August 7, 2024

ADR Case Update 2024 - 14

Federal Circuit Courts

- **ICSID PANEL WAS NOT "FOREIGN OR INTERNATIONAL TRIBUNAL" FOR PURPOSES OF §1782 DISCOVERY**

  Webuild S.P.A. v WSP USA Inc.
  United States Court of Appeals, Second Circuit
  2024 WL 3463380
  July 19, 2024

  Webuild, an Italian investment company, initiated ICSID arbitration against Panama, claiming that Panama had failed to provide complete and accurate information in the bidding process for its Third Lock Project. Webuild filed an ex parte application in U.S. federal district court under 28 U.S.C. §1782 seeking discovery from WSP, a U.S. engineering company that had recently hired one of the Project's consultants. Soon after the court granted the application, the U.S. Supreme Court held, in *ZF Automotive US, Inc. v Luxshare, Ltd.*, that §1782 authorizes discovery only for use in proceedings before foreign or international tribunals that "exercise governmental or intergovernmental authority." WSP and Panama, as an intervener, then moved to vacate the order. The court granted the motion, holding that the ICSID panel did not meet the *ZF Automative* standard. Webuild appealed.

  The United States Court of Appeals, Second Circuit affirmed. Webuild's §1782 discovery request against WSP must be denied under *ZF Automotive*, as the ICSID panel did not "exercise governmental or intergovernmental authority." The panel was not a pre-existing entity, nor was it independently created by the Panama-Italy BIT. It was, instead, "specially formed" in response to Webuild's arbitration request and funded jointly by the parties, who did not intend to imbue the tribunal with governmental authority.

- **NO FEDERAL JURISDICTION OVER VACATUR ACTION**

  Friedler v Stifel, Nicolaus & Co., Inc.
  United States Court of Appeals, Fourth Circuit
  2024 WL 3447984

July 18, 2024

Arbitration between a group of brokerage account holders (Petitioners) and their brokerage firm, Stifel, Nicolaus & Co. (SNC), held in favor of SNC, and Petitioners moved to vacate in federal district court. The court denied the motion, finding that Petitioners had failed to establish that the arbitration panel had acted with manifest disregard of the law. Petitioners appealed.

The United States Court of Appeals, Fourth Circuit vacated for lack of subject matter jurisdiction. The Court ordered supplemental briefing in light of the intervening U.S. Supreme Court's decision, *Badgerow v Walters*, which held that a petition for federal jurisdiction "must contain an independent jurisdictional basis beyond the Federal Arbitration Act itself." The Court rejected the parties' claims that federal jurisdiction was grounded in the arbitration panel's manifest disregard for federal securities laws. A federal petition to vacate raises only the enforceability of an arbitral award, not the merits of the underlying claim, and manifest disregard did not constitute a federal common-law ground for vacatur giving rise to federal jurisdiction. At most, manifest disregard is a "judicial gloss" on the FAA and does not provide a "jurisdictional gateway" for vacatur.

- **AIRLINE FUEL TECHNICIAN WAS TRANSPORTATION WORKER EXEMPT FROM ARBITRATION ENFORCEMENT UNDER FAA §1**

  Lopez v Aircraft Service International, Inc.
  United States Court of Appeals, Ninth Circuit
  2024 WL 3464425
  July 19, 2024

  Danny Lopez, an airline fuel technician, filed a putative class action against his employer, Menzies Aviation. Menzies moved to compel arbitration under Lopez's employee Arbitration Agreement. The court denied the motion, holding that Lopez was a transportation worker exempt from arbitration enforcement under FAA §1. Menzies appealed.

  The United States Court of Appeals, Ninth Circuit affirmed. Lopez qualified as an exempt transportation worker under FAA §1. The act of fueling cargo planes that carry goods in interstate commerce "is so closely related to interstate commerce as to be practically a part of it." Lopez, whose duties included "physically adding fuel to planes," was "directly involved in the transportation itself" and played "a direct and necessary role in the free flow of goods across borders."

California

- **ARBITRATION RIGHTS WAIVED**

  Quach v California Commerce Club, Inc.
  Supreme Court of California
  2024 WL 3530266
  July 25, 2024

  Peter Quach, a casino worker, sued his former employer, California Commerce Club, for wrongful termination and discrimination. The Club asserted Quach's obligation to arbitrate under his employee Arbitration Agreement as an affirmative defense, but made no further reference to arbitration as the Club proceeded in an aggressive discovery and motions practice for the next thirteen months. The Club then suddenly moved to compel arbitration, explaining that it had previously been unable to find a complete copy of the Agreement. The trial court denied the motion under California's three-part waiver test, finding that the Club 1) knew of its arbitration rights; 2) had acted contrary to those rights in proceeding in litigation; and thereby 3) caused prejudice to Quach. The Court of Appeal reversed, holding that Quach had failed to show substantial evidence of prejudice. Quach appealed.

  The Supreme Court of California reversed. Soon after the Court of Appeal's decision, the U.S. Supreme Court, in *Morgan v Sundance, Inc.* eliminated the federal law arbitration-specific

prejudice requirement, holding that the federal policy of "favoring arbitration" under the FAA was intended not to privilege arbitration agreements, but to correct against their previous disfavor. The California Supreme Court held that this reasoning applied equally to the CAA, and abrogated California's prejudice requirement. Applying California's "general law of waiver," the Court found that the record showed clear and convincing evidence that 1) the Club was aware of its arbitration rights as set forth in its own standard employee Arbitration Agreement, and 2) the Club intentionally abandoned its right to arbitrate, as it affirmatively indicated its preference for jury trial and actively engaged in discovery.

Ohio

- **VACATUR APPLICATION FAILED TO COMPLY WITH STATUTORY REQUIREMENTS**

  Ohio Patrolman's Benevolent Assoc. v Cleveland
  Supreme Court of Ohio
  2024 WL 3416946
  July 16, 2-24

  A Union representing police dispatchers filed a grievance and arbitration against the City of Cleveland, resulting in an award in favor of the City. The Union applied to vacate the award by filing a document in county court captioned, "Complaint: Application to Vacate Arbitration Award." The City moved to confirm the award, and to strike the Union's filing for improper service, as the Union had served its filing only upon the City's law department, but not upon the City's outside arbitration counsel. The court granted the City's motion to confirm, finding that it lacked jurisdiction over the Union's vacatur application due to the service error. The court of appeals affirmed, finding that the Union's application failed not only due to the service error, but because it was submitted as a pleading rather than a motion. The Union appealed.

  The Supreme Court of Ohio affirmed in part and reversed in part. The Union was not required to serve its filing upon the City's outside counsel. To seek vacatur of an arbitration award, Ohio Rev. Code §2711.13 requires a party to file a "motion" requesting an order of vacatur, and to serve notice of that motion "upon the adverse party or [that party's] attorney (emphasis added)" While common sense suggests that a party should serve both, the Union nonetheless complied with "the letter of the law." However, the Union's vacatur filing constituted a "pleading," rather than a "motion" as the statute required. A pleading "is meant to initiate a legal action," while a motion "is meant to resolve a legal question" arising during a legal action, or to resolve the action itself. It is not enough for a party to simply provide notice that an award "should be vacated." Rather, a party must provide a "motion" to "identify the alleged errors within the arbitration award and explain why those errors warrant" the requested action.

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

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