February 7, 2024

## ADR Case Update 2024 - 3

# Federal Circuit Courts

- **REMANDED FOR RECONSIDERATION OF PRELIMINARY INJUNCTION**

  *Resource Group International Limited v Chishti*
  United States Court of Appeals, Second Circuit
  2024 WL 220223
  January 22, 2024

  Bermuda-based investment company TRGI and its largest shareholder affiliate, TRGP, sold stock to AIG and GEM II pursuant to a Preferred Stock Purchase Agreement (SPA). The SPA required TRGI's director, Muhammad Chishti, to vote his shares to fill two TRGP Board seats with GEM II nominees. Chishti later resigned from TRGI, raising concerns about his capacity to deliver the Board seats. AIG and GEM II signed a Release Agreement with Chishti in which they agreed to repurchase Chishti's shares if GEM II's nominees were elected to the TRGP Board. Chishti subsequently initiated JAMS arbitration against TRGI under the SPA's Arbitration Agreement, claiming breach of fiduciary duty. TRGI then sued Chishti for breach of the Release Agreement and moved to enjoin the arbitration. The court denied the motion, finding that TRGI failed to show 1) likelihood that the Release Agreement would be found to supersede the SPA's arbitration agreement, or 2) that proceeding in arbitration would cause irreparable harm. TRGI appealed.

  The United States Court of Appeals, Second Circuit, vacated and remanded. New York law allows appeal from the denial of a motion to enjoin arbitration. The court below erred in finding TRGI was unlikely to succeed on the merits. The Release Agreement's Forum Selection Clause and Merger Clause made clear that it was intended to supersede the SPA's arbitration clause "as it relates to the subject matter of the Release Agreement." The court also failed to sufficiently consider the possibility of irreparable harm. New York case law has held that "forced arbitration of inarbitrable claims" may cause irreparable harm where the arbitration is one "for which any award would not be enforceable," and for which the costs of arbitration are "not compensable by any monetary award." The Court directed the lower court, on remand, to consider whether the anticipated harm was a harm for which TRGI would adequately be compensated "if they are in fact correct as to the inarbitrable nature of any of the claims in dispute."

- **CASE DISMISSED FOR LACK OF PERSONAL JURISDICTION**

  *Conti 11. Container Schiffarts-GMBH & Co. KG M.S. v MSC Mediterranean Shipping Company S.A.*
  United States Court of Appeals, Fifth Circuit

2024 WL 319267
January 29, 2024

A cargo ship, the M/V FLAMINIA, exploded in the Atlantic Ocean after taking on three chemical tanks at the Port of New Orleans. A London arbitration between the ship's owner, Conti, and its charterer, MSC, resulted in a $200 million award to Conti. MSC refused to pay, and Conti sued to confirm the award in the Eastern District of Louisiana. The court denied MSC's motion to dismiss for lack of personal jurisdiction. Under the New York Convention, the court determined jurisdiction with relation to all the contracts between the parties, rather than only upon the contracts related to the arbitration. The court found sufficient forum contact to support personal jurisdiction based on the fact that the tanks that caused the explosion were loaded and shipped in New Orleans. MSC appealed.

The United States Court of Appeals, Fifth Circuit reversed. The Court rejected MSC's argument that the lower court should have limited its personal jurisdiction analysis to contacts relating only to MSC's refusal to pay the arbitral award. The lower court properly interpreted the New York Convention to require consideration of all contracts relating to the underlying dispute, not just those relating to the arbitration. However, the fact that the tanks were loaded in New Orleans was not sufficient, of itself, to confer specific jurisdiction over MSC. The decision to load the tanks was made by MSC's subsidiary and did not result from an intentional choice made by MSC. The Court remanded for the lower court to dismiss the case for lack of personal jurisdiction.

- **NONSIGNATORY COULD NOT ENFORCE ARBITRATION AGREEMENT**

*Patterson v Jump Trading LLC*
United States District Court, N.D. California
2024 WL 49055
January 4, 2024

Investors filed a putative class action against Jump Trading and cryptocurrency company Terraform Labs (TFL), alleging that Jump had fraudulently misrepresented the stability of TFL's cryptocurrency. Investors dismissed TFL from the action and Jump moved to compel arbitration under TFL's Terms, to which Investors had agreed in registering to trade on TFL's app.

The United States District Court, N.D. California denied the motion to compel. Jump, as a nonsignatory, could not compel arbitration under the Investors' agreement to arbitrate with TFL. The Court rejected Jump's claim that the Agreement's delegation clause required the arbitrator to determine its enforcement rights. The clause, which delegated to the arbitrator "any question regarding this Agreement's existence, validity or termination," made no mention of third-party enforcement rights and, therefore, failed to provide "clear and unmistakable evidence" of any agreement to delegate that determination. Requiring arbitral determination of nonsignatory enforcement rights would mean that, once any individual entered into an arbitration agreement, "anyone anywhere in the world could insist upon arbitrating a dispute with that individual," no matter "how disconnected that dispute might be from the arbitration agreement."

- **NONSIGNATORIES ENTITLED TO ENFORCE ARBITRATION AGREEMENT**

*Rossi v Purvis*
United States District Court, N.D. California
2024 WL 319679
January 29, 2024

Software company StormQuant suffered financial troubles that endangered the compensation of CEO Reuben Purvis. The two parties entered into a Restricted Stock Purchase Agreement (RSPA) allowing a stock purchase to Purvis and his wife, Heather, as Co-Trustees of the Purvis Trust. Purvis resigned as CEO amidst disputes with major shareholder Edward Rossi. Rossi and StormQuant filed a securities and fraud action against Reuben Purvis, Heather Purvis, and Collis Systems, an LLC owned solely by the Purvises. Rossi alleged, among other things, that Purvis had induced StormQuant to sign the RSPA by fraudulently representing that he would forgo his compensation in exchange for the additional shares. The Purvises moved to compel arbitration under the RSPA. Rossi and StormQuant opposed, arguing that arbitration could not be enforced

by nonsignatories Heather Purvis and Collis Systems.

The United States District Court, N.D. California granted the motion to compel. The RSPA's arbitration agreement was valid and could be enforced by Reuben Purvis, Heather Purvis, and Collis Systems. Although Heather Purvis and Collis Systems were both nonsignatories, StormQuant had sued them both in their capacity as agents and/or alter egos of Reuben Purvis, which, under California law, entitled them "to enforce the arbitration provision of the RSPA that Mr. Purvis signed on behalf of the Purvis Trust." The Court rejected Rossi's claim that the arbitration agreement was unenforceable because it was fraudulently procured, as the claim failed to assert that the arbitration provision, specifically, was procured by fraud.

- **NO TRIABLE ISSUE OF FACT AS TO WHETHER PLAINTIFF SIGNED AGREEMENT**

*Forte v Insomnia Cookies, LLC*
United States District Court, N.D Indiana, South Bend Division
2023 WL 8831333
December 21, 2023

Delivery driver Jennipher Forte filed a wage-theft action against her employer, Insomnia Cookies. Insomnia moved to compel arbitration under the clickwrap Arbitration Agreement Forte completed during her December 14, 2022, onboarding. Forte opposed, claiming that she did not "believe" she signed the Agreement, that she had not seen the Agreement, and that she did not complete any paperwork on that date. Forte's declaration stated that her first day of work was December 15 and that, while she was watching onboarding videos relating to workplace safety and sexual harassment, her manager requested her login information and logged into her account for about ten minutes, during which time he had the opportunity to sign her name on the Agreement without her knowledge. Insomnia refuted Forte's account with metadata showing that 1) the Agreement was signed on December 14 from an IP address not associated with the store's computer; 2) Forte's first workday was December 19, and 3) Forte viewed and completed the anti-harassment materials as part of an orientation on December 23.

The United States District Court, N.D Indiana, South Bend Division granted Insomnia's motion to compel. Forte's testimony failed to create an issue of fact as to whether she completed the Agreement. Forte expressed only her "belief" that she did not sign the Agreement; she made no "affirmative statement" that she "did not sign any agreement." A triable issue of fact "does not exist when a plaintiff has only her own word in contradiction to the defendant's metadata," particularly when that metadata "debunks the alternative theory she guesses at."

- **ARBITRATION AGREEMENT ENFORCEABLE AGAINST SUBSEQUENT PURCHASER**

*Nicholas Services, LLC v Bombadier Inc.*
United States District Court, N.D. Mississippi, Oxford Division
2023 WL 8888641
December 26, 2023

Nicholas Air, a private air travel service, purchased two used aircraft manufactured by Bombadier. Both aircraft developed mechanical issues, and Nicholas made claims for repairs under their original Warranties. Bombadier provided some repairs, but disputes arose, and Nicholas Air sued Bombadier for breach of the Warranties. Bombadier moved to compel arbitration under its Purchase Agreements with the aircraft's original purchasers. Bombadier also submitted the dispute to AAA arbitration. AAA accepted the filing and agreed to "proceed with the administration of this matter." Nicholas Air moved to stay the arbitration, arguing that, as a non-signatory to the Purchase Agreements, it was not subject to arbitration.

The United States District Court, N.D. Mississippi, Oxford Division granted Bombadier's motion to compel arbitration. The Court rejected Bombadier's claim that, by accepting the case for arbitration, AAA had already determined arbitrability. Whether a nonsignatory is bound to an arbitration agreement is for the courts, not the arbitrator, to decide. Here, Nicholas Air was bound to arbitration by contract and equitable estoppel. The Warranties expressly stated that "any successor or owner" would remain subject to the applicable Purchase Agreement provisions "to the same extent as" the original buyer. The holder of the Warranties was, therefore, bound to the

arbitration obligations set forth in the Purchase Agreements. As a matter of equitable estoppel, Nicholas Air could not avail itself of the benefits of the Warranty without "subjecting itself to the same obligations which were agreed to by the original purchaser in the Purchase Agreement."

- **ADA ACTION PRECLUDED BY RAILWAY LABOR ACT**

  *Pritchard v American Airlines, Inc.*
  United States District Court, N.D. Texas, Fort Worth Division
  2023 WL 9053146
  December 22, 2023

  Nelton Pritchard worked at a customer call-line for American Airlines. Pritchard has cerebral palsy, and, to accommodate his disability, American capped his daily and weekly hours and exempted him from mandatory overtime. American subsequently signed a JCBA with the Union, in which American agreed to accommodate disabled employees "in a way that didn't violate the JCBA's seniority system." American then terminated Pritchard's accommodations because they conflicted with the seniority-based scheduling system. Pritchard sued under the ADA, and American moved to dismiss for lack of subject matter jurisdiction.

  The United States District Court, N.D. Texas, Fort Worth Division granted American's motion to dismiss. The court lacked subject matter jurisdiction because Pritchard's claim was precluded by the Railway Labor Act (RLA). Under the RLA, "minor disputes" – those which grow out of "the interpretation or application" of a CBA – are "exclusively within the jurisdiction of RLA adjustment boards." Pritchard's claim constituted a "minor dispute" because Pritchard's claim could not be determined "without first interpreting" the JCBA's seniority provisions, and such interpretation "would be dispositive of Pritchard's claim." This result did not contravene the ADA, as Pritchard "could have engaged the interactive process with American and identified alternative accommodations that didn't violate the JCBA."

- **ARBITRATION UNENFORCEABLE AGAINST NONSIGNATORY**

  *Hetrick Companies LLC v IINK Corp.*
  United States District Court, E.D. Virginia
  2024 WL 47408
  January 3, 2024

  Philippe Hetrick was the sole member of HetCo, an LCC that advocated for customers filing insurance claims. HetCo contracted for IINK, a digital payment endorsement company, to process insurance payments on behalf of HetCo's clients. HetCo lost its two primary clients after IINK disclosed confidential HetCo information to them and made defamatory statements about HetCo and Hetrick. HetCo sued IINK for violations of multiple statutes governing stored communications and electronic privacy, and Hetrick sued for defamation. IINK moved to compel arbitration of all claims under the arbitration agreement in its contract with HetCo., which Hetrick had signed as a representative of HetCo.

  The United States District Court, E.D. Virginia granted the motion to compel arbitration against HetCo but denied the motion as to Hetrick. State contract law – in this case, Florida's – determines whether an arbitration agreement may be enforced against a non-party. Non-parties generally are not bound by an agreement, and the agreement at issue failed to qualify for any of the exceptions recognized by Florida law. The mere fact that an entity is owned and controlled by one individual is insufficient to show that the entity is an alter ego. Signing the contract as an agent is not sufficient to bind the agent to arbitrate, and two parties cannot bind a third party as a beneficiary without that party's consent.

## California

- **DISPUTE AROSE UNDER EFASASHA, WHEN COMPLAINT WAS FILED**

*Kader v Southern California Medical Center, Inc.*
Court of Appeal, Second District, Division 5, California
2024 WL 322052
January 29, 2024

In May 2022, Omar Kader, COO of Southern California Medical Center (the Center) filed a DFEH complaint claiming he had been repeatedly sexually harassed and assaulted by the Center's CEO beginning in 2018. After the DFEH issued a right-to-sue notice, Kader commenced litigation against the Center. The Center moved to compel arbitration under an Arbitration Agreement Kader signed in 2019. Kader opposed, arguing the Agreement was unenforceable under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA, henceforth the Act), which applies to "any dispute or claim that arises or accrues" after March 3, 2022. The Act provides that "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute," no "predispute arbitration agreement" shall be "valid or enforceable" with respect to a case relating to that dispute. The Center argued the Act did not apply because the Agreement was not a "predispute" agreement, as the conduct at issue began before the Agreement was signed, and Kader's claims arose from conduct committed prior to March 3, 2022. The trial court denied the motion to compel, and the Center appealed.

The Court of Appeal, Second District, Division 5, California affirmed. The Act does not define "dispute" or when a dispute has arisen. Based on the term's ordinary meaning, as derived from general and legal dictionaries, the Court concluded that a dispute arises under the Act "when one party asserts a right, claim, or demand, and the other side expresses disagreement or takes an adversarial posture." The Court distinguished a "claim" or "cause of action," which arises when a plaintiff suffers an injury. A dispute "requires more than an injury" and cannot arise "until both sides have expressed their disagreement." Here, there was no evidence of a "dispute" between the parties until Kader filed his DFEH complaint. This filing occurred after both the signing of the Arbitration Agreement and the Act's effective date; the Act, therefore, barred enforcement of the Agreement.

- **CLICKWRAP ARBITRATION AGREEMENT UNCONSCIONABLE**

*Hasty v American Automobile Association of Northern California, Nevada & Utah*
Court of Appeals of California, Third District, San Joaquin
No. C097674
December 21, 2023

Insurance agent Aljarice Hasty filed discrimination charges against her employer, AAA. AAA moved to compel arbitration under the clickwrap Arbitration Agreement included in onboarding documents Hasty electronically signed as a condition of her employment. Hasty, who did not own a computer or tablet, viewed the documents on her iPhone 6. The Agreement, which appeared as Item 11 on a longer task list, could be accessed by clicking on an icon. The icon was not identified as a hyperlink and a user could sign the documents without viewing the Agreement. Onscreen, the Agreement's text was small and dense and, if printed, amounted to two letter-sized pages of small type. The court denied the motion to compel, finding a "high degree of procedural unconscionability" based on the Agreement's adhesive nature, the "significant degree of prolix and hidden terms," and the "questionability" of Hasty's assent to the Agreement. The Agreement was substantively unconscionable because 1) it was one-sided and lacked mutuality; 2) the confidentiality provision was overbroad, and 3) it contained an invalid PAGA waiver. AAA appealed.

The Court of Appeals of California, Third District, San Joaquin affirmed. The Arbitration Agreement exhibited a high degree of procedural unconscionability. Taken together, the problematic font and text density (which were "exacerbated" by the electronic platform), the unlabeled hyperlink, and ambiguous language evidenced "an aim to thwart, rather than promote the non-drafting party's understanding of its terms." The Agreement was substantively unconscionable because 1) it was one-sided in requiring parties to waive their right to "any remedy or relief" resulting from an action filed with a government agency; 2) incorporation of arbitration provider rules "then in effect" left employees "unclear" as to what terms "may be different when a dispute arose in the future"; 3) the confidentiality clause benefited only AAA by "keeping past findings secret"; and 4) the ban on all representative PAGA actions required employees to "waive a right that is not waivable." The trial court did not abuse its discretion in

declining to sever the unconscionable provisions, as the Agreement was "permeated with unconscionability."

- **MINOR DISAFFIRMED ARBITRATION AGREEMENT**

  *J.R. v Electronic Arts Inc.*
  Court of Appeal, Fourth District, Division 2, California
  2024 WL 178081
  January 17, 2024

  J.R., a minor, sued Electronic Arts (EA) for unfair business practices and consumer law violations. J.R., a user of EA's Apex Legends video game, claimed that EA deceptively induced players, "especially impressionable minors," to purchase digital currency for in-game use. EA moved to compel arbitration under the Arbitration Agreement contained in the game's user agreement. In opposition, J.R. submitted a declaration disaffirming "the entirety" of "any contract or agreement that was accepted through" his EA account, as authorized by Family Code § 6710. EA countered that the Agreement's delegation clause dictated that the arbitrator must determine whether the disaffirmation voided the Agreement, and that J.R. had failed to raise a specific challenge to the delegation clause. The court denied the motion to compel, finding that J.R. had effectively disaffirmed the User Agreement by 1) discontinuing his use of his EA account shortly after filing the complaint, and 2) expressly disaffirming the contract in his declaration. EA appealed.

  The Court of Appeal, Fourth District, Division 2, California affirmed. Family Code § 6710 allows a minor to "make a contract in the same manner as an adult, subject to the power of disaffirmance." In his declaration, J.R. unequivocally disaffirmed "any contract or agreement" made through his EA account. This statement served to disaffirm the user agreement, the Arbitration Agreement, and the delegation clause, "because all three of them were accepted through his EA account." The trial court was correct in concluding that there was "no arbitration agreement to enforce."

- **ARBITRATION RIGHTS WAIVED BY FAILURE TO PAY ARBITRATION FEES ON TIME**

  *Suarez v Superior Court of San Diego County*
  Court of Appeal, Fourth District, Division 1, California
  2024 WL 256450
  January 24, 2024

  Onecimo Suarez sued his employer, general contracting firm Rudolph & Sletten (R&S), for wage and hour violations. R&S successfully moved to compel arbitration, but failed to pay its share of the arbitration fees within the 30-day "grace period" following the due date for purposes of triggering remedies under California CCP § 1281.97. R&S paid the fees four days after the grace period ended on January 1, arguing the date was extended two days for the New Year's legal holidays and an additional two days under § 1010.6(a)(3)(B), which provides that any deadline accruing from electronic service of a court document shall be extended by two days. R&S moved again to compel arbitration and Suarez moved to lift the stay of litigation in favor of arbitration under § 1281.97. The court agreed with R&S that the two statutes, together, extended the grace period from January 1 to January 5, rendering R&S's payment timely, and granted R&S's motion to compel. Suarez petitioned for a writ of mandate directing the trial court to find that R&S had waived its right to arbitration.

  The Court of Appeal, Fourth District, Division 1, California granted Suarez's petition and directed the trial court to find that R&S had waived its arbitration rights. While the 30-day grace period was perhaps extended two days by the legal holiday, § 1010.6(a)(3)(B)'s two-day deadline extension applies only to electronic transmissions from the court, and did not apply to documents transmitted in the course of arbitration. R&S's January 4 payment therefore fell outside the grace period, giving Suarez the option to have the stay of litigation lifted. The Court rejected R&B's argument that its fees had not accrued because Suarez, too, failed to pay his portion of the initial fees and, accordingly, had not properly initiated arbitration. Under § 1281.97, arbitration is "initiated" when the party seeking arbitration meets the initial filing requirements, which necessarily occurs before the arbitration provider sends an invoice.

## New York

- **“IRRATIONAL” ARBITRATION AWARD VACATED**

  *In re: County of Nassau v Nassau County Sheriff's Correction Officers' Benevolent Association*
  Supreme Court, Appellate Division, Second Department, New York
  2024 WL 104212
  January 10, 2024

  Seven Nassau County corrections officers applied for County benefits for on-the-job injuries and illness. The County denied benefits because the injuries were treated same-day, involved no lost wages, and the claimants incurred no out-of-pocket medical expenses. The Union filed a grievance and, in arbitration, the arbitrator concluded that the denial violated the CBA because benefits were not limited to lost wages or spent costs, and that the claimants were entitled to all § 207-c leave and benefits. The court confirmed the award, and the County appealed.

  The Supreme Court, Appellate Division, Second Department, New York reversed and granted the County’s petition to vacate. Section 207-c entitles an officer who suffers on-the-job illness or injury to recover lost salary or payment for the cost of medical treatment. Accordingly, any claim to Section 207-c benefits must demonstrate that the officer suffered lost wages or required payment or reimbursement for medical treatment. The officers here made no such claims, and the arbitrator’s decision was therefore irrational.

*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**