBITRATOR OF JURISDICTION**

  Fraternal Order of Police v District of Columbia Metropolitan Police Department
  2022 WL 2721052
  District of Columbia Court of Appeals
  July 14, 2022

  The D.C. Police Department delivered Officer Justin Linville's notice of termination to the wrong address. Under the governing statute, a terminated employee has a limited time from the date of service within which to choose to file an appeal with the Office of Employee Appeals (OEA) or to invoke arbitration through the union. An employee must pursue one option only, and, by filing with either OEA or the union, the employee is deemed to have exercised that choice. Linville eventually received notice just four days before the deadline – too short a time to determine if the union would be willing to arbitrate his claim. To ensure at least one appeal option, Linville filed a "protective" OEA appeal which he then withdrew after the union agreed to arbitrate on his behalf. The Department moved to dismiss the arbitration for lack of jurisdiction, arguing that Linville's filing of the OEA appeal foreclosed him from pursuing arbitration. The arbitrator held that the case was arbitrable, finding that the statute did not state that an employee's choice was irrevocable and that the Department's failure to provide adequate notice had prevented Linville from exercising a meaningful choice before the deadline. The Public Employee Relations Board affirmed the decision, but the Superior Court reversed, holding that since Linville was never served with the initial termination notice, it was 'unarguable" that the appeals deadline "should be considered never to have started to run" and that Linville, therefore, had not been deprived of meaningful choice. Linville appealed.

  The District of Columbia Court of Appeals reversed, holding that Linville's filing with the OEA did not divest the arbitrator of jurisdiction. The rule governing termination appeals is directed at

claim-processing rather than jurisdiction: it uses no jurisdictional terms and establishes no jurisdictional consequences. The Court rejected the Department's claim that, even if non-jurisdictional, the rule was mandatory and precluded equitable relief. The rule was intended to give employees a choice of forum. Since the Department's faulty notice left Linville with no time to determine his union's willingness to arbitrate, Linville "might quite reasonably be relieved of the consequence of a statute that presumes a choice he did not in fact have." Linville was not seeking to contravene the statute to "get a second bite at the apple" or pursue multiple routes of appeal but was simply trying to find his way out of a bind he found himself in through no fault of his own. The court below erred in finding that Linville should have assumed that the appeals deadline would begin to run only upon his actual receipt of service. No "prudent litigator" can assume that their position will be vindicated and, as the Department did, in fact, argue below that its initial service was adequate to trigger the deadline, Linville could not be faulted for "lacking confidence" in that outcome.

California

- **FAA APPLIED TO INTRASTATE TRANSIT SYSTEM EMPLOYMENT CONTRACT**

  Evenskaas v California Transit, Inc.
  2022 S.O.S. 3084; 2022 Cal. App. LEXIS 622
  Court of Appeal of the State of California, Second Appellate District, Division Seven
  July 15, 2022

  David Evenskaas worked as a driver for Caltrans paratransit services, which provides public transit to disabled riders. When Evenskaas filed a class action against Caltrans for wage and hour claims, Caltrans moved to compel arbitration under his employment contract and to dismiss pursuant to the contract's class action waiver. Evenskaas argued that Caltrans could not enforce arbitration under the FAA because Caltrans was not engaged in interstate commerce and that the class action waiver was unenforceable based on the California Supreme Court's holding in *Gentry v Superior Court*. The court ruled for Evenskaas, holding that the FAA did not apply and that the class action waiver was unenforceable. Caltrans appealed.

  The Court of Appeal of the State of California, Second Appellate District, Division Seven, reversed and remanded, holding that the FAA applied to Evenskaas's employment contract. Although Caltrans does not operate outside state lines, its paratransit services operate pursuant to the requirements of the ADA and are subject to federal control. Citing the Supreme Court's recent decision in *Viking River Cruises, Inc. v. Moriana*, the Court held that the FAA preempts the *Gentry* rule against enforcing certain class action waivers in an employment contract. Absent other grounds, the waiver, therefore, remained enforceable. The Court directed the lower court, on remand, to compel arbitration and dismiss all class claims.

Missouri

- **SEPARATE ARBITRATION AGREEMENT WAS PART OF CONTRACT**

  Bridgecrest Acceptance Corporation v Donaldson
  2022 WL 2707785
  The Supreme Court of Missouri, en banc
  July 12, 2022

  Kelly Donaldson and other consumers (Consumers) purchased cars through Installment Contracts assigned to Bridgecrest. The Contracts incorporated by reference separate Arbitration Agreements, which, in turn, incorporated the Contracts by reference, identifying each Agreement as "part of" the accompanying Contract. When Consumers defaulted on their payments, Bridgecrest repossessed and sold their cars, then sued to collect outstanding payments. Consumers counterclaimed for unlawful and deceptive business practices, and Bridgecrest moved to compel arbitration. The court denied the motion, holding that the Arbitration

Agreements lacked consideration, were unconscionable, and that Bridgecrest was estopped from enforcement after unsuccessfully attempting to invoke arbitration under the same form arbitration agreement in a previous case. The court of appeals affirmed. The Supreme Court of Missouri transferred the case to its docket pursuant to Article V, section 10 of the Missouri Constitution.

The Supreme Court of Missouri reversed and remanded, holding that the Arbitration Agreements did not lack consideration, were not unconscionable, and were not precluded by collateral estoppel. In each instance, the Contract consisted of the Contract and the Agreement together, and the car sale provided consideration for that Contract as a whole. The fact that the Arbitration Agreements excluded Bridgecrest's self-help remedy of repossession did not render them unconscionably one-sided, as Consumers were not constrained to contest that self-help through arbitration but remained free to seek injunctive relief. Bridgecrest was not estopped from enforcing the Agreements based on the arbitral finding in a separate case that the form arbitration agreement lacked consideration. In that case, the arbitrator had previously determined the underlying contract to be fraudulent and void and examined the arbitration agreement as a stand-alone document. Here, the Contracts were never held invalid and provided the consideration necessary to support the Arbitration Agreements.

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

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