January 19, 2022

ADR Case Update 2022 - 2

Federal Circuit Courts

- **PARTIES CANNOT DELEGATE ISSUES OF FORMATION TO THE ARBITRATOR**

  Ahlstrom v DHI Mortgage Company, Ltd
  2021 WL 61333104
  United States Court of Appeals, Ninth Circuit
  December 29, 2021

  When DHI Mortgage (DHIM) hired Robert Ahlstrom as a loan officer, Ahlstrom signed a Mutual Arbitration Agreement (MAA) with DHIM's parent company, D.R. Horton, Inc. (Horton). The MAA included a delegation clause giving the arbitrator exclusive authority to resolve formation issues. Ahlstrom filed putative class action employment claims against Horton, who successfully moved to compel arbitration, and identical claims against DHIM. Ahlstrom opposed DHIM's motion to compel arbitration, arguing lack of formation since DHIM was not named in or signatory to the MAA. The court granted DHIM's motion, holding that formation issues were subject to arbitration under the delegation clause. Ahlstrom appealed.

  The United States Court of Appeals of the Ninth Circuit reversed and remanded for further proceedings. Courts must decide formation issues even in the face of a delegation clause, as there is no basis upon which to compel arbitration unless an agreement is found to exist. The panel also concluded that this MAA, as drafted, described and governed a relationship between Ahlstrom and Horton that did not exist and thus did not constitute a properly formed agreement to arbitrate. The Court rejected DHIM's argument that the MAA encompassed DHIM as Horton's subsidiary.

California

- **ARBITRATION AGREEMENT WITH PROSPECTIVE EMPLOYER DID NOT COVER DISPUTES WITH FORMER EMPLOYER**

Garcia v Expert Staffing West
2021 WL 6131098
Court of Appeal, Second District, Division 6, California
December 29, 2021

Roseana Garcia worked for Essential Seasons (ES), an agricultural and food-service staffing company that placed Garcia in a position with Cool-Pak, LLC (Cool-Pak). After leaving ES, Garcia applied to work at Expert Staffing West (Expert), which provided payroll services to ES during the time of Garcia's employment. Garcia signed an arbitration agreement (Agreement) with Expert as part of the application process but was not hired. Garcia later joined as a plaintiff in a pre-existing class action against Cool-Pak, which filed a cross-complaint against Expert and ES. Citing the Agreement, Expert petitioned to compel arbitration of Garcia's individual claims. ES and Cool-Pak filed joinders. The court held the Agreement did not apply and denied the petition. Cool-Pak, ES, and Expert (Appellants) appealed.

The Court of Appeal, Second District, Division 6, California, confirmed, holding that Garcia's Arbitration Agreement with prospective employer Expert did not apply to her disputes with ES and Cool-Pak based on the existence of a business relationship between Expert and ES/Cool-Pak. The Agreement, which was part of Expert's "onboarding package," gave no rights to ES and Cool-Pak, as a shared business relationship was insufficient to establish those companies as Expert's "related entities," nor were they third-party beneficiaries. Allegations in Garcia's complaint that the Appellants were "agent/alter egos" of one another did not constitute a judicial admission enabling the Appellants to assert shared rights, as such language was merely boilerplate in cases involving multiple defendants. To hold otherwise would give all co-defendants, no matter how tenuously connected, the right to compel arbitration when any one defendant had an arbitration agreement with the plaintiff.

- **WEBSITE'S NOTIFICATION OF TERMS AND CONDITIONS INSUFFICIENTLY CONSPICUOUS TO BIND PLAINTIFFS TO ARBITRATION AGREEMENT**

Sellers v JustAnswer LLC
20 WL 6144075
Court of Appeal, Fourth District, Division 1, California
December 30, 2021

JustAnswer operates a website of the same name on which users submit questions, for a fee, to "experts" in various fields. First-time site users Tina Sellers and Erin O'Grady (Plaintiffs) each submitted a question on the site's initial screen. To receive an answer, users were directed to a second screen requiring them to sign up for a $5/7-day trial membership, which they did by clicking a button labeled "Start my trial." Small-print text lower down the page notified users that clicking the button constituted an agreement to the site's Terms of Service, set forth on a separate page accessible by hyperlink. After discovering that they had been automatically enrolled in a monthly membership, Plaintiffs filed a class action against JustAnswer alleging that the website violated the Automatic Renewal Law (ALA) by failing to provide conspicuous notice of the contract terms or require affirmative consent. JustAnswer petitioned to compel arbitration under the Terms of Service. The court denied on formation grounds, and JustAnswer appealed.

The Court of Appeal, Fourth District, Division 1, California, affirmed. The alleged agreement was a "sign-in wrap agreement" providing textual notification that a user's purchase constituted an agreement to terms set forth separately, without requiring those users to indicate that they had read or agreed to those terms. Website owners have complete control over their sites, and they bear the onus of putting users on sufficient notice of their contractual terms. JustAnswer's notification of contract terms failed to meet ALA requirements to use larger typeface, color contrast, and visual proximity that would render such terms sufficiently "clear and conspicuous" to bind Plaintiffs to the arbitration agreement.

Washington State

- **PROXY SIGNATORY COULD ENFORCE ARBITRATION CLAUSE**

  Dekrypt Capital, LLC v Uphold Ltd.
  Unpublished opinion No. 82606-9-I
  Court of Appeals, Division 1, State of Washington
  January 10, 2022

  Under separate but identical Token Sales Agreements (TSAs), Dekrypt and four other companies (Buyers) purchased cryptocurrency tokens from Uphold to fund Uphold's creation of a universal cryptocurrency trading platform. Uphold signed the TSAs as a proxy for the "Vendor," a yet-to-be-formed company (Universal), with the provision that Universal would ratify the TSAs following incorporation. The TSAs included arbitration provisions and choice of law clauses designating Singapore law. Buyers sued Uphold and its affiliates for illegally selling cryptocurrency tokens as unregistered securities and making false representations. Uphold and its affiliates moved to compel arbitration under the TSAs. Buyers opposed, claiming that only Universal could enforce the TSAs. The court denied Uphold's motion, and Uphold appealed.

  The Court of Appeals, Division 1, State of Washington reversed. The Court avoided conflict of law issues, holding that Singapore and Washington law equally supported Uphold's right to enforce arbitration. By identifying Uphold as "Proxy," the TSAs recognized Uphold as a substitute for "Vendor." Uphold's affiliates similarly were entitled to enforce arbitration under Singapore third-party beneficiary statutes and under Washington law of equitable estoppel, which prevents parties from circumventing an arbitration clause by suing non-signatories based on the underlying contract. The TSAs specifically included the Proxy's "respective Affiliates" in indemnification and hold harmless provisions, and disputes over their enforcement rights fell within the arbitration clause as "arising out of" or "in any way relating to" the TSAs.

Washington, D.C.

- **ARBITRATOR'S APPOINTMENT TO OUTSIDE PROCEEDING BY COUNSEL FOR OPPOSING PARTY RAISED NO "JUSTIFIABLE DOUBTS" OF IMPARTIALITY**

  Tatneft v Ukraine
  2021 WL 6122670
  United States Court of Appeals, District of Columbia Circuit
  December 28, 2021

  Russian company Tatneft, the Russian Republic of Tatarstan, and Ukraine are the major shareholders of Ukrtatnafta, a company that owns and operates an oil refinery. AmRuz and Seagroup (A&S), later found to be owned by Tatneft executives, purchased Ukrtatnafta shares using promissory notes, giving Russian interests majority control. A Ukrainian court invalidated the purchases and ordered the shares returned to Ukrtatnafta. Without notice to Tatneft or A&S, a Ukrainian minor shareholder procured a Ukrainian court order forcing the shares to auction where the shareholder purchased them, tipping voting control again in favor of Ukrainian interests. Tatneft sought arbitration under the Russia-Ukraine Bilateral Investment Treaty (BIT), arguing that Ukraine improperly facilitated the auction purchase. Under the BIT, each party appointed one arbitrator, and those arbitrators together appointed Professor Vicuña as the third arbitrator. As arbitration proceeded over the next seven years, counsel for each side appointed Vicuña as arbitrator in another proceeding; Vicuña did not notify the parties of these appointments. After the arbitration tribunal found in favor of Tatneft, Tatneft petitioned to enforce the award, and Ukraine opposed, arguing that Vicuña should have notified Ukraine of his outside appointment by opposing counsel and that enforcement would violate public policy based on the illegality of the underlying A&S transactions. The court granted Tatneft's petition. Ukraine appealed.

  The United States Court of Appeals for the District of Columbia Circuit affirmed. Ukraine argued that the lower court mistakenly enforced the award in spite of the New York Convention's public policy and improper composition exceptions. The Court rejected Ukraine's public policy claim, as

there is no U.S. policy against enforcing an arbitration award based on underlying violations of foreign law. The Court also rejected Ukraine's assertion that because Vicuña failed to disclose circumstances creating justifiable doubts about his impartiality, the composition of the arbitral authority was not in accordance with the agreement of the parties. Although International Bar Association arbitration guidelines indicate that a pattern of two or more outside appointments may raise such doubts, one outside arbitration in seven years fell short of this standard, particularly given that Ukraine's counsel had also appointed Vicuña to an outside arbitration. Vicuña was not required to disclose his appointment because it did not raise "justifiable doubts" of his impartiality.

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- **NO ARTICLE III STANDING TO CHALLENGE ARBITRATION PROVISION**

Weissman v National Railroad Passenger Corporation
2021 WL 6122753
United States Court of Appeals, District of Columbia Circuit
December 28, 2021

After National Railroad Passenger Corporation, dba Amtrak, added a mandatory arbitration provision to its terms and conditions for ticket purchase, Amtrak users Weissman and Llewellyn (Plaintiffs) sued for declaratory and injunctive relief. Plaintiffs alleged that the arbitration provision made it impossible for them to purchase tickets without waiving their rights to judicial redress, causing ongoing injury by deterring them from riding Amtrak. The court dismissed for lack of standing. Plaintiffs appealed.

The United States Court of Appeals, District of Columbia Circuit, affirmed, finding that Plaintiffs suffered no injury-in-fact to warrant Article III standing. The addition of an arbitration provision did not meaningfully abridge the Plaintiffs' ability to purchase train tickets. Challenges to existing arbitration provisions are generally non-justiciable in the absence of an arbitrable dispute. Here, the claim of injury arising from an inability to avoid entering into an arbitration agreement was even more speculative.

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

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