June 21, 2023

ADR Case Update 2023-12

Federal Courts

- **GRIEVANCE NOT ARBITRABLE UNDER CBA**

National Nurses Organizing Committee v Midwest Division MMC, LLC
United States Court of Appeals, Tenth Circuit
2023 WL 3959956
June 13, 2023

The Nurses' Union filed a grievance against Midwest Division Hospital, claiming that a newly implemented staffing grid violated their CBA by displacing bargaining unit employees with supervisory employees. Midwest refused to process the grievance, and the Union sued to compel arbitration. The court denied the motion, finding that the grievance was not arbitrable under the CBA. The Union appealed.

The United States Court of Appeals, Tenth Circuit, affirmed that the dispute was not arbitrable under the CBA. While CBA Section 4 stated that it was "not the Hospital's intent to displace bargaining unit employees with supervisory employees in the performance of bargaining unit work," that provision also stated that nothing in the CBA "precluded" management employees from performing bargaining unit work for various reasons, including training, emergencies, and workload increase. CBA Section 19 further stated that nothing in the CBA "shall be interpreted in any way as interfering with the Hospital's right" to determine "the classifications and qualifications of employees that may be assigned to any unit shift, procedure, group of patients, or job." The plain language of these provisions showed that the parties "did not consent to arbitrate the kind of dispute" asserted in the grievance.

- **ORDER COMPELLING APPRAISAL NOT IMMEDIATELY APPEALABLE**

Positano Place at Naples I Condominium Association, Inc. v Empire Indemnity Insurance Company
United States Court of Appeals, Eleventh Circuit
2023 WL 3730876
May 31, 2023

Insurer Empire Indemnity disputed the amount of Positano's claim for hurricane damage to its properties.

Positano sought to invoke the policy's appraisal provision and, when Empire did not respond, sued. The court granted Positano's motion to compel appraisal, and Empire appealed.

The United States Court of Appeals, Eleventh Circuit dismissed for lack of jurisdiction. The court's order compelling appraisal was an interlocutory order not immediately appealable under 28 U.S.C. § 1292(a)(1) or the FAA.

- **PLAINTIFF EQUITABLY ESTOPPED FROM REPUDIATING ARBITRATION CLAUSE**

MouseBelt Labs Pte. Ltd. v Armstrong
United States District Court, N.D. California
2023 WL 3735997
May 24, 2023

Singapore company MouseBelt Labs invested in Knowledgr, an "academic research crowdsourcing platform" founded and headed by Patrick Joyce, via two Accelerator Agreements. MouseBelt filed a California action against competitor ResearchHub and its controlling shareholder Brian Armstrong (together, Defendants), claiming that Defendants, under the guise of contemplating investment, used Joyce to plunder Knowledgr's resources, destroyed Knowledgr's chances of success, and poached Joyce to work at ResearchHub. These actions, MouseBelt alleged, "annihilated the value of MouseBelt's contractual rights to ownership of equity in Knowledgr." Defendants filed demurrers, which were overruled in part and sustained in part. MouseBelt then removed the action to federal court. Defendants moved to compel arbitration under the Accelerator Agreements.

The United States District Court, N.D. California granted the motion to compel. The Court rejected MouseBelt's claim that Defendants had waived their arbitration rights by litigating the state action. The Court declined to impute Joyce's knowledge of the arbitration rights set forth in the Accelerator Agreements Joyce executed while employed by Knowledgr, to new employer ResearchHub and the related Defendants. Joyce's duty not to disclose confidential Knowledgr Agreements persisted despite Joyce's subsequent employment with ResearchHub. MouseBelt was equitably estopped from repudiating the arbitration clause. MouseBelt's claims, predicated on allegations that Defendants "induced Joyce to shirk and to eventually abdicate Knowledgr's contractual obligations" existed only "by virtue of the Agreements" and were therefore "intertwined with the contract providing for arbitration."

- **EFFA BARRED ARBITRATION OF SEXUAL ORIENTATION DISCRIMINATION CLAIM**

Mera v SA Hospitality Group, LLC
United States District Court, S.D. New York
2023 WL 3791712
June 3, 2023

Restaurant busser Danilla Mera sued his employer, SA Hospitality, bringing FLSA and NYLL claims for unpaid wages and NYSHRL and NYCHRL claims for an "alleged hostile work environment created by sexual orientation discrimination." SA Hospitality moved to compel arbitration under the Arbitration Agreement Mera signed upon hiring.

The United States District Court, S.D. New York granted the motion to compel in part and denied in part. Arbitration of Mera's hostile work environment claims, alleging "constant harassment and abuse" made on the basis of his sexual orientation, was barred by the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFFA). Mera's unpaid wage claims remained arbitrable under the Agreement, as the EFFA renders an arbitration agreement unenforceable "only to the extent that the case filed by such an individual 'relates to' the sexual harassment dispute."

California

- **NO "CLEAR AND UNMISTAKABLE" DELEGATION OF ENFORCEABILITY ISSUES**

Jack v Ring LLC
Court of Appeal, First District, Division 2, California
2023 WL 3639767
May 25, 2023

Plaintiffs sued for a public injunction requiring home security device manufacturer Ring LLC to make disclosures that many of its product features were available only through a separate subscription plan. Ring moved to compel arbitration under the Arbitration Agreement in its Terms of Service, which delegated enforceability determinations to the arbitrator. The court denied the motion, and Ring appealed.

The Court of Appeal, First District, Division 2, California, affirmed. Although the Agreement's delegation provision expressly delegated enforceability to the arbitrator, a separate "poison pill" provision mandated severance of any claim "if a court decides that applicable law precludes enforcement." In this situation, "there is no clear and unmistakable delegation of authority to the arbitrator." Similarly, the Agreement's incorporation of JAMS arbitration rules, which granted the arbitrator "the authority to determine jurisdiction and arbitrability issues as a preliminary matter," did not constitute clear and unmistakable delegation of enforceability or "cure the ambiguity" created by the severability clause.

Texas

- **"EXCESSIVE" ARBITRATION COSTS NOT ESTABLISHED**

Houston AN USA, LLC v Shattenkirk
Supreme Court of Texas
2023 WL 3666899
May 26, 2023

Terminated employee Walter Shattenkirk sued his former employer, Houston AutoNation, for race discrimination and retaliation. AutoNation moved to compel arbitration under the Arbitration Agreement Shattenkirk signed during onboarding. Shattenkirk opposed on unconscionability grounds, arguing that excessive arbitration costs would preclude him from vindicating his statutory rights. Although the Agreement was silent as to costs, provider, or applicable rules, Shattenkirk relied on evidence showing the cost of a sample arbitration, an email from AutoNation counsel stating that "AutoNation and the Claimant usually agree to split the arbitration costs," and evidence of his financial limitations. The court denied the motion to compel, holding the Agreement unconscionable. The ruling was affirmed on appeal, and AutoNation petitioned for and was granted review.

The Supreme Court of Texas reversed. The party opposing arbitration on prohibitive cost grounds must provide "specific evidence that a party will actually be charged excessive arbitration fees." While Shattenkirk's evidence may have provided a "reasonable estimate" of his potential arbitration costs, it was impossible to assess whether these costs would prohibit him from pursuing his rights without knowing "(1) how that amount relates to the overall expense of litigating versus arbitration and (2) Shattenkirk's ability to afford the former but not the latter." It was "premature" to determine unconscionability where it remained possible that Shattenkirk would incur none of these costs. In the event AutoNation "insists upon some payment from Shattenkirk, and Shattenkirk resists arbitration on that ground, only then will the court have to address the legal basis for Shattenkirk's obligation to pay and, if so, what amount."

Georgia

- **NO SHOWING OF MANIFEST ABUSE OF DISCRETION BY ARBITRATOR**

Lang Enterprises Ltd. Co. v. Alcue Properties & Interiors, Inc.
Court of Appeals of Georgia
2023 WL 3913960
June 9, 2023

Alcue Properties contracted for construction company Lang Enterprises to perform mitigation work at one of its properties. The relationship soured, and the parties submitted their dispute to arbitration. The arbitrator issued an award in favor of Lang, finding that Alcue had breached the parties' contract by refusing to allow Lang access to complete the agreed-upon work. On cross-motions by the parties, the court vacated the award for showing manifest disregard of the law, finding that the award had erroneously relied on Georgia's Right to Repair Act, which does not apply in the commercial context, and that the award exceeded the amount Alcue would have owed Lang under their contract. Lang appealed.
The Court of Appeals of Georgia reversed. An arbitrator is "not required to make findings of fact or state his or her rationale in reaching decisions." The arbitration record – which the Court found "devoid of even the most basic factual details" -- contained nothing to indicate the arbitrator's intent and provided no "viable concrete evidence" that the arbitrator "purposefully intended to disregard applicable law." The Court rejected Alcue's claim that the arbitrator "presumably" had based the award on the Right to Repair Act simply because the Act was raised in the arbitration pleadings.