September 6, 2023

ADR Case Update 2023 - 17

Federal Courts

- **MOTION TO UNSEAL CONFIDENTIAL ARBITRATION AWARD DENIED**

  Stafford v International Business Machines Corporation
  United States Court of Appeals, Second Circuit
  2023 WL 5183546
  August 14, 2023

  Upon her termination by IBM, Elizabeth Stafford signed a Separation Agreement requiring confidential arbitration of any claim arising from the termination. Stafford demanded and won a confidential arbitration of ADEA age discrimination claims against IBM and petitioned to confirm the award. Stafford attached the award to her petition under seal but simultaneously petitioned to unseal it. Stafford argued that the confidentiality requirement was intended to prevent information sharing among terminated IBM employees and impede potential litigation. IBM paid the award in full and filed an opposition to the motion to unseal. The court granted Stafford's motion to confirm and motion to unseal. The court held that once attached to the confirmation petition, the award constituted a "judicial document" and that IBM failed to overcome the presumption of public access to judicial documents. IBM appealed, and the court stayed the unsealing of the award pending appeal.

  The United States Court of Appeals, Second Circuit, vacated and remanded. Stafford's confirmation petition was rendered moot when IBM satisfied the award in full. The court erred in granting the motion to unseal, as it failed to consider "countervailing factors." Confidentiality is a "paradigmatic aspect of arbitration," and Stafford made clear her intention to use her litigation to "launder" confidential materials for use by future litigants against IBM. These arbitral confidentiality considerations outweighed the presumption of access to judicial documents.

- **SETTLEMENT APPROVAL DECISION REMANDED**

  Moses v The New York Times Company
  United States Court of Appeals, Second Circuit
  2023 WL 5281138
  August 17, 2023

  In a putative class action on behalf of other New York Times (NYT) subscribers, Maribel Moses challenged NYT's automatic subscription renewals under California's Automatic Renewal Law. Following mediation, the parties entered into a binding Settlement Agreement in which NYT agreed to revise the renewal policy. In exchange for claims release, class members could opt to receive either a pro rata cash payment of the Settlement Fund or an Access Code for a new,

one-month NYT subscription. Following a fairness hearing, the court certified the class and approved the settlement. Referencing the Second Circuit's nine-factor approval test set forth in City of Detroit v Grinnell Corp., the court applied a "presumption of fairness" to the settlement because it was reached "in arm's-length negotiation." The court separately considered and approved a $5,000 incentive award to Moses and a $1.25 million attorney's fee award.

The United States Court of Appeals, Second Circuit, vacated and remanded. The lower court erred in applying a presumption of fairness and separately evaluating the incentive payment and attorneys' fees. While the Grinnell factors "remain a useful framework," the 2018 revisions to Rule 23 direct the court's focus to four "primary procedural considerations and substantive qualities." Under Rule 23(e)(2), the court below was required 1) to consider arm's-length negotiation as only one of the four core factors; 2) to consider the terms of any proposed attorney's fee award in "tandem" with the settlement terms in evaluating the adequacy of the relief provided for the class, and 3) to take incentive payments into account in determining whether the settlement treated class members "equitably relative to one another." The court further erred in valuing the Access Codes at face value rather than redemption value. The Access Codes fell squarely within the CAFA's coverage of "coupons."

- **MOTION TO COMPEL AFTER CLASS CERTIFIED DID NOT CONSTITUTE WAIVER**

H&T Fair Hills, Ltd. v Alliance Pipeline L.P.
United States Court of Appeals, Eighth Circuit
2023 WL 5113793
August 10, 2023

Alliance constructed and operated a natural gas pipeline across North Dakota, Minnesota, Iowa, and Illinois. Agreements with those states (State Agreements) required Alliance to "mitigate, or provide compensation for" the Pipeline's "negative agricultural impacts." Under separate right-of-way Easements with individual landowners, Alliance also agreed to pay for "damages to crops" that "may arise" from Pipeline construction and maintenance. Alliance initially managed landowners' crop damages claims through a "Crop Yield Program" but ended the Program in 2015. The landowners filed a class action requiring Alliance to pay for ongoing yield losses suffered from 2015 forward. Most of the Easements included Arbitration Provisions, and following class certification, Alliance moved to compel arbitration against those landowners. The landowners opposed, arguing that 1) Alliance waived its arbitration rights by raising them only after class certification; 2) their claims for "ongoing yield losses" were not claims for "crop damages" covered by the Arbitration Provisions; and 3) their claims were brought pursuant to the State Agreements and were not subject to arbitration under the Easements. The court ordered the parties to arbitrate crop damages issues but held that causation of ongoing yield losses and Alliance's obligations to continue the Crop Yield Program fell outside the scope of arbitration. Alliance appealed.

The United States Court of Appeals, Eighth Circuit, affirmed in part and reversed in part. Alliance did not waive its arbitration rights: a motion to compel arbitration prior to class certification "would have been a motion to bind parties who were not yet part of the case," and Alliance acted consistently with its rights by filing the motion to compel "quickly after the class was certified." The State Agreements did not invalidate the Easement arbitration agreements nor provide a separate avenue for litigation but merely "set a baseline level of protection for landowners." The court below properly ordered arbitration of crop damages claims but erred in carving out the remaining issues, which were "bound together" with the arbitrator's tasks of defining and determining the scope of "damages" for purposes of the Arbitration Provisions.

- **LATE ARBITRAL DISCLOSURES DID NOT WARRANT VACATUR**

Grupo Unidos por el Canal, S.A. v Autoridad del Canal de Panama
United States Court of Appeals, Eleventh Circuit
2023 WL 5313828
August 18, 2023

Panama Canal authority Autoridad entered into a multibillion-dollar Contract for European consortium Grupo Unidos to design and construct an expansion of the Panama Canal.

Grupo Unidos delivered the project nearly two years late, and at the end of a resulting five-year arbitration, an ICC panel issued a Partial Award of $230 million in favor of Autoridad. Grupo Unidos immediately requested extensive disclosures from the three panelists and, based on newly disclosed information, applied to the ICA for their removal. The ICA acknowledged that some information should have been previously disclosed – one Autoridad attorney was counsel in a panelist's previous arbitration; another panelist served as co-arbitrator with an Autoridad attorney -- but held that the late disclosures raised no questions of arbitral independence. The panel issued the Final Award, which Grupo Unidos moved to vacate in federal court. The court denied vacatur and granted Autoridad's cross-motion to confirm. Grupo Unidos appealed.

The United States Court of Appeals, Eleventh Circuit affirmed. The general rule of vacating an award only in "exceptional circumstances" applies with "even greater force" to an international arbitration. Although arbitrators "should err on the side of greater, rather than lesser disclosure," an award cannot be vacated "simply because the arbitrators worked with each other and with related parties elsewhere." The arbitrators were chosen for many sound reasons, not least for their extensive experience – "boasting more than 500 international arbitrations over their combined careers" – and construction contract expertise. It was of "little wonder, and of little concern" that "elite members of the small international arbitration community cross paths in their work," and "familiarity due to confluent areas of expertise" did not of itself indicate bias.

- **ARBITRATION AGREEMENT NOT UNCONSCIONABLE**

Payne v Savannah College of Art and Design, Inc.
United States Court of Appeals, Eleventh Circuit
2023 WL 5617080
August 31, 2023

Isaac Payne was terminated from his position as Head Fishing Coach at the Savannah College of Art and Design (SCAD) and sued for race discrimination and retaliation. SCAD moved to compel arbitration under the Arbitration Agreement Payne signed as a condition of employment. The Agreement provided that SCAD would advance initial arbitration fees but that the non-prevailing party would bear the full cost of all arbitration fees and required arbitration before a retired federal judge with five years of experience in the substantive practice area. Payne argued that these provisions rendered the Agreement unconscionable, as he could not afford to bear the full cost of arbitration fees and because the arbitrator selection standards would "effectively limit the pool of arbitrators to two White men." The court granted SCAD's motion to compel, holding that the Agreement was not unconscionable, and Payne appealed.

The United States Court of Appeals, Eleventh Circuit affirmed. Noting that Georgia's unconscionability standard is "hard to satisfy," and has been defined to apply only to provisions that "shock the conscience," the Court held that the Arbitration Agreement's fee provision was not unconscionable. The simple fact that Payne "might win" the arbitration prevented him from showing that he was "likely to incur any costs whatsoever," and SCAD's policy of fronting the arbitration costs, as well as provision for a second appeal, helped ensure that Payne would not be "excluded from the arbitral forum." Payne's estimation of the limited arbitrator pool was "questionable," and he "cited absolutely no authority for his contention that it would be unconscionable for his arbitration to be conducted by a white arbitrator."

- **ARBITRATION AGREEMENT UNCONSCIONABLE**

Iravanian v Translations.com, Inc.
United States District Court, N.D. California
2023 WL 5286394
August 17, 2023

Translator Hanieh Iravanian sued her employer, Translations.com, for wage theft and other labor violations. Translator.com moved to compel arbitration under the Arbitration Agreement Iravanian had signed as a condition of employment, which required "binding arbitration in New York City by the American Arbitration Association," and authorized the arbitrator to determine costs between the parties.

The United States District Court, N.D. California denied the motion to compel, holding the Arbitration Agreement unconscionable. Arbitrability was for the Court to decide, as Translations.com failed to present "clear and unmistakable evidence" that the parties had agreed to arbitrate arbitrability. The Agreement provided only for the selection of an arbitration forum and provider; it did not "purport to provide the rules governing that adjudication, let alone incorporate the AAA rules delegating arbitrability to the arbitrator." The Agreement was procedurally unconscionable, as Iravanian had been required to make an immediate "take-it-or-leave-it" decision with no opportunity to review or negotiate the terms, and the Agreement was obscured within a larger document with no distinguishing visual markers or initialing requirement. The Agreement was substantively unconscionable in requiring a California employee making $30-$40 per hour to arbitrate in New York and potentially bear the full costs of the arbitration.

- **VACATUR DENIED FOR FAILURE TO SHOW MANIFEST DISREGARD**

  Elwell v Raymond James Financial Services, Inc.
  United States District Court, S.D. New York
  2023 WL 5186275
  August 10, 2023

  Christina and Erik Elwell initiated FINRA arbitration against their financial advisor and broker, Daniel Pimental, and his employer, Raymond James, seeking tens of millions of dollars in damages allegedly caused by Pimental's breach of fiduciary duty and various forms of misconduct. The panel held for the Elwells, but its award of $67,917 in compensatory damages plus pre-judgment interest fell far short of their expectations. The Elwells petitioned to vacate the Award, arguing that the panel showed manifest disregard for the law by improperly rejecting their damages calculations and failing to explain how the $67,917 was calculated.

  The United States District Court, S.D. New York denied vacatur, holding that the Elwells failed to show that the arbitrators acted in manifest disregard of the law. Arbitrators "may award the damages they believe are due based on the evidence before them," and the Elwells cited no legal authority requiring the panel to accept their damages calculations. The mere fact that the arbitrators chose to award "only a small amount of the damages sought" did not "indicate at all that the arbitrators manifestly disregarded the law."

- **FAILURE TO OBJECT DURING ARBITRATION PREVENTED ENFORCEMENT DEFENSE**

  Kora Pack Private Limited v Motivating Graphics LLC
  United States District Court, N.D. Texas, Fort Worth Division
  2023 WL 4826222
  July 27, 2023

  Indian corporation Kora Pack sought arbitration of a payment dispute with Motivating Graphics (MG), a Texas LLC, pursuant to an MOU that dissolved their business relationship. The MOU's arbitration clause required each party to select an arbitrator and the two selected arbitrators to appoint a third. Kora selected its arbitrator, but MG did not. Kora asked the High Court of Madras, the arbitral venue, to appoint an arbitrator on MG's behalf. MG participated in the resulting arbitration, which concluded in an award to Kora. Kora sued to enforce the award in federal district court and moved for summary judgment. MG opposed, asserting defenses under the New York Convention that 1) the composition of the arbitral tribunal did not accord with the arbitration clause, as only the Supreme Court of India had authority to select the arbitrator in an international arbitration; 2) the MOU was invalid due to fraud and coercion; 3) the award was beyond the scope of the MOU; and 4) the award was contrary to Indian public policy, as Kora had failed to return MG's equipment as the Award required.

  The United States District Court, N.D. Texas, Fort Worth Division granted summary judgment in favor of Kora. MG correctly argued that, under Indian law, the Supreme Court of India should have appointed the arbitrator; however, MG ignored multiple notices sent by Kora and made the "strategic decision" not to attend the two appointment hearings set by the High Court. Having failed to object to the appointment for twenty months, it could not now assert that appointment as a defense. MG's only evidence as to invalidity -- one conclusory statement by an MG employee that Kora had made false promises – was insufficient to defeat summary judgment. MG's scope

defense also failed, as MG had every opportunity to raise scope challenges during the arbitration but failed to do so. Finally, any violation of Indian public policy was irrelevant, as the standard is whether the award violates the public policy of the enforcing country. The Award required Kora to return MG's equipment only after MG paid the Award. As MG had not done so, Kora's failure to return the equipment did not violate United States public policy.

California

- **NON-SIGNATORY MANUFACTURER COULD NOT ENFORCE ARBITRATION**

  Kielar v Superior Court of Placer County
  California Court of Appeal, Third District
  2023 WL 5270559
  August 16, 2023

  Mark Kielar sued Hyundai for violations of the Song-Beverly Consumer Warranty Act and fraudulent inducement based on alleged mechanical defects in his 2012 Hyundai Tucson. Hyundai moved to compel arbitration under the sales contract between Kielar and his local car dealership. The court granted the motion, holding that non-signatory Hyundai was entitled to enforce the arbitration agreement under equitable estoppel.

  The California Court of Appeal, Third District, reversed, holding that Hyundai could not enforce arbitration under the sales contract. Kielar's complaint alleged breach of Hyundai's written warranty and relied on no terms from the sales contract. The Court noted that the California Supreme Court was likely to imminently resolve the circuit split on this issue, and chose to follow those courts which had held that "manufacturers' express or implied warranties that accompany a vehicle at the time of sale" do not constitute "obligations arising from the sale by contract."

New York

- **ARBITRATION AWARD NOT NULLIFIED BY PURPORTED SETTLEMENT**

  Harleysville Insurance Company/Nationwide General Insurance Company v Estate of Otmar Boser
  New York Supreme Court, Appellate Division, Second Department
  2023 WL 4918894
  August 2, 2023

  Following a serious automobile accident, Ruth Boser, acting on her own behalf and as executor of the estate of her late husband, Otmar Bosar, filed a demand against insurer Harleysville for arbitration of her claims for underinsurance motorist benefits. On November 7, 2019, the arbitration concluded in a $950,000 award in favor of Ruth Boser. Harleysville, however, believed that it finalized a settlement with Boser just a few days later, on November 10, and that this settlement nullified the arbitration award. Harleysville moved to enforce the purported settlement agreement; Boser cross-moved to confirm the award. The court denied Harleysville's motion and confirmed the award. Harleysville appealed.

  The New York Supreme Court, Appellate Division, Second Department affirmed confirmation of the award based on its finding that no final settlement had been reached. The purported settlement relied on by Harleysville consisted solely of emails exchanged by counsel. To be enforceable, a settlement agreement "must set forth all material terms" and evince a "clear mutual accord between the parties. While an email from Harleysville's counsel proposed terms, Boser's counsel responded with an additional proposed term requiring Harleysville to agree that $50,000 recovered from the other vehicle's insurer would not be set off against the settlement. The email stated that any agreement was "based on the understanding that no arbitration award had been reported," and that, before finalizing the settlement, Boser's counsel would inform the

arbitrator that no award was required. This exchange indicated that “additional steps had to be taken to finalize the settlement,” and there was no clear and mutual accord between the parties.

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

Contact Information
David Brandon
Program Manager
JAMS Institute
415-774-2648
DBrandon@jamsadr.com