September 21, 2022

ADR Case Update 2022 - 17

Federal Courts

- **STATUTE OF LIMITATIONS FOR ENFORCING AWARD RUNS FROM TIME AWARD BECOMES BINDING**

  The University of Notre Dame (USA) in England v TJAC Waterloo, LLC
  United States Court of Appeals, First Circuit
  2022 WL 4138410
  September 13, 2022

  TJAC hired ZVI Construction to renovate a dormitory which TJAC then sold to the University of Notre Dame in England. In a London arbitration, Notre Dame sought damages from TJAC and ZVI for construction defects. The parties agreed to bifurcate the arbitration into two proceedings: one to determine liability and the second to allocate damages. At the end of the liability proceedings, the arbitrator issued Award Nos. 1 and 2 finding TJAC and ZVI jointly liable. After Notre Dame confirmed the award in U.S. district court, TJAC and ZVI appealed, arguing that the award was not "final" for purposes of judicial enforcement. The United States Court of Appeals, First Circuit affirmed the confirmation, holding that when parties have agreed to arbitrate liability and damages in separate proceedings, the liability award constitutes a final, enforceable order. Meanwhile, the parties continued with damages proceedings, and between 2016 and 2020, the arbitrator issued damages Award Nos. 3 – 7, each addressing a separate portion of the damages. Following issuance of the last award, No. 7, on March 31, 2020, Notre Dame moved to confirm the total award. TJAC and ZVI opposed, arguing that enforcement of Award No. 4 – the largest award, issued on April 11, 2017 -- was barred by the three-year statute of limitations. The district court confirmed the total award, holding the statute of limitations did not begin to run until the arbitrator issued Award No. 7, at which point the arbitrator had concluded a "final comprehensive damages determination" that "definitely and comprehensively" settled the parties' dispute. TJAC and ZVI appealed.

  The United States Court of Appeals, First Circuit affirmed. Under FAA § 207, a foreign arbitral award falling under the New York Convention may be confirmed within three years after the award "is made." § 207 also provides that enforcement may be refused if the award "has not yet

become binding on the parties." Read together, these provisions establish that an award "is made" for enforcement purposes not when the award is issued but when it becomes binding upon the parties. Otherwise, if the statute began to run the moment an award was issued, the limitations period could conceivably expire before the award became enforceable. Under the First Circuit's "well-worn finality standard," an award is deemed final if it reflects the arbitrator's intent to resolve all claims submitted in the arbitration demand. Each damages award here was essentially an interim award allocated to a specific finding: Award No. 4 calculated the "final cost of works," while Award No. 5 reflected "additional and ancillary costs," and No. 6 calculated interest due on Award Nos. 4 and 5. The arbitrator specifically stated in Award No. 4 that the Awards were "to be read together" and that other damages determinations were "yet to be decided." In Award No. 6, the arbitrator revised an ongoing interest award made in Award No. 5, reflecting his understanding that each Award was a piece of an ongoing process, not a final and definitive resolution enforceable on its own. The fact that the damages were determined "piecemeal" did not create the same situation as the original bifurcation. There, the parties had specifically agreed to resolve liability and damages in two separate proceedings, and the first award, made up of Award Nos. 1 and 2, constituted the final resolution of liability. Here, there had been no agreement to treat the damages awards as independently final and confirmable, and Award No. 4 did not "finally and definitely" resolve a claim for purposes of triggering the statute of limitations.

- **RECORD INSUFFICIENT TO DENY MOTION TO COMPEL ARBITRATION**

  Zachman v Hudson Valley Federal Credit Union
  United States Court of Appeals, Second Circuit
  2022 WL 4229375
  September 14, 2022

  Nicole Zachman filed a putative class action against her Credit Union for wrongfully assessing fees. The Credit Union moved to compel arbitration under the arbitration agreement in its standard Account Agreement. Zachman opposed, claiming that when she opened her account in 2012, the Account Agreement contained no arbitration provision and that she was never notified that the Agreement had been updated to include one. The Credit Union responded that Zachman had been put on inquiry notice of the updated Account Agreement when she signed up for online banking, which required Zachman to click "I agree to the above terms and conditions" to an "Internet Disclosure and Agreement" that referenced and provided a URL to the updated Account Agreement. Zachman argued that this process was insufficient to put her on notice that the original Account Agreement had been updated, as no notifications of any updates were posted on the website, in the Credit Union's quarterly newsletter, or on Zachman's account statements. At the hearing, the Credit Union presented a copy of the Account Agreement but no screenshots or other visual aids to show the layout or design of the webpages Zachman viewed. The court denied the motion to arbitrate, finding that the Credit Union failed to demonstrate that Zachman was put on inquiry notice of the arbitration agreement. The Credit Union appealed.

  The United States Court of Appeals, Second Circuit reversed, finding that the lower court erred in denying arbitration based on an insufficient factual record. "Clickwrap" and "scrollwrap" agreements, which require a user to affirmatively click "I agree," are consistently upheld where the website presents the agreement in a "clear and conspicuous" manner sufficient to provide the user constructive notice of the agreement's terms. This determination requires a court to assess visual evidence of the webpage's layout and design, typically presented in screenshots. Here, the Credit Union failed to submit evidence that would have enabled the court to make these assessments. Instead of making a final determination based on an insufficiently developed record, however, the court should have required further evidence or proceeded to trial on that issue. On remand, the Court directed the lower court to consider the design and content as it was presented to the user and assess whether the Account Agreements were clearly identified and available to the user.

- **ASSIGNMENT'S VALIDITY TO BE DETERMINED BY ARBITRATOR**

  Zirpoli v Midland Funding, LLC
  United States Court of Appeals, Third Circuit
  2022 WL 3971783

September 1, 2022

Benjamin Zirpoli took out a consumer loan with OneMain Financial Group. OneMain sold Zirpoli's "charged-off" loan, along with other delinquent accounts, to Midland Funding. Midland sued Zirpoli to collect the outstanding balance but later dismissed the suit and attempted to collect the loan by reporting it to consumer agencies, negatively impacting Zirpoli's credit score. Zirpoli filed a class action claiming that Midland's purchase of the loan was unlawful because Midland lacked a CDCA license. Midland moved to stay the action and compel arbitration under the Terms of the loan. Zirpoli opposed, arguing that he was not bound by the Terms' arbitration clause because OneMain's assignment to Midland was null and void. The court denied the motion based on its findings that Midland was not licensed by the CDCA during the relevant time period. Midland appealed.

The United States Court of Appeals, Third Circuit, vacated and remanded, holding that arbitrability should be determined by the arbitrator. The existence of an arbitration agreement was undisputed: Zirpoli signed an agreement that, by its terms, required him to arbitrate claims not only against OneMain, but against its "past, present, or future" assignees, and Midland was OneMain's assignee. The validity of the assignment was not a question of formation but of enforceability, and the arbitration agreement's delegation clause specifically delegated arbitrability to the arbitrator, as well as "any defenses to enforcement." Zirpoli's challenge went to the validity of the contract as a whole rather than to the delegation clause specifically, and the enforcement of the delegation clause was not determined by the potential invalidity of the Arbitration Agreement. Having established that it was not the Court's role to decide validity, the Court went on to note that the assignment was, in fact valid, as Zirpoli's "charge-off" loan was no longer "performing as a loan" and therefore did not fall within the purview of the CDCA. The Court remanded the case to the district court with instructions to grant Midland's motion to stay and refer the matter to arbitration.

- **ARBITRATION AGREEMENT NOT SUPERSEDED**

Field Intelligence Inc. v Xylem Dewatering Solutions Inc.
United States Court of Appeals, Third Circuit
2022 WL 4138581
September 13, 2022

Xylem manufactures and sells large-capacity water pumps. Under a 2013 Non-Disclosure Agreement (2013 Agreement), Xylem contracted for Field Intelligence to develop hardware to interface with the pumps and software that would monitor and control the equipment. Field did so, and Xylem purchased the resulting hardware units through written purchase orders, as well as monthly subscriptions that allowed Xylem customers to access the software for a monthly fee. The parties later formalized the subscription process in a 2017 Software Subscription Service Agreement (2017 Agreement), which contained an integration clause stating that the 2017 Agreement "supersedes any and all prior or contemporary understandings or agreements." While the 2013 Agreement included a mandatory arbitration agreement with a delegation clause, the 2017 Agreement required disputes arising under that Agreement to be litigated in New Jersey state or federal court. Xylem later began manufacturing its own hardware and Field sued for breach of the 2017 Agreement. During discovery, one of Field's interrogatory answers stated that Xylem had breached the 2013 Agreement by reverse-engineering its hardware design. Xylem then filed an arbitration demand under the 2013 Agreement. Field moved to enjoin the arbitration, claiming that the 2017 Agreement superseded the 2013 Agreement. The court enjoined the arbitration, holding that supersession was for the court, not the arbitrator, to decide and that the 2013 Agreement had been superseded. Xylem appealed.

The United States Court of Appeals, Third Circuit, vacated in part and remanded. The Court agreed that supersession should be determined by the court rather than the arbitrator. Although the delegation clause authorized the arbitrator to determine "termination or validity," supersession, like formation, goes to whether an arbitration agreement exists at all. Were the 2013 Agreement superseded, it would no longer exist, and there would be no Arbitration Agreement to enforce. To hold otherwise would mean that parties would "never be able to rid themselves" of a prior agreement to arbitrate arbitrability. The court below erred, however, in finding the 2013 Agreement superseded. Under New Jersey law, a later contract supersedes an earlier one only if both contracts concern the same subject matter and the later agreement is so

inconsistent with the previous one that the two "cannot stand together." Here, the subject matter was distinct: the 2013 Agreement applied to the exchange of confidential and proprietary information during product development, while the 2017 Agreement provided customer software access. The contracts were insistent only in their dispute resolution provisions, and those were easily reconciled: claims made under the 2013 Agreement would be subject to arbitration, while claims made under the 2017 Agreement would be litigated. Finally, the 2013 Agreement specifically stated that it could be modified "only by an express amendment and waiver in writing by the Parties," and the parties made no such waiver. Accordingly, the 2013 Agreement's arbitration agreement remained in effect, and Xylem was entitled to arbitrate claims made under that Agreement.

- **ELECTRONIC ACKNOWLEDGMENTS SUFFICIENT TO CREATE BINDING AGREEMENT TO ARBITRATE**

  Reed v Best Buy Warehousing Logistics, LLCS
  United States District Court, N.D. Ohio
  2022 WL 3972547
  September 1, 2022

  When Marilyn Reed completed an electronic application for a position as an Asset Protection Officer at Best Buy, she clicked "I Agree" in response to a prompt stating, "I agree to Best Buy's Arbitration Policy." A later prompt stated, "Please check this box if you consent to provide an electronic signature rather than a handwritten signature whenever you sign documents on this website," and Reed again clicked, "I Agree." Best Buy hired her via an offer letter which stated that Best Buy's Arbitration Policy was a condition of employment and that acceptance of the offer constituted agreement to that Policy. She clicked "I Agree" to the Policy online two more times: once in completing a form accepting employment and again after completing an E-Learning module. Following her termination, Reed sued Best Buy for age and disability discrimination. Best Buy moved to compel arbitration and dismiss.

  The United States District Court, N.D. Ohio granted the motion to compel arbitration and dismiss, holding that Reed's "electronic acknowledgments of arbitration clauses" were sufficient to create binding agreement. The Court rejected Reed's argument that she had not "signed" any agreement to the Policy. By soliciting her agreement to "provide an electronic signature rather than a handwritten signature," Reed argued, Best Buy created the expectation that she would at some point be presented with a signature block and that no agreement would be created without her signature. This argument, the Court held, relied on an "overly narrow" reading of the term "electronic signature" and failed to provide any reason why her repeated clicking of "I Agree" in response to webpage prompts did not manifest her assent.

- **ONE-SIDED EXEMPTIONS FROM ARBITRATION AGREEMENT DID NOT RENDER CONSIDERATION ILLUSORY**

  Dow v Keller Williams Realty, Inc.
  United States District Court, N.D. Texas, Fort Worth Division
  2022 WL 4009047
  September 2, 2022

  Inga Dow owns and operates three KWRI real estate brokerage Market Centers. For each Market Center, Dow signed a License Agreement with KWRI, each containing a broad mandatory Arbitration Clause applicable to any dispute "that arises under or in relation to this Agreement or that concerns the relationship created by this Agreement." Each also contained an exception allowing KWRI to sue, rather than arbitrate, any disputes relating to appropriation of intellectual property or collection of royalties and profit-sharing contributions. Dow filed sexual harassment and tortious breach of contract claims against KWRI and its former CEO (KWRI Defendants), as well as another company and several individuals "associated with KWRI during Dow's tenure" (Other Defendants). The KWRI Defendants sued to compel arbitration of all claims under the License Agreements, arguing that Dow's claims against the Other Defendants should be subject to arbitration under intertwined claims estoppel. In opposition, Dow argued that the Arbitration Clauses lacked consideration, were unconscionable and did not apply to her claims. The Other Defendants opposed as well, arguing that Dow's claims against them were not sufficiently

intertwined to merit exception from the rule against enforcing arbitration against non-signatories.

The United States District Court, N.D. Texas, Fort Worth Division granted the motion to compel arbitration with respect to the KWRI Defendants. Under Texas law, the fact that the Arbitration Clauses exempted KWRI from arbitration of certain actions did not render consideration for the Clauses illusory, nor did the fact that Dow did not anticipate the Clauses applying to her individual tort claims render them unconscionable. Dow acknowledged that she had read and understood the License Agreements and was given time to seek legal advice before signing. The requirement that she seek arbitral rather than judicial recourse did not mean she would be "left without a suitable remedy." Dow's claims fell within the scope of the Arbitration Clauses, as they all related to KWRI and others "under the KWRI umbrella who allegedly have or had supervisory control over her and her Market Centers." The Court could not, however, enforce arbitration against the Other Defendants. Under New York law, the standard for intertwined estoppel is narrower than the test for scope, requiring that a non-signatory has a "close relationship" with one of the signatories and that the claims are "intimately founded in and intertwined with the underlying contract obligations." This standard was not met here, where the Other Defendants were "merely independent participants in a business transaction."

California

- **PAGA ACTION BARRED BY CBA AMENDED RETROACTIVELY BY SUBSEQUENT MOU**

  Oswald v Murray Plumbing and Heating Corporation
  Court of Appeal, Second District, Division 2, California
  2022 WL 4008080
  September 2, 2022

  Journeyman pipefitter Jerome Oswald filed a PAGA action against his former employer, Murray Plumbing and Heating, for wage theft. Murray moved to compel arbitration under the CBA governing Oswald's employment which required arbitration of all disputes, including PAGA claims. Murray argued that, although waiver of PAGA actions is generally prohibited, Oswald's action fell under Labor Code § 2699.6, which exempts construction workers from PAGA where a CBA 1) provides a grievance and arbitration procedure to address Labor Code violations; 2) clearly waives PAGA; and 3) authorizes the arbitrator to award all remedies available under the Labor Code. The trial court held that the CBA did not meet the requirements of § 2699.6 and denied the motion. Murray appealed.

  The Court of Appeal, Second District, Division 2, California, reversed and remanded. After Murray filed its appeal, the parties' collective bargaining representatives signed an MOU replacing the original arbitration clause retroactively, which the Court admitted into evidence in the interests of justice. The MOU amended and clarified the CBA's arbitration provisions, bringing them into compliance with the requirements of § 2699.6. The Court rejected Oswald's objection that the MOU did not apply to his claims, as it was signed after his employment ended and while his lawsuit was pending. Contracting parties may agree to an arbitration clause that applies retroactively to a pending lawsuit, and here Oswald's union, the contracting party, agreed to do so. The Court held that Oswald's action was therefore exempt from PAGA under § 2699.6 and directed the court below, on remand, to order arbitration of the dispute in compliance with the CBA.

Colorado

- **ARBITRATOR LACKED AUTHORITY TO SANCTION COUNSEL**

  Herrera v Santangelo Law Offices, P.C.
  Colorado Court of Appeals
  2022 COA93; 2022 WL 3269839
  August 11, 2022

Robert Herrera, arbitration counsel for Touchstone Home Health, used a fake FedEx driver to fraudulently obtain the signature of opposing party Santangelo Law Offices on a document he then represented to the arbitrator as a settlement agreement between the parties. The fraud was quickly uncovered, and Santangelo moved for sanctions against Touchstone and Herrera. The arbitrator sanctioned Touchstone and ordered Herrera, in his individual capacity, to reimburse Santangelo for fees and expenses incurred in responding to the fraud. Herrera sued to vacate the award, arguing that the arbitrator lacked authority to sanction him. The court confirmed the award, and Herrera appealed.

The Colorado Court of Appeals reversed, holding that the arbitrator lacked authority to sanction Herrera in his personal capacity. Touchstone's arbitration obligation derived from its Fee Agreement with Santangelo, to which Herrera was a non-signatory, and an agreement to arbitrate may be invoked only by one signatory against another. The Court rejected Santangelo's argument that Herrera had "assumed" the obligation to arbitrate by entering his appearance at arbitration as counsel for Touchstone and agreeing to be governed by the Colorado Rules of Civil Procedure. This conduct was made on behalf of Touchstone and did not manifest Herrera's intention to be personally bound by the Fee Agreement, particularly given that Herrera immediately and explicitly "disavowed any obligations arising out of" that Agreement when Santangelo moved for sanctions. Herrera's arguments were not barred by equitable estoppel, as Herrera had never knowingly claimed benefits under, enjoyed rights under, or sought to enforce the Fee Agreement. The Court noted that Herrera's actions had been since subject to regulatory proceedings resulting in a three-year suspension of his license to practice law.

- **AGENT AUTHORIZED TO MAKE PATIENT'S MEDICAL DECISIONS LACKED AUTHORITY TO BIND PATIENT TO ARBITRATION**

  Fresquez v Trinidad Inn, Inc.
  Colorado Court of Appeals
  2022COA96; 2022 WL 3652016
  August 25, 2022

  When Beatrice Trujillo was admitted to the Trinidad Inn nursing facility, her son Ralph Fresquez signed an admission agreement and a separate Arbitration Agreement on her behalf. Fresquez told Trinidad's social services assistant he held power of attorney for Trujillo, but the assistant requested no documentation. Following Trujillo's death, Fresquez sued Trinidad for negligence, and Trinidad moved to compel arbitration. The court denied the motion, holding the Arbitration Agreement invalid. Trinidad appealed.

  The Colorado Court of Appeals affirmed, holding that Fresquez lacked authority to bind Trujillo to the Arbitration Agreement. Under Colorado's Health-Care Availability Act, health care providers may ask patients to sign arbitration agreements, but no patient may be denied care for refusing to sign such an agreement. An arbitration agreement, therefore, cannot be "reasonably understood" to be an admission document, as it represents a "fundamentally different" decision that "pertains exclusively to a person's legal rights and remedies." An agent's authority to make health care decisions and sign documents necessary to admit a patient to a health care facility, therefore, "does not encompass the authority to bind the patient to an arbitration agreement, unless the patient has granted the agent an unlimited power of attorney or specific authority to bind the patient to an arbitration agreement." Here, there was no evidence that Trujillo and Fresquez ever discussed an arbitration agreement, and Trujillo signed no documentation giving Fresquez unlimited power of attorney.

Texas

- **ARBITRABILITY SHOULD BE DETERMINED BY ARBITRATOR**

  CHG Hospital Bellaire, LLC v Johnson
  Court of Appeals of Texas, Houston (1st Dist)
  2022 WL 3720136

August 30, 2022

Nurse Seketa Johnson injured her back while working at CHG Hospital. Johnson sued CHG for negligence, and CHG moved to compel arbitration under the arbitration agreement Johnson completed online as a condition of her employment. The agreement applied to any claim for "negligence, gross negligence, and all claims for personal injuries" and specifically exempted claims for "workers' compensation, unemployment compensation, or state disability insurance." Johnson opposed, arguing that she did not recall giving online consent to the arbitration agreement and that her claims constituted excluded "workers' compensation claims." CHG argued that the exclusion did not apply, as Johnson was seeking damages in tort and not for claims under the Texas Workers Compensation Act. The trial court held that Johnson's testimony created a triable issue of fact as to the existence of an arbitration agreement and denied CHG's motion to compel. The Court of Appeals of Texas, Houston (1st Dist) upheld the decision but was reversed by the Texas Supreme Court, which held that Johnson's testimony did not create a triable fact issue. The Texas Supreme Court remanded the case to the Court of Appeals of Texas, Houston (1st Dist), to determine whether Johnson's claims fell within the scope of the agreement.

The Court of Appeals of Texas, Houston (1st Dist) reversed the denial of CHG's motion to compel, finding that the arbitration agreement's delegation clause specifically delegated arbitrability questions, including the scope of the agreement, to the arbitrator. The Court directed the lower court, on remand, to enter an order compelling arbitration followed by dismissal.

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

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