June 7, 2023

ADR Case Update 2023 - 11

Federal Circuit Courts

- **SELF-EXECUTING TREATY PROVISION AUTHORIZES COURTS TO REFER PARTIES TO ARBITRATION**

  Green Enterprises, LLC v Hiscox Syndicates Limited at Lloyd's of London
  United States Court of Appeals, First Circuit
  2023 WL 3557919
  May 19, 2023

  Puerto Rican recycling company Green Enterprises filed a claim with its insurer, Lloyd's of London, after a fire destroyed one of its plants. Lloyd's denied the claim. Green sued, and Lloyd's successfully moved to compel arbitration under the policy. Green appealed.

  The United States Court of Appeals, First Circuit affirmed. The New York Convention specifically authorizes courts to refer parties to arbitration. The relevant question to be determined, as an issue of first impression, is the extent to which the Convention is a "self-executing" provision that "automatically" has effect as domestic law. Here, Convention Article II(3) provides a clear directive to domestic courts that the court "shall" refer the parties to arbitration and is "precisely the type of directive to United States courts that is a hallmark of a self-executing treaty provision."

California

- **NO DUTY TO DISCLOSE POST-APPOINTMENT RESULTS OF PENDING CASES**

  Perez v Kaiser Foundation Health Plan, Inc.
  Court of Appeal, First District, Division 3, California
  2023 WL 3473765
  May 16, 2023

Maria Perez enrolled online in the Kaiser health care plan offered by her employer. The enrollment process required Perez's online agreement, via electronic signature, to the plan's Arbitration Agreement. Perez sued Kaiser for failing to timely diagnose and treat her daughter's fatal cancer, and Kaiser petitioned to compel arbitration. In opposition, Perez argued that she had not signed an agreement to arbitrate, that the online agreement failed to comply with state requirements for disclosing arbitration agreements, and that, as a non-native speaker, she did not understand that she was agreeing to arbitration. The trial court found that the weight of the evidence supported the conclusion that Perez had agreed to arbitration. The selected arbitrator timely disclosed his prior and pending cases involving Kaiser and issued an award finding that Kaiser was not liable for the daughter's death. Perez moved to vacate the award for bias, citing the arbitrator's multiple cases involving Kaiser and his failure to disclose the subsequent outcomes of the Kaiser arbitrations identified as pending at the time of his initial disclosure. The court denied the motion, and Perez appealed.

The Court of Appeal, First District, Division 3, California, affirmed. The trial court's finding of an arbitration agreement was supported by substantial evidence. The online arbitration disclosure provided sufficient notice of the arbitration agreement, as it appeared immediately before the signature line, and accompanying text clearly explained that pressing "SAVE" constituted an electronic signature. The arbitrator had no duty to disclose post-appointment results of arbitration cases pending at the time of his appointment, and the fact that he had decided those cases in favor of Kaiser did not support a finding of bias.

- **ARBITRATOR COMMITTED NO CLEAR LEGAL ERROR RELEASE OF CLAIMS**

Castelo v XCeed Financial Credit Union
Court of Appeal, Second District, Division 7, California
2023 WL 3515225
May 18, 2023

In November 2018 XCeed Federal Credit Union terminated Elizabeth Castelo, its Controller and Vice President of Accounting, effective December 31, 2018. On November 19, 2018, the parties signed a Separation Agreement in which Castelo agreed to release all claims, including claims for wrongful termination and age discrimination, as a condition to receiving severance. At the same time, XCeed presented Castelo with a Reaffirmation Agreement, to be signed on her December 31, 2018 "separation" date, but Castelo signed both Agreements at the same time. Castelo later sued XCeed for age discrimination and wrongful termination. In arbitration, Castelo argued that her release of claims applied only to claims accrued prior to the date of signing and that her subsequent claims accrued on the December 31 separation date. The arbitrator found, based on extrinsic evidence, that the parties intended to release all claims through December 31. Castelo moved to vacate the award as void under Civil Code § 1668, which prohibits any pre-dispute agreement that seeks to exempt a party from future statutory violations. The trial court denied Castelo's motion to vacate and confirmed the award. Castelo appealed.

The Court of Appeal, Second District, Division 7, California, affirmed. The arbitrator committed no "clear legal error" in concluding that Castelo's release did not violate Civil Code § 1668. § 1668 was intended to prevent parties from "granting themselves licenses to commit future aggravated wrong." Castelo's claims all "arose out of, or flowed from," the termination decision embodied in the Separation Agreement. At the time Castelo signed the release, she "already knew the basic facts that would later form the basis for her wrongful termination and age discrimination claim."

- **NO AGREEMENT TO ARBITRATE**

Kinder v Capistrano Beach Care Center, LLC
Court of Appeal, Second District, Division 7, California
2023 WL 3531821
May 18, 2023

Resident Nancy Kinder sued nursing facility Capistrano Beach Care Center after suffering injuries from a fall. Capistrano petitioned to compel arbitration under arbitration agreements Kinder's adult children, Barbara and James, had executed on her behalf, each signing above a line that stated, "I hereby certify that I am authorized as Resident's agent in executing and delivering this

arbitration agreement." The court denied the petition, finding that Capistrano had failed to meet the burden of showing that Barbara and James had "actual or ostensible authority" to bind Kinder to arbitration. Capistrano appealed.

The Court of Appeal, Second District, Division 7, California, affirmed the trial court's finding that there was no agreement to arbitrate. "Purported certification" of agency, on its own, was insufficient proof of actual agency. Capistrano presented no evidence that Kinder did anything to lead James, Barbara, or Capistrano to believe that James and Barbara had the actual authority to enter into arbitration agreements on her behalf. Kinder's continued residency at Capistrano did not constitute subsequent ratification, as the agreements expressly stated that their execution was not a precondition to receiving medical treatment or admission to the facility.

New York

- **"EXEMPT" EMPLOYEE'S TERMINATION NOT ARBITRABLE UNDER CBA**

  In re: Teamsters Local 445 v Town of Monroe
  Court of Appeals of New York
  2023 WL 3587526
  May 23, 2023

  When the Secretary to the Town of Monroe Planning Board was hired, the job was an exempt class civil service position terminable at will. A subsequent CBA between the Town and the Union redefined the bargaining unit to include the secretary position, requiring that any termination be for just cause. The Town terminated the secretary, and the Union filed a grievance. The Town refused to address the grievance, and the Union sued to compel arbitration. The court denied the Town's motion to dismiss, holding that "neither law nor public policy" prohibited parties from bargaining termination protections for an exempt employee. The Appellate Division affirmed. The Town petitioned for, and was granted, leave to appeal.

  The Court of Appeals of New York reversed. Affording for-cause termination protection to an exempt class employee violated New York Civil Service Law, decisional law, and public policy. Under Civil Service Law, non-exempt positions are subject to various quantifiable requirements and provided statutory protections regarding removal and disciplinary actions. In contrast, exempt positions require confidentiality, the "exercise of authority or discretion at a high level," or the need for "some expertise or personal qualities which cannot be measured by a competitive examination." The sensitive nature of these positions demands that an officer exercising appointment and removal power have "largely unrestricted authority" to hire and terminate at will. At-will-terminability is, therefore, a defining characteristic of an exempt position, and without at-will-terminability, an employee is not "exempt." The secretary's termination, therefore, was not subject to arbitration under the CBA.

- **PLAIN AND UNAMBIGUOUS CONTRACT LANGUAGE MUST BE GIVEN EFFECT**

  Kent Waterfront Associates, LLC v National Union Fire Insurance Company of Pittsburgh
  Supreme Court, Appellate Division, Second Department, New York
  2023 WL 3328782
  May 10, 2023

  Kent Builders entered into an Insurance Agreement with National Union Fire Insurance Co. The Agreement bound Kent Builders and "each of its subsidiary, affiliated or associated organizations that are included as Named Insureds under any of the Policies." A separate provision stated that the Agreement was binding on Kent Builders as well as "all subsidiaries and affiliates." A payment dispute arose, and National Union served an arbitration demand on Kent Builders, as well as four Affiliates not identified as Named Insureds. The Affiliates petitioned, pursuant to CPLR article 75, to permanently stay the arbitration as it related to them, as they were not parties to the Agreement. The court denied the petition, and the Affiliates appealed.

  The Supreme Court, Appellate Division, Second Department, New York reversed. The Affiliates

were not Named Insureds and therefore were not bound by the Agreement. An insurance contract "should be read as a whole" and "should not be read so that some provisions are rendered meaningless." The Court rejected National Union's argument that the "all subsidiaries and affiliates" language created ambiguity. The Agreement's "plain and unambiguous language" provided that Kent Builders affiliates were bound only if they were Named Insureds.

- **DEMAND TRIGGERED STATUTE OF LIMITATIONS ON STAY PROCEEDINGS**

  In re: Great Northern Insurance Company v Schwartzapfel
  Supreme Court, Appellate Division, Second Department, New York
  2023 WL 3328965
  May 10, 2023

  Steven J. Schwartzapfel sent an arbitration demand to Great Northern Insurance Company pursuant to his insurance policy. The mailing contained multiple documents, including a cover letter dated December 10, 2019. Great Northern received the mailing on December 13, 2019. On January 29, 2020, Great Northern sued to stay the arbitration. The court denied the petition as untimely. Great Northern appealed.

  The Supreme Court, Appellate Division, Second Department, New York affirmed. CPLR 7503(c) allows a party twenty days from the service of an arbitration demand to apply to stay the arbitration. Despite containing multiple documents, the mailing was not "deceptive" or intended to prevent Great Northern's timely response. The mailing's cover letter "clearly indicated that a demand for arbitration was included as an exhibit to the letter."

Texas

- **SUBSEQUENT PURCHASER BOUND TO ARBITRATION BY ESTOPPEL**

  Lennar Homes of Texas Land and Construction, Ltd. v Whiteley
  Supreme Court of Texas
  2023 WL 3398584
  May 12, 2023

  Subsequent purchaser Kara Whiteley sued Lennar Homes for breach of implied warranties, claiming that negligent construction caused a "serious mold problem" in her house. Lennar successfully moved to compel arbitration under its Purchase Agreement with the previous owner. In arbitration, Lennar filed third-party complaints against its subcontractors. The arbitrator ruled for Lennar, and the parties submitted cross-motions to confirm and vacate the award. The court vacated the award against Lennar but made no ruling on vacating the award against the subcontractors, who subsequently intervened. The Court of Appeals affirmed the vacatur on interlocutory appeal, holding that Whiteley was not bound to arbitration under the Purchase Agreement, but held that the vacatur did not extend to the award against the subcontractors. Lennar petitioned for, and was granted, Supreme Court review.

  The Supreme Court of Texas reversed in part, holding that Whiteley was bound to arbitration by direct benefits estoppel. Whiteley's claims for breach of implied warranty of good workmanship and of implied warranty of habitability did not arise solely from the Purchase Agreement, but neither did they "stand independently." Rather, breach must be determined "by reference to" the Purchase Agreement. The Court made no ruling on the subcontractors, who were not before the trial court when it made its ruling but remanded the question for further proceedings.

Washington

- **MEDIATION REQUEST TIMELY FILED**

Fraley v Commonspirit Health
Court of Appeals of Washington, Division 2
2023 WL 3314879
May 9, 2023

David Fraley was left with permanent injury and pain following spinal surgery performed by Dr. Blair at St. Joseph's Hospital. Two weeks before expiration of the three-year statute of limitations, Fraley, on advice of counsel, sent two letters requesting mediation: one addressed to St. Joseph's and the second to Dr. Blair. After some delay, St. Joseph's forwarded the letter to Dr. Blair, who received it after the date on which the statute of limitations would otherwise have expired. Fraley's letter specifically invoked RCW 7.70.110, providing that a mediation request tolls the medical malpractice statute of limitations. Fraley subsequently filed a malpractice complaint against Blair, who moved for summary judgment, claiming that, because his letter was not sent directly to Blair's work address, it was insufficient to toll the statute of limitations. The court denied summary judgment and certified the matter for discretionary review.

The Court of Appeals of Washington, Division 2. RCW 7.70.110 requires only that a mediation request be "written" and "made" in "good faith." It contains no specific service requirements, and nowhere states that the tolling provision is triggered upon receipt. Here, Fraley understandably addressed his letter to Dr. Blair at the hospital where Dr. Blair performed his surgery, and Blair did, in fact, receive the letter. Fraley "made his mediation request on the date he signed and mailed the letters, and the trial court did not err in concluding that his mediation request was timely filed."

- **CHALLENGE TO AGREEMENT "AS A WHOLE" FOR ARBITRATOR TO DECIDE**

Biochron, Inc. v Blue Roots, LLC
The Court of Appeals of Washington, Division 3
2023 WL 3638293
May 25, 2023

Biochron, a licensed commercial cannabis producer, entered into an MOU to sell its assets to Blue Roots, who wished to take over the business. Before an asset purchase agreement was completed, Biochron turned over its physical assets, and Blue Roots began overhauling the facility. Blue Roots, meanwhile, disclosed propriety information to Biochron, including its "mother plans and growth processes." The parties' relationship began to sour, and Blue Roots filed an arbitration demand under the MOU. Biochron sued for a TRO and preliminary injunction against the arbitration. Biochron then moved to compel arbitration. The court denied the motion, holding that the MOU was not a contract. Biochron did not seek appellate review but answered and asserted counterclaims against Biochron's complaint, including claims for trade secret misappropriation. Biochron moved for partial summary judgment to dismiss the trade secret counterclaim, and Blue Roots renewed its motion to compel arbitration. The court granted partial summary judgment, holding that Blue Roots had failed to take reasonable efforts to protect the confidentiality of its trade secrets, and denied the motion to compel. Blue Roots appealed.

The Court of Appeals of Washington, Division 3, reversed. The trial court erred in denying Blue Roots' renewed motion to compel arbitration. Biochron's challenge to the MOU as a whole was for the arbitrator, not the court, to decide, and the dispute fell within the scope of the Arbitration Agreement. Blue Roots did not waive its arbitration rights by proceeding in litigation: it had sought to exercise its arbitration rights at the outset, proceeded in litigation only when its motion to compel was denied, and even then "mostly played defense." The court erred in dismissing Blue Roots' misappropriation of trade secrets claim after excluding evidence on administrative grounds without assessing relevant factors. Finally, the court erred in granting summary judgment in the face of genuine issues of fact raised by contradictory expert reports.

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