April 20, 2022

ADR Case Update 2022 - 8

Federal Circuit Courts

- **ARBITRATION CLAUSE DID NOT SURVIVE EXPIRED CBA**

  Pittsburgh Mailers Union Local 22 v PG Publishing Co. Inc.
  2022 WL 946344
  United States Court of Appeals, Third Circuit
  March 30, 2022

  Three unions of newspaper employees had concurrent CBAs with PG Publishing, each providing for a grievance procedure requiring binding arbitration. When the CBAs expired, employees continued to work under partial terms while the unions negotiated new agreements. During this time, PG failed to provide certain employee health benefits and the unions filed grievances. PG refused to arbitrate the grievances and the unions sued, claiming that PG's post-expiration operations had created "implied-in-fact" contracts requiring PG to follow previous grievance procedures. On cross-motions for summary judgment, the court held that it could not compel arbitration. The unions appealed.

  The United States Court of Appeals, Third Circuit affirmed. The Court overturned its own precedent, holding that intervening Supreme Court decisions dictated that a CBA must be interpreted according to ordinary contract principles. Unless a contract provision specifies its own distinct durational limit, it expires when the contract expires. The arbitration provisions here specified no independent duration and PG's obligation to arbitrate expired with the CBAs.

- **ARBITRATION PANEL'S ACTIONS FELL UNDER CLARIFICATION EXCEPTION TO FUNCTUS OFFICIO**

  In re: Romanzi
  2022 WL 1055497
  United States Court of Appeals, Sixth Circuit
  April 8, 2022

  After attorney Craig Romanzi filed for bankruptcy, the Trustee for his bankruptcy estate sued

Romanzi's former employer, the law firm of Fieger and Fieger (the Firm), for Romanzi's share of a settlement fee. The parties agreed to arbitrate their claims and to abide by a "brief reasoned decision" by the panel. The panel held for the Trustee, issuing a single-sentence decision naming a total award amount. When the Trustee sued to confirm, the Firm moved to vacate, arguing that the panel had failed to meet its obligation to provide a reasoned decision. The court remanded the case to the panel, directing them to address the parties' defenses and their justification for the award. Before complying, the panel requested the parties to submit a statement of their defenses and proposed findings. Only the Trustee submitted a statement, and the panel issued a supplemental award, with extended reasoning, in the amount proposed by the Trustee. The Trustee sued to confirm and the Firm moved to vacate, arguing that the panel exceeded its powers; violated the doctrine of *functus officio* by reopening the case; and acted *ex parte* in adopting the Trustee's proposed award. The court held for the Trustee and the Firm appealed.

The United States Court of Appeals, Sixth Circuit affirmed. The panel did not exceed its powers by failing to produce a more extensive initial opinion. The Firm's objections were founded on the panel doing less, rather than more, than their agreement required, and were properly remedied by the court's remand. That remand did not "reopen" the case but fell within the "clarification-completion exception" to the *functus officio* doctrine, which allows a court to remand to the original arbitrator for clarification if an arbitral award is ambiguous or fails to meet an agreed-upon duty to explain. The panel implicated no *ex parte* considerations by adopting the Trustee's proposed award, as the panel copied the Firm on all emails and it was the Firm's choice not to submit its own statement of defenses and proposed findings.

- **NO CONTRACT FORMATION ABSENT REASONABLY CONSPICUOUS NOTICE OF TERMS**

  Berman v Freedom Financial Network, LLC
  2022 WL 1010531
  United States Court of Appeals, Ninth Circuit
  April 5, 2022

  Fluent, a digital marketing company, used websites offering gift cards and free samples to collect users' personal information which it then used to generate sales leads for its clients. The sites used "sign-in wrap agreements" which notified users that, by pressing a button to continue into the website, they agreed to contract terms available by hyperlink. Erica Russell and Stephanie Hernandez registered as users on Fluent sites, following directions to submit their addresses and other personal information on a page advertising free samples and other rewards. A notification of terms, printed in small gray typeface with an underlined hyperlink to "Terms and Conditions" (Terms), was placed above a large green button labeled "Continue!" which the user clicked to move to the next page. After using Fluent's sites, Russell and Hernandez began receiving marketing calls and texts from a Fluent client and brought a putative class action against Fluent for violating the Telephone Consumer Protection Act. Fluent moved to compel arbitration under the Terms. The district court denied the motion, holding that the website failed to provide users sufficient notice that clicking the "Continue" button bound them to the Terms. Fluent appealed.

  The United States Court of Appeals, Ninth Circuit affirmed. An online contract can be formed only where 1) a website provides reasonably conspicuous notice of its terms and 2) the user takes some action that unambiguously manifests assent to those terms. Fluent's notification of terms was "the antithesis of conspicuous," obscured in gray font "barely legible to the naked eye" among brightly colored large-type offers that drew away the user's attention. The hyperlink was identified insufficiently by underline only, rather than in blue capital letters as is customary. Even assuming reasonable notice, the act of clicking a large green "Continue!" button could not manifest assent where the user was not expressly told that it would do so.

- **CLICKWRAP AGREEMENT PROVIDED REASONABLE NOTICE OF TERMS**

  Aminoff & Co. LLC v Parcel Pro, Inc.
  2022 WL 987665
  United States District Court, S.D. New York
  April 1, 2022

  Aminoff, a high-end jewelry company, used its online account with Parcel Pro to arrange

shipment of an expensive watch. Parcel Pro's website utilized a "clickwrap" agreement process: the webpage notified users that they must read and agree to "Terms & Conditions" (Terms) available by hyperlink, requiring users to check a box and click a button labeled "Accept and Continue" before proceeding into the site. The watch was lost in transit and Aminoff sued Parcel Pro and its carrier, FedEx. FedEx removed to federal court on diversity grounds and Parcel Pro sued to stay the action and compel arbitration. Aminoff opposed, claiming that the website failed to provide reasonable notice of the Terms sufficient to allow formation.

The United States District Court, S.D. New York stayed the action and referred the matter to arbitration. Courts routinely uphold clickwrap agreements where the webpage provides reasonable notice of its terms. Here, the website's registration page clearly notified Aminoff that he must read and agree to the Terms in order to open an account. The Terms were made available by a hyperlink easily identifiable in bold green text on a page without visual clutter. To register, Aminoff entered his name and clicked a box adjacent to text stating that, by checking that box, the user acknowledged and agreed to the Terms. This process put Aminoff on inquiry notice of the Terms and, by checking the box, Aminoff "undoubtedly agreed to be bound" by them.

California

- **COURT THAT GRANTED PETITION TO COMPEL ARBITRATION HAS JURISDICTION TO LIFT THE STAY WHERE PARTY DEMONSTRATES INABILITY TO PAY**

  Aronow v Superior Court of San Francisco County, Respondents; Emergent, LLP, Real Parties in Interest
  2022 WL 896183
  Court of Appeal, First District, Division 4, California
  March 28, 2022

  Gerald Aronow sued his former attorneys at the Emergent law firm for legal malpractice and Emergent moved to compel arbitration under their retainer agreement (Retainer). The court granted Emergent's motion and stayed the case. The Retainer's arbitration clause required the parties to bear their own arbitration costs and, at the initial arbitration conference, Aronow stated that he was unable to pay his share of the arbitrator's advance fee. The arbitrator adjourned the conference and discontinued the arbitration. Aronow returned to court requesting waiver of his arbitration costs or, alternatively, asking the court to lift the litigation stay. The court held that it lacked jurisdiction to lift the stay and that Aronow had failed to show his inability to pay. At Aronow's request, the court certified the question for appeal, acknowledging that Aronow, who was receiving public assistance, likely would be able to produce evidence of indigency given the opportunity. Aronow petitioned for a writ of mandate.

  The Court of Appeal, First District, Division 4, California granted Aronow's petition, directing the court to vacate its refusal to lift the stay. Because Aronow had waived his right to litigate under the arbitration provision, his inability to pay for arbitration left him with no forum in which to resolve his claims. Courts retain "some amount of discretion" to lift a stay, and California's strong policy of ensuring equal access to judicial process dictated that the court devise procedures to prevent Aronow from being denied his day in court. The Court directed the lower court, on remand, to provide Aronow the opportunity to demonstrate his inability to pay. If Aronow proved unable to pay, Emergent could choose either to pay Aronow's arbitration costs or to waive its right to arbitrate.

- **PARTY WAIVED RIGHT TO ARBITRATE BY FILING MOTIONS AND INITIATING DISCOVERY**

  Kokubu v Sudo
  2022 WL 950448
  Court of Appeal, Second District, Division 8, California
  March 30, 2022

A group of Japanese investors (Kokubu) and U.S. investors (Park) purchased an office complex, allocating their interests in a Master Lease Agreement (MLA). Amid disagreements over their respective shares, the investors defaulted on the commercial loan that financed their purchase. Kokubu sued the other investors and the lender for partition and filed a lis pendens against the property. Park responded by filing and then withdrawing a demurrer; filing a cross-complaint against the lender; and, pursuant to the MLA, issuing an arbitration demand which it withdrew several months later. After withdrawing the demand, Park proceeded with discovery and motions practice until two days before the trial date, when Park moved to compel arbitration and stay proceedings. The court denied Park's motion, holding that Park had waived its right to arbitration. Park appealed.

The Court of Appeal, Second District, Division 8, California affirmed the court's waiver finding. The Court rejected Park's argument that delay in seeking arbitration should constitute waiver only where the delay is unreasonable and has prejudiced the opposing party. California law grants courts "considerable flexibility" to determine waiver based on six factors which the court applied below. The court properly based its finding on substantial evidence that Park 1) engaged in actions inconsistent with its right to arbitrate, pursuing a litigation strategy for sixteen months following withdrawal of its arbitration demand; 2) substantially invoked the litigation machinery, causing Kokubu to incur more than $300,000 in legal fees; 3) delayed its motion to stay more than two years after Kokubu's complaint and, by withdrawing its arbitration demand, led Kokubu to believe it would not be pursuing arbitration; 4) filed a cross-complaint on the same day as its arbitration demand without seeking a stay; 5) used judicial discovery tools not available in arbitration; and 6) prejudiced Kokubu by delaying resolution of the case, depriving Kokubu of the time and cost advantages of arbitration.

- **SIGN-IN WRAP AGREEMENT PROVIDED SUFFICIENT NOTICE OF LICENSE TERMS**

  B.D. v Blizzard Entertainment, Inc.
  2022 WL 907767
  Court of Appeal, Fourth District, Division 1, California
  March 29, 2022

  B.D., a minor, registered online for an account with Blizzard's online gaming platform, Battle.net. Battle.net's registration site used a "sign-in wrap" agreement notifying users that, by pressing a button labeled "Continue" to proceed into the site, they agreed to the terms of its End User License Agreement (License). The License was made available on the site's log-in page in a pop-up window that enabled users to scroll through the entire text. The License included an arbitration provision incorporating a "Dispute Resolution Policy" (DRP) accessible within the document by hyperlink. B.D. sued Blizzard claiming that Blizzard's "Overwatch" game constituted illegal online gambling, and Blizzard moved to compel arbitration under the License. The court denied Blizzard's motion, finding that the DRP, accessible only by a hyperlink located on the 15th page of the 16-page License, was insufficiently conspicuous to provide constructive notice of the Terms. Blizzard appealed.

  The Court of Appeal, Fourth District, Division 1, California reversed. A reasonable user would anticipate that a site designed for ongoing use would be governed by terms and conditions. In this context, the Court had "no trouble" finding that Battle.net provided sufficiently conspicuous notice of the Terms. The notification of terms was easily visible in white text on a dark background and clearly explained the significance of clicking the "Continue" button. The pop-up window made the full text of the License accessible without the need to click on a hyperlink. The portion of the License immediately visible in the pop-up window provided sufficient notice of the DRP, stating in bold capital letters that the License contained a binding arbitration agreement and class action waiver, urging the user to "please read them" as "they affect your legal rights."

Florida

- **INCORPORATION OF ARBITRAL RULES CONTAINING DELEGATION CLAUSE WAS "CLEAR AND UNMISTAKABLE EVIDENCE" OF PARTIES' INTENT TO DELEGATE ARBITRABILITY TO ARBITRATOR**

Airbnb, Inc. v Doe
2022 WL 969184
Supreme Court of Florida
March 31, 2022

After discovering that their Airbnb host had secretly recorded them on hidden cameras, John and Jane Doe sued the host and Airbnb. Airbnb moved to compel arbitration under its Terms of Service, which provided for binding arbitration "in accordance with" the rules of AAA. The court stayed the case and granted Airbnb's motion, holding that arbitrability issues should be resolved by the arbitrator in accordance with the AAA rules. The Does appealed and the Second District reversed, holding that the arbitration provision's selection of the provider's rules did not constitute "clear and unmistakable" evidence that the parties intended to delegate arbitrability issues to the arbitrator. Acknowledging that its opinion was an "outlier" in arbitration jurisprudence, the Second District certified its conflict with other Florida circuit courts for review.

The Supreme Court of Florida quashed and remanded. Federal appellate courts consistently agree that when an agreement incorporates a set of arbitral rules those rules become part of the agreement. Here, the provider's rules specifically empowered the arbitrator to resolve arbitrability issues, and the arbitration provision's incorporation of those rules constituted "clear and unmistakable evidence" that the parties intended to delegate arbitrability issues to the arbitrator.

Georgia

- **SPOUSAL POA INSUFFICIENT TO ESTABLISH THAT HUSBAND SIGNED ARBITRATION CONTRACT AS HIS WIFE'S AGENT**

C.R. of Thomasville, LLC v Hannaford
2022 WL 1012952
Court of Appeals of Georgia
April 5, 2022

When Judy Hannaford was admitted to a nursing facility (Thomasville) her husband Leo signed a Nursing Home Admission Agreement (Agreement) identifying Judy as "Resident" and Leo as "Responsible Party." Leo signed and printed his name in the space designated for "Resident" and again in the space for "Resident's Representative," under which a short checklist of options allowed the signatory to specify the nature of their representation. Leo checked "Spouse" and left blank all the "Legal Representative" options including the one for an agent acting under Power of Attorney. Judy had executed a power of attorney (POA) to Leo more than ten years previously, but Leo did not reference the POA in signing the contract and Thomasville was unaware of it at that time. Following Judy's death, Leo sued Thomasville for causing injuries leading to Judy's death. Thomasville moved to dismiss or, alternatively, to stay the action and compel arbitration, citing the Agreement and the POA. The trial court denied, finding that Leo signed the Agreement as Judy's spouse and not as her agent under the POA. Thomasville appealed.

The Court of Appeals of Georgia affirmed. The mere existence of a POA is insufficient to establish that a spouse is acting as an agent; there must be some evidence that the spouse is intentionally exercising authority under the POA. Here, there was no evidence that Judy was incapacitated at the time of the Agreement, requiring Leo to act under the POA, and Leo testified in affidavit that he did not sign the Agreement pursuant to the POA. The Court rejected Thomasville's argument that, by signing in the space for "Resident," Leo indicated that he was acting as Judy's agent. This interpretation was belied by Leo's choice to identify his signing capacity as "Spouse" rather than "Legal Representative." At best, the signature could be seen as ambiguous and contract law requires ambiguity to be construed against the drafter. The Agreement, on its face, showed that Leo signed the Agreement as Judy's spouse and not as her legal representative. To find otherwise would run afoul of Georgia law, which requires the court to give meaning to every contract term.

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