December 13, 2023

ADR Case Update 2023 - 21

Federal Circuit Courts

- **PARTY WAIVED ARBITRATION RIGHTS BY PROCEEDING WITH EQUITY ACTION**

  Breadeaux's Pisa, LLC v Beckman Bros. Ltd.
  United States Court of Appeals, Eighth Circuit
  2023 WL 6801149
  October 16, 2023

  For fifteen years, Main Street Pizza operated as a franchise of Breadeaux's Pisa. The Franchise Agreement provided for mandatory arbitration "except insofar as the Franchisor elects to enforce this Agreement by judicial process and injunction." After the Agreement's term ended, Main Street continued to operate a pizza restaurant at the same location. Breadeaux filed an equitable action alleging that Main Street was in violation of the Agreement's non-compete clause. Main Street responded with counterclaims. Breadeaux successfully moved to compel arbitration of the counterclaims and stay the litigation, then moved for a preliminary injunction. The court denied the injunction and ordered Breadeaux to comply with Main Street's discovery requests. Breadeaux filed an arbitration demand seeking preliminary and permanent injunctions and declaratory relief and moved to stay the litigation pending the arbitration. The court denied the motion, and Breadeaux appealed.

  The United States Court of Appeals, Eighth Circuit affirmed. Breadeaux elected to proceed in litigation and sought to stay that litigation in favor of arbitration only after the court's adverse discovery ruling. Under the terms of the Agreement, once Breadeaux chose to litigate its equitable claims, those claims were no longer referable to arbitration. Further, Breadeaux waived its arbitration rights, as it knew of those rights, but chose instead to seek injunctive relief that necessarily required a determination of arbitrable issues.

- **FOREIGN ARBITRAL AWARD CONFIRMED**

  Exclusive Trim, Inc. v Kastamonu Romania, S.A.
  United States District Court, S.D. New York
  2023 WL 6664614
  October 12, 2023

  Exclusive Trim, Inc. (ETI), a Florida residential door distributor, entered into a Supply Agreement to purchase a minimum number of "door skins" from Romanian manufacturer Kastamonu. ETI later notified Kastamonu that it was discontinuing its door distribution business. ETI refused to purchase any more doors, falling short of its minimum purchase obligations, and Kastamonu refused to return ETI's deposit. The parties submitted to arbitration under the Supply Agreement.

The arbitrator held that the Supply Agreement contained an “impermissible penalty,” denied Kastamonu’s claims, and awarded ETI the full deposit amount, as well as attorneys’ fees and arbitration costs. Kastamonu failed to pay, and ETI sued to confirm the award.

The United States District Court, S.D. New York confirmed the arbitration award. Under the New York Convention, a foreign award must be confirmed absent a showing that the award meets one of the seven specified grounds for refusal set forth in the Convention. ETI established that there was “no genuine issue of material fact precluding judgment in its favor.” Both parties fully participated in the arbitration, and the arbitrator’s findings “adhered to the terms of the Supply Agreement” and “were well within the bounds of its authority."

California

- **AWARD VACATED FOR RAISING A PERCEPTION OF BIAS**

FCM Investments, LLC v Grove Pham, LLC
California Court of Appeal, Fourth District, Division 1
2023 WL 6826821
October 17, 2023

Disputes arose during a commercial real estate transaction between purchaser FCM Investments and seller Grove Pham, and the parties submitted to arbitration. The arbitrator found Grove Pham in breach of the purchase agreement and awarded FCM damages and the return of its deposit. The arbitrator noted that, although the transaction was “rather complicated,” her decision was simplified by the primary witness’s lack of credibility. The arbitrator cited the witness’s use of an interpreter, which the arbitrator perceived as a “ploy” by the witness “to appear less sophisticated” than she really was. The arbitrator believed the interpreter was unnecessary, as the witness had “been in the country for decades,” had “engaged in sophisticated business transactions,” and had “herself functioned as an interpreter.” FCM moved to confirm the award, and Grove Pham moved to vacate on excess of powers grounds. The court confirmed, and Grove Pham appealed.

The California Court of Appeal, Fourth District, Division 1 reversed. Grove Pham argued for the first time on appeal that the arbitrator’s statements raised a perception of bias. Grove Pham did not forfeit the argument by failing to raise it below, as the claim met both exceptions to the forfeiture doctrine: 1) it raised a “pure question of law on undisputed facts,” and 2) implicated “weighty concerns involving the public interest.” The court below erred in confirming the award, which “amply” gave rise to a “reasonable impression of possible bias.” The arbitrator’s four-page decision was “sparse and virtually devoid of legal analysis” and relied primarily on the arbitrator’s assessment of witness credibility based on “uninformed misconceptions about English proficiency and language acquisition.” The Court directed the lower court to vacate the award on remand.

Georgia

- **CHANGE TO ARBITRATION AWARD WAS PERMISSIBLE CLARIFICATION**

Xie Law Offices, LLC v Luo
Georgia Court of Appeals
2023 WL 6859220
October 18, 2023

Kelvin Luo worked as an immigration associate at Xie Law Offices (Xie Law) and at the Georgia Regional Center (GRC), an entity created by Xie Law’s managing partner, Jeff Xie. Luo left the firm, and Xie Law initiated arbitration, claiming that Luo violated non-compete and non-solicitation provisions of his employment contract. Luo counterclaimed for breach of contract based on Xie Law’s failure to pay past-due bonuses. The arbitration panel denied Xie Law’s claims and ordered Jeff Xie and GRC to pay damages in the full amount of Luo’s unpaid bonuses, plus pre-

judgment interest and attorney fees. The award stated that "Xie Law is also liable for payment of the same sums as" Jeff Xie and GRC. Luo filed a motion for clarification, which the panel granted, issuing an order stating that Xie Law, GRC, and Jeff Xie were "jointly and severally liable" for the full amount of the award. The court denied Xie Law's motion to vacate and granted Luo's motion to confirm. Xie Law appealed.

The Georgia Court of Appeals affirmed confirmation of the award. Georgia's Arbitration Code authorizes an arbitrator to change an award where, as here, the award was "imperfect in a matter of form, not affecting the merits of the controversy." The original award did not use the language "jointly and severally liable," but its wording "nevertheless had the same practical effect." The clarification merely corrected this imperfection. Luo's motion to confirm was timely, as the time limitation began to run on the date the panel issued the changed award.

- **LESSOR EXCLUDED FROM TAX ASSESSMENT ARBITRATION**

2200 Atlanta Investors, LLC v DeKalb County
Georgia Court of Appeals
2023 WL 6888765
October 19, 2023

Atlanta Investors leased property from the DeKalb County Development Authority. The lease required Atlanta Investors to make "payments in lieu of property taxes" to the DeKalb County Tax Commissioner. After paying the property's 2016 taxes, Atlanta Investors sued for a refund, claiming that the county failed to comply with a statutory valuation freeze. DeKalb moved to dismiss on sovereign immunity grounds. DeKalb argued that the statutory immunity waiver allowing taxpayers to challenge tax valuation did not apply to Atlanta Investors, as Atlanta Investors made payments to the County "in lieu of property taxes" and therefore was not a "taxpayer" under the statute. Atlanta Investors requested that, in the event of dismissal, the court order arbitration pursuant to their lease agreement. The trial court dismissed for sovereign immunity and denied the arbitration request. Atlanta Investors appealed.

The Georgia Court of Appeals affirmed. Atlanta Investors was not a taxpayer for purposes of the statutory challenge. Its obligation to pay arose from its lease obligation, not from the County's tax assessment. Although the lease gave Atlanta Investors the right to contest property valuations "in the same manner as other property owners," it also stated that all provisions relating to valuation of the property were the "obligation and responsibility" of the Board of Tax Assessors and "not of the County." Accordingly, the arbitration provision did not "compel the County to participate in arbitration concerning valuation of the tax assessment, much less arbitrate" a tax refund claim.

New York

- **MOTION'S FAILURE TO SPECIFY AGREEMENT DID NOT PRECLUDE ENFORCEMENT**

Mejia v Linares
New York Supreme Court, Appellate Division, First Department
2023 WL 6298194
September 28, 2023

Gustavo Mejia sued Uber, and Uber cross-motioned to compel arbitration. Mejia opposed the motion, arguing that it purported to rely on the Uber app's 2021 Terms but presented evidence of the 2016 Terms and failed to specify which Terms supported the motion. Mejia further argued that the 2021 Terms were unconscionable. The court denied the motion to compel, and Uber appealed.

The New York Supreme Court, Appellate Division, First Department reversed and remanded. Uber's failure to specify under which of the two arbitration agreements it was making its arbitration demand did not preclude it from relying on the 2016 Terms. The evidence presented was sufficient to establish that the 2016 Terms created an enforceable arbitration agreement between the parties. Under the 2021 Terms, which included a delegation cause,

unconscionability of those Terms was for the arbitrator to decide.

- **FRAMED ISSUE HEARING REQUIRED BEFORE ORDERING ARBITRATION**

  In re: United States Automobile Association v Mickens
  New York Supreme Court, Appellate Division, First Department
  2023 WL 6298167
  September 28, 2023

  Tevin Mickens was struck by a car while riding a "Citi Bike" in Manhattan. He applied for no-fault benefits to his insurer, USAA. USAA denied the claim based on its finding that Mickens did not reside with his mother, the policyholder, at the time of the accident. Mickens demanded arbitration, which USAA petitioned to stay. The Supreme Court denied the stay, finding that USAA failed to meet the burden of showing that Mickens did not reside with his mother at the time of the accident. USAA appealed.

  The New York Supreme Court, Appellate Division, First Department, reversed. The parties' evidence raised an issue of fact as to whether Mickens resided with his mother. While USAA submitted hospital billing records and Micken's no-fault benefits application listing a separate address, Micken's driver's license, voter registration card, and tax documents showed his mother's address. The court below should have granted a temporary stay of arbitration and directed a framed issue hearing on this issue.

Washington

- **CLAIMS SUBJECT TO ARBITRATION AGREEMENT**

  Raab v Nu Skin Enterprises, Inc.
  Washington Court of Appeals, Division 3
  2023 WL 6471303
  October 5, 2023

  Earnest Raab and other distributors (Plaintiffs) of Nu Skin beauty and nutritional products filed a Washington action against Nu Skin and higher-level distributors, claiming that Nu Skin's distribution structure was unfair. Nu Skin sued in Utah district court to compel arbitration under the parties' Arbitration Agreement, which provided for mandatory arbitration in Utah according to Utah law. Nu Skin moved to dismiss the Washington action for improper venue. Plaintiffs opposed, arguing that 1) their claims were not subject to the Arbitration Agreement; 2) the forum selection clause contravened Washington public policy; and 3) the Arbitration Agreement was unconscionable. The court denied Nu Skin's motion to dismiss, holding that Washington was the proper venue and that the Arbitration Agreement did not apply to Plaintiffs' claims. The Utah district court held that the Washington decision had preclusive effect and denied Nu Skin's motion to compel. Nu Skin appealed.

  The Washington Court of Appeals, Division 3, reversed and remanded. Spokane County was the proper venue for Plaintiffs' actions. Nu Skin transacted business there, and the events giving rise to Plaintiffs' claims occurred there in "substantial part." The lower court had the authority to determine arbitrability, as the Arbitration Agreement contained no delegation clause but defined the Agreement too narrowly. The Agreement applied broadly to all disputes between distributors and Nu Skin and between distributors and other distributors, and Plaintiffs' claims fell squarely within its coverage. Unconscionability was a contract issue to be determined under Washington law, as Washington had the "most significant relationship" to the transaction, and Utah's more stringent unconscionability standard was contrary to Washington law.

- **PANEL'S "MISUNDERSTANDING" OF LAW DID NOT REQUIRE VACATUR**

  State of Washington v American Tobacco Co.
  Washington Court of Appeals, Division 1

2023 WL 6803193
October 16, 2023

Pursuant to a Master Settlement Agreement (MSA) between participating cigarette manufacturers (PMs) and multiple states, Washington State statutorily required manufacturers not participating in the MSA (NPMs) to make escrow deposits. The deposits were calculated per "units sold," which were defined as cigarette packs or "roll-your-own" tobacco containers bearing the State's excise tax stamp on which the State collected taxes. The escrow amounts were annually adjusted (NPM Adjustment) to accord with the State's excise tax collection. Under separate compacts between the State and tribal sovereigns, cigarettes sold on reservations ("compact cigarettes") bore tribal excise tax stamps and were subject to a tribal excise tax equal to the State's tax. A 2003 arbitration held that tribal compact cigarettes were not "units sold" for purposes of the NPM Adjustment, but a 2004 arbitration panel held that they were, stating that the tribes' tax authority derived from their compacts with the State. The State moved to vacate the ruling and for a declaratory judgment defining "units sold." The PMs opposed, arguing that the declaratory judgment claim was subject to arbitration under the MSA. The court issued a declaratory judgment that compact cigarettes were not "units sold" for purposes of the NPM Adjustment and denied the motion to vacate. The PMs appealed the declaratory judgment, and the State appealed the denial of its motion to vacate.

The Washington Court of Appeals, Division 1, affirmed the declaratory judgment and the denial of vacatur. The declaratory judgment claim was not arbitrable, as the MSA's arbitration provision applied only to disputes made by the independent auditor responsible for calculating the NPM Adjustment. The court below properly interpreted "units sold" to exclude tribal compact sales. The 2004 arbitration panel erred in holding that tribal taxation was a proxy for State taxation. Tribal authority derives from tribal sovereignty, not from any permission granted by the State, and the panel's decision "grossly" misunderstood Indian law and basic principles of tribal authority. However, the court below correctly concluded that the panel's error of law did not justify vacatur. It is not for the court to review the merits of the arbitrator's decision, and the panel stated that its interpretation of the statute was "not determinative" of its decision.

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