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ADR Case Update 2023 - 13

U.S. Supreme Court

- DISTRICT COURT MUST STAY LITIGATION PENDING INTERLOCUTORY APPEAL**

Coinbase, Inc. v Bielski
Supreme Court of the United States
No. 22-105
June 23, 2023

Abraham Bielski filed a putative class action against online cryptocurrency platform Coinbase, claiming that Coinbase failed to replace funds fraudulently taken from users' accounts. The district court denied Coinbase's motion to compel arbitration under its User Agreement. Coinbase filed a Section 16(a) interlocutory appeal and moved to stay the district court proceedings pending its resolution. The district court declined to stay proceedings, and, on appeal, the Ninth Circuit declined as well, following its precedent that "an appeal from the denial of a motion to compel arbitration does not automatically stay district court proceedings." Coinbase petitioned for and was granted certiorari.

The Supreme Court of the United States reversed and remanded. Noting the Circuit split between the Ninth Circuit's rule and "most other Courts of Appeals," the Court held that a district court "must stay its proceedings while the interlocutory appeal on arbitrability is ongoing." Although Section 16(a) is silent on staying district court proceedings, the provision was enacted "against the clear background" of Supreme Court precedent that an appeal "divests the district court of control over those aspects of the case involved in the appeal." When the question is whether a case belongs in arbitration or district court, the entire case is essentially "involved in the appeal." The "common practice" of staying district court proceedings pending interlocutory appeal "reflects common sense." Allowing courts to proceed with litigation pending appeal would forfeit the benefits of arbitration -- "efficiency, less expense, less intrusive discovery, and the like" -- and waste scarce judicial resources.

Federal Courts

- **ARBITRATION AWARD FAILED TO COMPLY WITH CBA**

Advantage Veterans Services of Walterboro, LLC v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International, Local 7898
United States Court of Appeals, Fourth Circuit
2023 WL 4004122
June 15, 2023

After AVSW nursing care facility employee Sarah Black was discharged for policy violations, the Union initiated grievance and arbitration on her behalf. Applying a “just cause” standard, the arbitrator held for Black, finding that AVSW failed to provide “strong and convincing evidence” of the violations. AVSW sued to vacate, arguing that the award did not “draw its essence from the CBA” because the arbitrator failed to make the “reasonable basis determination” required by its terms. The court affirmed the award, finding that the arbitrator’s analysis reflected a “plausible reading of the CBA.” AVSW appealed.

The United States Court of Appeals, Fourth Circuit reversed. The CBA specifically limited the arbitrator’s power, requiring her to determine “whether AVSW had a reasonable basis for concluding that the employee engaged in the conduct for which h/she is being disciplined.” This language required the arbitrator to engage in a “backwards-looking analysis” to determine whether the AVSW “had a reasonable basis for its decision at the time it discharged Black.” The arbitrator failed to engage in such analysis, basing her decision on evidence presented at the time of the hearing and, specifically, relying on her own credibility assessment of primary witnesses. The Court, therefore, vacated the award, as it did not “draw its essence” from the CBA.

- **AWARD VACATED FOR BEING FRAUDULENTLY PROCURED**

NuVasive, Inc. v Absolute Medical, LLC
United States Court of Appeals, Fourth Circuit
2023 WL 4096037
June 21, 2023

Medical product manufacturer NuVasive sued distributor Absolute Medical and its owner, Greg Soufleris (Defendants), for breach of distribution and non-competition agreements. The court stayed the litigation and ordered arbitration of the breach claim. The resulting award found Absolute liable for breach but denied NuVasive’s claims for lost profits damages. In subsequent litigation of the parties’ remaining claims, NuVasive discovered text messages showing that Soufleris had coached Absolute sales representative Dave Hawley during Hawley’s videoconference testimony. NuVasive moved to vacate the award for being “procured” through “corruption, fraud or undue means.” Defendants opposed the motion as untimely, as NuVasive failed to give notice of its motion to vacate within three months of the award as required by FAA Article 12. The court granted the motion to vacate, holding the limitation period equitably tolled. Defendants appealed.

The United States Court of Appeals, Fourth Circuit affirmed. The Court followed the Ninth Circuit in holding that Section 12’s time limitation may be equitably tolled “when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” Soufleris and Hawley’s “shocking conduct” and subsequent concealment of that conduct were extraordinary circumstances beyond NuVasive’s control. NuVasive could not have known about that conduct until it was revealed in the subsequent litigation discovery. Having properly accepted NuVasive’s motion as timely, the lower court did not err in exercising its discretion to vacate the award as “procured by corruption, fraud, or undue means” based on its determination that 1) NuVasive had established the fraud “by clear and convincing evidence”; 2) the fraud was not discoverable “upon the exercise of due diligence prior to or during the arbitration”; and 3) the fraud was “materially related to an issue in the arbitration.”

- **BREACH OF ADR AGREEMENT NOT A BASIS FOR DISMISSAL**

State Street Global Advisors Trust Company v Visbal
United States District Court, S.D. New York
2023 WL 4053170
June 16, 2023

To promote the launch of its gender diversity-indexed SHE Fund, State Street Global Advisors commissioned artist Kirstin Visbal to produce the “Fearless Girl” statue, which now sits across from the NYSE Building. Following Fearless Girl’s globally viral success, State Street and Visbal negotiated a Master Agreement governing their respective copyright and trademark rights. Under the Agreement’s ADR provision, either party’s notice of breach would trigger a 30-day Cure Period during which the other party was required to cure the breach or submit to non-binding mediation. On February 11, 2019, State Street gave notice of breach after discovering that Visbal was selling a full-size replica of the statue to Australia and planned to participate in its public unveiling. Visbal denied the breach, stating that the Australia sale would “not be rescinded.” Three days later, State Street sued for injunctive relief, which the court denied, and Visbal proceeded with the sale and public event. Both parties moved for summary judgment.

The United States District Court, S.D. New York granted partial summary judgment to both parties, finding that Visbal did not anticipatorily breach the Master Agreement or infringe upon State Street’s license but that genuine issues of fact remained as to Visbal’s counterclaims and State Street’s damages claims. The Court denied Visbal’s request to dismiss the case because State Street, by bringing suit before expiration of the 30-day Cure Period, was in breach of the Agreement. Although State Street’s filing did breach the Agreement, the existence of a mediation agreement “is not a defense to an action, and thus, may not be the basis for a motion to dismiss a complaint based on documentary evidence.”

California

- **CASE REMANDED TO DETERMINE IF ESTOPPEL TOLLED VACATUR DEADLINE**

Law Finance Group, LLC v Key
Supreme Court of California
2023 WL 4168752
June 26, 2023

Arbitration of an interest and fees dispute between borrower Sarah Key and lender LFG concluded in a damages award to LFG. LFG petitioned to confirm the award. The parties’ counsel reached an agreement to extend the 100-day deadline by which Key was statutorily required to seek vacatur and/or respond to LFG’s petition. Key eventually filed a vacatur motion 130 days after service of the arbitral award and filed a response, which also argued for vacatur, 139 days after service. Lender opposed both as untimely. The court held that Key’s vacatur petition was untimely but that her response was timely pursuant to the attorneys’ agreement to extend the deadline. The court vacated the award for violating statutory rights and public policy. The Court of Appeal reversed, holding that the 100-day response deadline was a jurisdictional deadline that could not be extended by stipulation. The Court of Appeal rejected Key’s claim for equitable relief. Because the deadline was jurisdictional, the Court of Appeal found, it was unreasonable for Key to “depend on the assumption that the parties could alter the 100-day deadline by agreement.” Key appealed.

The Supreme Court of California reversed and remanded. CAA §1288 requires that both a petition to vacate and a request to vacate made in response to a petition to confirm must be made “not later than 100 days” after service of the award. However, the statute is not jurisdictional, and nothing in its language or underlying policy indicates legislative intent to “preclude the courts from applying traditional principles of equity.” The Court remanded the case for reconsideration in light of its conclusion that § 1288’s deadline “may be tolled in exceptional circumstances and that a party may be estopped from raising the deadline as a defense.”

- **ARBITRAL SUBPOENAS CONSTITUTED UNAUTHORIZED DISCOVERY SUBPOENAS**

McConnell v Adventest America, Inc.
California Court of Appeals, Fourth District, First Division
No. D080532
May 24, 2023

During arbitration against former employer Adventest, Samer Kabbani deleted the WhatsApp application from his cell phone before relinquishing it to Adventest's attorneys, rendering his WhatsApp messages unrecoverable. In an effort to obtain the lost messages, the arbitrator subpoenaed two Nonparties identified as recipients of Kabbani's messages. The subpoenas directed the Nonparties to appear at a short hearing at which they were to produce or make available for download not just the lost WhatsApp messages but all relevant correspondence and messages from a broad range of online platforms. As soon as the documents were delivered, the hearing would then "be adjourned until a later date," upon which the Nonparty would "be called to provide testimony." When the Nonparties refused, the arbitrator issued an order to compel. The Nonparties petitioned the court to vacate the order, arguing that the subpoenas were improper discovery subpoenas. The court denied the petition, and the Nonparties appealed.

The California Court of Appeals, Fourth District, First Division reversed, holding that the subpoenas were unauthorized discovery subpoenas. Although CAA Rule 1282.6 allows an arbitrator to issue a subpoena requiring a witness to appear at hearing with documents or other evidence, it does not give the arbitrator the power to require nonparties to produce documents "at a hearing specially set for the limited purpose of receiving the subpoenaed documents." To hold otherwise would allow parties to "avoid the prohibition against nonparty discovery, and demand any manner of documents, by simply requiring the nonparty to produce the documents at an arbitration proceeding."

Georgia

- **PETITION TO CONFIRM ARBITRATION AWARD WAS "RIPE" FOR DECISION**

Defense Products and Services Group, Inc. v Kinney
Court of Appeals of Georgia
2023 WL 4009760
June 15, 2023

After winning an arbitration award against Defense Products and Services Group (DPSG) in a stock ownership dispute, stockholder Claimants petitioned to confirm the award in Fulton County. DPSG objected on ripeness grounds and moved to dismiss without prejudice. DPSG then petitioned to vacate the award in its county of residence, Coweta. The Fulton Superior Court granted Claimants' petition to confirm, noting that DPSG had made no substantive argument for vacatur. Coweta County then dismissed DPSG's petition to vacate in light of the Fulton ruling. DPSG appealed both actions, which were consolidated on appeal.

The Court of Appeals of Georgia affirmed. The Court rejected DPSG's argument that Claimants' petition to confirm was "unripe" because Fulton County should have waited for resolution of the Coweta County action before confirming the award. "Simply nothing" in the Georgia Arbitration Code supported DPSG's premise. To the contrary, the Code requires that a subsequent petition, such as a motion to vacate, must be made "to the court hearing the initial application."

Illinois

- **AGENT NOT AUTHORIZED TO BIND NURSING HOME RESIDENT TO ARBITRATION AGREEMENT**

Parker v Symphony of Evanston Healthcare, LLC
Appellate Court of Illinois, First District, First Division
2023 IL App (1st) 220391
June 5, 2023

Cathy Parker, as representative of Mae Jefferson's estate, sued nursing facility Symphony of Evanston Healthcare, claiming that Symphony's negligence had caused Mae's death. Symphony moved to dismiss and compel arbitration under the agreement signed by Mae's daughter Kathy at the time of Mae's admittance. The court granted Symphony's motion, and Parker appealed.

The Appellate Court of Illinois, First District, First Division reversed. While Kathy, as holder of Mae's health care power of attorney, was authorized to admit Mae to Symphony, she lacked authority to bind Mae to the agreement. The agreement was not a condition precedent to Mae's admission, nor was it an integrated part of the admissions agreement, and the decision to sign the agreement was, therefore, not a "health care decision" within the scope of Kathy's authority.

New York

- **ARBITRAL AWARD REMANDED FOR IMPOSITION OF LESSER PENALTY**

In re: O'Brien v Yonkers City School District
Supreme Court, Appellate Division, Second Department, New York
2023 WL 3856165
June 7, 2023

Following arbitration under New York Education Law § 3020, Yonkers City School District terminated teacher Denis O'Brien for "inappropriately restraining a female student who was trying to get past him." The court denied O'Brien's petition to vacate, and O'Brien appealed.

The Supreme Court, Appellate Division, Second Department, New York affirmed the award's finding of misconduct but remitted the matter to the School District for imposition of a lesser penalty. When arbitration is conducted by statutory mandate, the award is subject to "closer judicial scrutiny": it "must have evidentiary support and cannot be arbitrary and capricious." Although the video of the incident "could be interpreted in more than one way," the Court was required to defer to the arbitrator's credibility determination. However, in the context of O'Brien's "otherwise unblemished record of approximately 19 years as a teacher," the Court found termination to be "so disproportionate to the offense as to be shocking to one's sense of fairness."

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