August 10, 2022

ADR Case Update 2022 - 14

Federal Circuit Courts

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

  Abdurahman v Prospect CCMC LLC
  2022 WL 2977361
  United States Court of Appeals, Third Circuit
  July 28, 2022

  Crozer Keystone is the parent corporation of a hospital, CCMC, and Prospect, a company that employs professionals working at hospitals. When Dr. Dina Abdurahman was hired as a medical resident at CCMC, she signed an employment agreement with Crozer Keystone, an arbitration agreement with Prospect, and a residency agreement with CCMC. Abdurahman was terminated following a dispute over sexual harassment claims she had made against her supervisor Dr. Jacobs, a Prospect employee. Abdurahman sued CCMC and Jacobs, who moved to dismiss based on Abdurahman's arbitration agreement with Prospect. The court rejected the motion, and CCMC and Jacobs appealed.

  The United States Court of Appeals, Third Circuit affirmed. CCMC, as a non-signatory, had no right to enforce the arbitration agreement. CCMC held no agency rights to enforcement: evidence showed that Prospect was CCMC's agent, not the other way around, and agency alone is insufficient to support enforcement unless the agent is specifically acting on behalf of the signatory. CCMC's "corporate sibling" relationship did not establish the "obvious and close nexus" necessary to invoke estoppel. The Court rejected CCMC's argument that the documents Abdurahman signed upon her hiring should be viewed together, as Abdurahman's claims were not founded in or entwined with any underlying contractual obligation. The Prospect arbitration agreement created no duties or obligations beyond arbitrating all disputes with Prospect. Abdurahman's claim against Prospect employee Jacobs fell outside of that agreement, as the arbitration agreement was limited to disputes arising from Abdurahman's "employment with" Prospect, and Abdurahman was employed by CCMC, not Prospect.

- **CASE REMANDED TO DETERMINE WHETHER FACIALLY VALID CONTRACT REVOCABLE UNDER VOID CONTRACT DEFENSE**

  Triplet v Menard, Inc.
  2022 WL 3009204
  United States Court of Appeals, Eighth Circuit
  July 29, 2022

  Menard hired Maggie Triplet, who has severe autism, as a cashier. Menard refused Triplet's requests to allow her state-sponsored job coach to accompany her during the hiring process, and when Triplet signed an employment agreement that included an arbitration clause, she was given no opportunity to review the agreement with her job coach or with her mother, who serves as her guardian and conservator. Triplet struggled with her work, and one day, when she "shut down," her manager Barb Myers pinned Triplet's arms and dragged her from the work area. Triplet and her mother sued Menard and Myers for discrimination and state-law torts, and Menard and Myers moved to compel arbitration. The court denied the motion, holding the arbitration agreement unenforceable as a matter of equity. Menard and Myers appealed.

  The United States Court of Appeals, Eighth Circuit, vacated and remanded, holding that the contract was facially valid under South Dakota law. Under the FAA, a written arbitration agreement is unenforceable only if state-law grounds exist to revoke the agreement, and the court below failed to identify such grounds. The fact that Triplet had been placed in conservatorship was not, in itself, evidence that Triplet was legally incompetent to contract. The Court noted that the contract might be found revocable under the void contract defense but found the record insufficiently developed to support that finding. The Court remanded the case for summary trial to determine whether the arbitration agreement was enforceable.

- **INTERNATIONAL ARBITRAL SUBPOENA ENFORCEABLE**

  Jones Day v Orrick, Herrington & Sutcliffe, LLP
  2022 WL 3023605
  United States Court of Appeals, Ninth Circuit
  August 1, 2022

  Law firm Jones Day commenced international arbitration in Washington, D.C. against one of its former partners, a German national, who left Jones Day's Paris office to join Orrick, Herrington & Sutcliffe. When Orrick failed to comply with an arbitral document subpoena, Jones Day petitioned to enforce the subpoena in D.C. Superior Court. The court dismissed the petition for lack of personal jurisdiction over San Francisco-based Orrick. The arbitrator then sat for a hearing in San Jose and issued a subpoena for the appearance of two Orrick partners. Orrick again refused to comply, and Jones Day sued to enforce the action in the District Court for the Northern District of California. The court denied the petition, holding that FAA § 7 grants enforcement authority only to the district in which the arbitrator sits. The court held that an arbitrator could not sit in more than one location so that, despite the hearing in San Jose, Washington, D.C. constituted the seat of the arbitration for venue purposes. Jones Day appealed.

  The United States Court of Appeals, Ninth Circuit, reversed. The district court properly held subject matter jurisdiction over the subpoena enforcement under FAA § 2, which provides federal jurisdiction over an "action or proceeding falling under" the New York Convention. The Court rejected Orrick's argument that this language applies only to enforcement of final arbitral awards. The provision does not exclude enforcement of arbitral subpoenas, and an action need not be specifically listed in the Convention to "fall under" the Convention. Enforcement of an arbitral subpoena is not only consistent with the Convention but is necessary to ensure proper functioning of the underlying arbitration. The lower court erred in dismissing the action on venue grounds. FAA § 204 provides that such an action "may be brought" in the district where the arbitration is held. This language is permissive, not restrictive, and the provision "supplements, rather than supplants" other venue rules. Here, the Northern District of California was an appropriate venue because it was the location of Orrick's principal place of business.

- **PUBLIC POLICY OBJECTION WAIVED BECAUSE PARTY FAILED TO OBJECT DURING ARBITRATION PROCEEDINGS**

Técnicas Reunidas de Talara S.A.C. v SSK Ingeniería y Construcción S.A.C.
United States Court of Appeals, Eleventh Circuit
2022 WL 2898795
July 22, 2022

After the final arbitration hearing between Técnicas and SSK, two attorneys on SSK's legal team resigned and took jobs with the law firm representing Técnicas. The parties proceeded with post-hearing briefings, and, a year later, the arbitral panel issued a $40 million award to SSK. Técnicas petitioned to vacate the award, arguing that the attorneys' actions violated public policy. The court agreed that attorney "side-switching" was against public policy but held that the award did not contravene that policy, as Técnicas made no showing of actual prejudice and had waived its right to object by failing to do so within a reasonable time. Técnicas appealed.

The United States Court of Appeals, Eleventh Circuit, affirmed. Leaving aside the public policy issue, the Court held that Técnicas had waived its objection by failing to raise it in a timely manner. All the facts of the attorney side-switching were made available to Técnicas more than a year before the award issued, giving Técnicas ample opportunity to object during the arbitral proceedings. Having failed to object to the attorneys' actions during the arbitration, Técnicas could not later rely on those actions to collaterally attack an unfavorable award.

California

- **FAA DID NOT PREEMPT STATUTORY TIME LIMITATION ON PAYING ARBITRATION FEES**

  Gallo v Wood Ranch USA, Inc.
  Court of Appeal of the State of California, Second Appellate District, Division Two
  No. B311067
  July 25, 2022

  Under California Civil Procedure rules 1281.97 and 1281.98, a company enforcing its own arbitration agreement against a consumer or employee must pay its share of arbitration fees within 30 days of the due date. Failure to do so constitutes a "material breach" of the arbitration agreement, triggering mandatory attorney fees and costs, after which the opposing party may continue with arbitration at the company's expense or proceed to litigation. When restaurant server Sunny Gallo sued her employer, Wood Ranch, for multiple employment violations, Wood Ranch successfully moved to compel arbitration under the arbitration agreement Gallo signed upon hiring. The parties selected an arbitrator, but, despite multiple notifications from the arbitrator, Wood Ranch failed to pay within 30 days of the deadline. Gallo then moved to vacate the arbitration order, declaring her intention to withdraw from the arbitration and proceed in litigation. Wood Ranch opposed, arguing that sections 1281.97 and 1281.98 were arbitration-specific restrictions preempted by the FAA. The court granted Gallo's motion to vacate, awarding her attorneys' fees and costs. Wood Ranch appealed.

  The Court of Appeal of the State of California, Second Appellate District, Division Two affirmed. Sections 1281.97 and 1281.98 were enacted to address a specific problem: employees and consumers were being trapped in "procedural limbo" by companies that required arbitration agreements but then stalled or avoided arbitration by refusing to pay their share of fees. The FAA does not preempt every arbitration-specific law, but only those whose effect is to prohibit, discourage, or otherwise adversely affect arbitration. The provisions here were enacted to support arbitration by giving effect to the parties' agreement to arbitrate. They essentially create a statute of limitations after which arbitration may proceed at company cost, safeguarding employee and consumer arbitration against corporate sabotage.

Massachusetts

- **FOOD DELIVERY DRIVERS NOT EXEMPT FROM FAA**

  Archer v Grubhub
  2022 WL 2964639
  Supreme Judicial Court of Massachusetts
  July 27, 2022

  Grubhub driver Veronica Archer delivered restaurant takeout meals, as well as pre-packaged items such as potato chips and sodas from convenience stores or markets, to local customers. When Archer and other drivers (Drivers) sued Grubhub for wage violations, Grubhub moved to compel arbitration under the terms of the Drivers' online registrations. The court denied the motion, holding that Drivers were among the "class of workers engaged in foreign and interstate commerce" exempt from the FAA under FAA § 1. Grubhub appealed, and the Supreme Judicial Court of Massachusetts transferred the case to its docket sua sponte.

  The Supreme Judicial Court of Massachusetts reversed and remanded, holding that Drivers were not workers engaged in interstate commerce exempt under FAA Section 1. Federal jurisprudence interprets this class of workers to include workers for whom the interstate movement of goods is a "central part" of their job description. Their jobs must be connected not just to goods that may have crossed state lines but to "the act of moving those goods across state or national borders." Here, the pre-packaged goods completed their interstate journey when delivered to the local restaurants and convenience stores that had ordered them, not when Drivers delivered those goods from a local seller to a local consumer.

New Jersey

- **PARTY SUING INSURER UNDER DIRECT ACTION STATUTE SUBJECT TO ARBITRATION AGREEMENT OF ORIGINAL INSUREDS**

  Crystal Point Condominium Association, Inc v Kinsale Insurance Company
  2022 WL 2793326
  Supreme Court of New Jersey
  July 18, 2022

  Crystal Point successfully sued two contractors over construction defects but was unable to collect the judgments because the contractors disappeared. Crystal Point then sued the contractors' insurer, Kinsale, relying on New Jersey's Direct Action Statute, which enables a party unable to collect on a final judgment to bring a direct action against the insurer. Kinsale moved to compel arbitration under the arbitration agreements in the contractors' policies. The court declined to apply the Direct Action Statue on evidentiary grounds but, finding that the arbitration agreements applied to "all" coverage disputes, ordered the parties to arbitration. The court of appeals reversed, holding that the Direct Action Statue applied and that Crystal Point was an "incidental beneficiary" not subject to the arbitration provisions. Kinsale petitioned for and was granted certification.

  The Supreme Court of New Jersey reversed, reinstating the arbitration order. By providing sheriff affidavits showing unsatisfied writs of execution on the judgments, Crystal Point presented sufficient evidence of the contractors' insolvency to trigger coverage of the Direct Action Statute. The Statute's plain language states that such an action is "purely derivative" of the contractors' rights, meaning that Crystal Point holds only those rights held by the contractors. By holding that Crystal Point was not subject to the arbitration agreements, the appellate court granted Crystal Point greater rights than the contractors could have asserted. Accordingly, Crystal Point's claims were subject to the arbitration agreements and should be resolved in binding arbitration.

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

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