May 3, 2023

ADR Case Update 2023 - 9

Federal Circuit Courts

- **UBER DRIVERS NOT EXEMPT UNDER FAA SECTION 1**

  Singh v Uber Technologies, Inc.
  United States Court of Appeals, Third Circuit
  2023 WL 3086603
  April 26, 2023

  Driver Jaswinder Singh filed a class action against Uber for misclassifying drivers as independent contractors. Uber moved to compel arbitration under the Terms to which Singh agreed when registering as a driver. Singh opposed, arguing that Uber drivers are transportation workers exempt from arbitration enforcement under FAA Section 1. The court granted the motion to compel, and Singh appealed.

  The United States Court of Appeals, Third Circuit, affirmed that Uber drivers are not "transportation workers" exempt under FAA Section 1. Uber drivers are engaged in local transportation. Most Uber rides do not cross state lines, and the few that do arise "incidentally" from "the happenstance of geography." Those "rare border crossings" are insufficient to render interstate commerce central to the work Uber drivers "typically carry out."

- **TITLE VII CLAIM ARBITRABLE UNDER RLA**

  Polk v Amtrak National Railroad Passenger Corporation
  United States Court of Appeals, Fourth Circuit
  2023 WL 3081769
  April 26, 2023

  Train conductor Dawn Polk filed a Title VII racial discrimination claim against Amtrak, arguing that Amtrak wrongfully continued unannounced drug testing beyond the terms of her employment settlement. The court granted Amtrak's motion to dismiss Polk's Title VII claim, finding it subject to arbitration under the Railway Labor Act (RLA). Polk appealed.

The United States Court of Appeals, Fourth Circuit affirmed. The Court rejected Polk's argument that her claim was not a "minor dispute" subject to arbitration because 1) it arose as an independent cause of action under Title VII and 2) its resolution did not require "interpretation or application" of her CBA. Title VII does not "refer to, let alone repudiate" the RLA, which was enacted to provide centralized arbitration of minor disputes. Her claim rested entirely on the premise that Amtrak treated her differently than other employees and would necessarily require a court to interpret CBA provisions covering employee discipline and reinstatement.

- **NO EVIDENCE OF NOTICE OF NEW TERMS OR MUTUAL ASSENT TO ARBITRATE**

  Jackson v Amazon.com, Inc.
  United States Court of Appeals, Ninth Circuit
  2023 WL 2997031
  April 19, 2023

  Drickey Jackson enrolled as a local delivery driver in Amazon's Flex program and agreed to the program's 2016 Terms. The Terms included a mandatory arbitration provision and stated that participants were "responsible for" periodically reviewing the Terms "to stay informed of any modifications." Amazon allegedly emailed drivers in 2019 with amended Terms that included a broader arbitration provision. In 2021, Jackson filed a class action lawsuit claiming that Amazon unlawfully wiretapped driver communications and monitored their closed Facebook groups. Amazon moved to compel arbitration. The court denied the motion, holding that Amazon failed to show that it had provided individual email notice to Jackson of the 2019 Terms and that the alleged misconduct fell outside the scope of the 2016 Terms. Amazon appealed.

  The United States Court of Appeals, Ninth Circuit affirmed. The court below properly found that Amazon failed to show an agreement to arbitrate under the 2019 Terms: it failed to produce a copy of any emails notifying drivers of the amended Terms and failed to show that Jackson received one. The Court rejected Amazon's argument that it was Jackson's responsibility to stay abreast of changes to the Terms. Such an assertion "stands the law's notice requirement on its head," as the burden is on website owners to put users on notice of their terms. The arbitration provision in the 2016 Terms therefore governed, and Jackson's statutory claims of wiretapping and privacy violations fell outside their scope.

- **PRIMARY JURISDICTION'S DOMESTIC LAW GOVERNED VACATUR**

  Corporación AIC, SA v Hydroeléctrica Santa Rita S.A.
  United States Court of Appeals, Eleventh Circuit
  2023 WL 2922297
  April 13, 2023

  Following an international arbitration in Miami, Florida, Corporación sued to vacate the arbitration award on excess of power grounds. The court denied vacatur, following Eleventh Circuit precedent to hold that the only available remedies were those set forth in the New York Convention, which does not provide for vacatur. An Eleventh Circuit panel affirmed but opined that Circuit precedent was wrongly decided and should be overturned by the full court. The Eleventh Circuit vacated the panel opinion and ordered rehearing *en banc*.

  The United States Court of Appeals, Eleventh Circuit, sitting *en banc*, overturned precedent to hold that the primary jurisdiction's domestic law provides the vacatur grounds for an arbitral award. The Convention and the FAA both speak to "recognition and enforcement," which may be refused on specified grounds, and previous decisions have erroneously conflated that language with vacatur. Under the New York Convention, only courts in a primary jurisdiction can vacate an arbitral award, but neither Article V of the Convention nor FAA § 207 provides the grounds on which that court may do so. Following the lead of fellow circuits, the Court concluded that the primary jurisdiction's domestic law should serve as a "gap-filler." Accordingly, in a New York Convention case where the arbitration is seated in the United States, FAA Chapter 1 provides the grounds for vacatur of an arbitral award.

California

- **ARBITRATION AGREEMENT INVALID UNDER "POISON PILL" PROVISION**

  Westmoreland v Kindercare Education LLC
  Court of Appeal, First District, Division 2, California
  2023 WL 3052080
  April 24, 2023

  Rochelle Westmoreland filed individual and PAGA wage-theft claims against her former employer, Kindercare. Kindercare moved to compel arbitration under the Arbitration Agreement Westmoreland signed upon hiring. The Agreement included a class action waiver and a "Poison Pill" provision stating that if the class action waiver were found unenforceable, "then this agreement is invalid." The court granted Kindercare's motion to compel but, on a writ of mandamus, the Court of Appeal reversed. The court held that the Poison Pill provision was ambiguous and should therefore be construed against the drafter, concluding that the trial court erred in severing the class action waiver and enforcing the remainder of the Agreement. Based on intervening legal developments, including the U.S. Supreme Court decision in *Viking River Cruises, Inc. v Moria*, Kindercare filed a renewed motion to compel, which the court denied. Kindercare appealed.

  The Court of Appeal, First District, Division 2, California, affirmed. Although an order denying a renewed motion is unappealable, the Court treated the appeal as a writ of mandate in the interests of judicial efficiency. The Poison Pill provision, drafted in 2016, was plainly intended to address the legal landscape existing at that time. Had that provision not been included, the intervening *Viking River* decision would dictate that Westmoreland's individual claim be subject to arbitration. As written, however, the provision unambiguously left "no room for Kindercare to choose to bifurcate Westmoreland's claims" and invalidated the Arbitration Agreement.

- **ILLEGIBLE ARBITRATION AGREEMENT NOT UNCONSCIONABLE**

  Basith v Lithia Motors, Inc.
  Court of Appeal, Second District, Division 8, California
  2023 WL 3032099
  April 21, 2023

  and

  Fuentes v Empire Nissan, Inc.
  Court of Appeal, Second District, Division 8, California
  2023 WL 3029968
  April 21, 2023

  In both cases, Nissan employees signed employment documents containing an Arbitration Agreement printed in "strikingly minute" and "blurry" text. The lower courts held the Agreements unenforceable as unconscionable. Nissan appealed.

  The Court of Appeal, Second District, Division 8, California, reversed in both cases. Both a procedural and substantive element must be present to find unconscionability. Although the Agreement's text was "a problem," the Agreement itself was substantively fair. To find the Agreement unconscionable based on the textual problem alone would "double-count" the procedural element and nullify the substantive element. "Font," the Court stated, "is irrelevant to fairness."

New York

- **ARBITRATION NOT BIASED**

  In re: TCR Sports Broadcasting Holding, LLP
  Court of Appeals of New York
  2023 WL 3061481
  April 25, 2023

  In 2005, Minor League Baseball (MLB), the Baltimore Orioles, the Washington Nationals, and the Mid-Atlantic Sports Network (MASN) executed a Settlement Agreement giving MASN exclusive telecast rights for Orioles and Nationals games. The parties failed to reach agreement on 2012-2016 telecast rights and went to arbitration before MLB's Revenue Sharing Definitions Committee (RSDC) as required under the Agreement's ADR provision. The RSDC issued an award setting the Nationals' telecast rights fees. On motions by MASN and the Orioles, the Supreme Court vacated the award because of RSDC's "evident partiality," citing Nationals' counsel's concurrent representation of MLB and a $25 million advance MLB gave the Nationals to encourage settlement participation. The Appellate Division affirmed and ordered a second RSDC arbitration, rejecting MASN and Orioles requests to direct the second arbitration to another forum. The problematic counsel stepped down, the Nationals repaid the $25 million, and an entirely new RSDC panel again set the Nationals' telecast rights fees. The Nationals sued to confirm. MASN and the Orioles opposed, alleging continuing partiality, and requested a third arbitration in a forum unaffiliated with MLB. The court held for the Nationals, and the Appellate Division affirmed. MASN and the Orioles appealed both Appellate Division orders.

  The Court of Appeals of New York affirmed as modified. MASN and the Orioles failed to show clear and convincing evidence that the "reconstituted RSDC" was evidently partial. The facts underlying the first vacatur had been addressed, and the second proceedings were not tainted. Remittal to a new forum was, therefore, unnecessary. The parties, both "sophisticated and counseled," knowingly agreed to arbitrate before a panel of MLB insiders because of their specialized knowledge and "cannot now claim that they received something different than they bargained for." However, the settlement agreement gave the RSDC only the power to determine fair market value of the telecast rights. Non-payment of fee issues must be resolved separately in accordance with the settlement's dispute resolution provisions, even if that meant taking the litigation into "extra innings."

Pennsylvania

- **CASPA PROHIBITS ATTORNEYS' FEES WAIVER**

  E. Allen Reeves, Inc. v Old York, LLC
  Superior Court of Pennsylvania
  2023 WL 2921091
  April 13, 2023

  General contractor Reeves completed a building project for Old York and subsequently filed for bankruptcy. After his bankruptcy plan was confirmed, Reeves sued Old York for unpaid invoices, penalties, and attorneys' fees under the Contractor and Subcontractor Payment Act (CASPA). Old York successfully moved to compel arbitration under their contract's Arbitration Clause. The arbitrator entered an award in favor of Reeves, awarding him damages, penalties, and attorneys' fees. Old York moved to vacate, claiming that the arbitrator exceeded authority in awarding penalties and fees, as the Arbitration Clause specifically provided that "no arbitrator(s) shall have the authority to enter an award of punitive damages or attorneys' fees to either of the parties." The court held that the arbitrator had authority under CASPA to award penalties and attorneys' fees "notwithstanding the language in the contract." The court confirmed the award, and Reeves appealed.

The Superior Court of Pennsylvania affirmed that the arbitrator had not exceeded authority. CASPA Section 512(b) provides that the prevailing party in any proceeding to recover payment under CASPA "shall" be awarded attorneys' fees, "notwithstanding any agreement to the contrary." This provision "clearly provides that attorneys' fees under CASPA cannot be waived by contract." The Court rejected Reeves's argument that the court, not the arbitrator, must determine the attorneys' fee award. Section 512(b)'s non-waiver provision "cannot be evaded by couching the waiver language in the form of a limitation on the authority of the arbitrator." Section 512(a) similarly requires that the arbitrator "shall award" a penalty of "1% per month of the amount that was wrongfully withheld." This award is not "punitive" but is mandatory and does not provide for waiver. Finally, the court did not err in including fees for Reeves's bankruptcy counsel, as the CASPA action and his defense against Old York's petition in bankruptcy court were "intertwined."

Texas

- **"CLEAR AND CONVINCING EVIDENCE" OF DELEGATION OF ARBITRABILITY**

  TotalEnergies E&P v MP Gulf of Mexico, LLC
  Supreme Court of Texas
  2023 WL 2939648
  April 14, 2023

  Total E&P co-owned oil-and-gas leases with MP Gulf of Mexico. The parties entered into two agreements: 1) a System Operating Agreement (SO Agreement), which contained an arbitration provision mandating AAA arbitration, and 2) a Cost Sharing Agreement (CS Agreement), which did not. MP Gulf unilaterally reopened a well, and Total E&P refused to share the costs. Total E&P sued for a declaratory judgment to determine its rights under the CS Agreement. MP Gulf then initiated AAA arbitration against Total E&P for breach of the SO Agreement and seeking a declaratory judgment as to expense allocation under the CS Agreement. The court stayed the arbitration, holding that the dispute arose under the CS Agreement, which vested governing jurisdiction in the Harris County courts. The Court of Appeals reversed and ordered AAA arbitration, holding that the SO Agreement's arbitration provision delegated arbitrability to the arbitrator. Total E&P petitioned for review.

  The Supreme Court of Texas affirmed. The SO Agreement explicitly stated that arbitration must be conducted "in accordance" with AAA rules, evincing "clear and unmistakable agreement" that it was for the arbitrator to determine arbitrability and scope. Thus, it was for the arbitrator to determine whether the dispute arose under the SO Agreement or the CS Agreement.

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