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ADR Case Update 2021 - 16

Federal Circuit Courts

- **NON-PARTIES ENTITLED TO ENFORCE ARBITRATION CLAUSE**

  Morgan v. Ferrellgas, Inc., et al.
  2021 WL 3519956
  United States Court of Appeals, Eighth Circuit
  August 11, 2021

  Morgan sued her former employer, Ferrellgas, and employees James Ferrell and Pamela Brueckmann, asserting gender discrimination against the company and tort claims against all defendants. Morgan asserted that the defendants were responsible for material misrepresentations and omissions that caused Morgan to accept employment with Ferrellgas (an unstable company), sell her business, and relocate. Defendants moved to compel arbitration of all claims under the arbitration clause in Morgan's employment agreement with Ferrellgas. The court granted the defendants' motion to compel against Ferrellgas. The court denied the individual defendants' motion to compel arbitration of the tort claims because they were not parties to the agreement to arbitrate, and Morgan did not consent to arbitrate individual tort claims arising from actions that predated her employment. Ferrell and Brueckmann appealed.

  The United States Court of Appeals for the Eighth Circuit affirmed in part, reversed in part, and remanded. Given the broad language of the arbitration clause in the employment agreement, the Court found that the lower court erred in concluding that no language in the Employment Agreement suggested that Morgan consented to arbitrate tort claims arising from actions predating her employment. The claims arose out of and related to the resulting Employment Agreement and relationship. The Court also held that Ferrell and Brueckmann, non-parties to the Agreement, could enforce the arbitration clause. A signatory plaintiff cannot avoid arbitration when she treats signatory and non-signatory defendants as a single unit. Morgan asserted tort claims against Defendants, including its officers and agents, thus treating them as a single unit.

- **NON-PARTY NOT ENTITLED TO ENFORCE ARBITRATION CLAUSE**

  Sosa v. Onfido

2021 WL 3523197
United States Court of Appeals, Seventh Circuit
August 11, 2021

Sosa registered his identity to become a verified user on the marketplace app OfferUp. The verification process involved using the app's TruYou feature with technology provided by Onfido. Sosa later sued Onfido under the Illinois Biometric Information Privacy Act, alleging that the TruYou feature used facial recognition technology to collect his biometric identifiers without his consent. Onfido argued that the case belonged in arbitration because it was entitled to enforce an arbitration clause in the Terms of Service contract between Sosa and OfferUp under three different non-party contract enforcement theories: third-party beneficiary, agency, and equitable estoppel. The court rejected each of these theories and denied Onfido's motion to compel individual arbitration. Onfido appealed.

The United States Court of Appeals for the Seventh Circuit affirmed. Onfido's argument that Washington law, rather than Illinois law, should apply fell short because he failed to demonstrate any conflict between Illinois and Washington law before the court rendered a choice-of-law determination inappropriate. There are recognized exceptions to the general rule that a non-signatory to a contract typically has no right to invoke an arbitration provision contained in that contract, including the three raised by Onfido: third-party beneficiary, agency, and equitable estoppel. IL law recognizes a strong presumption against conferring contractual benefits on non-contracting third parties. To overcome that presumption, the language of the contract must include an express provision identifying the third-party beneficiary by name or by description of a class to which the third party belongs. Nothing in the Terms of Service designated Onfido as a third-party beneficiary of the contract. Onfido failed to demonstrate a principal-agent relationship, offering no evidence to show that OfferUp exercised control over its activities, or that Onfido could affect legal relationships on OfferUp's behalf. Onfido also failed to show that Sosa should be equitably estopped from denying Onfido's enforcement of the arbitration provision, identifying no representation Sosa made to Onfido under the Terms of Service or otherwise to induce Onfido to rely on the contract's arbitration provision.

- **PARTY DID NOT WAIVE ITS RIGHT TO ARBITRATE BY LITIGATING**

Toddle Inn Franchising v. KPJ Associates, LLC
2021 WL 3524057
United States Court of Appeals, First Circuit
August 11, 2021

KPJ ran a ME daycare as a franchisee of Toddle Inn. The contract between them provided that all disputes be resolved by arbitration under the FAA, that Toddle could sue for injunctive relief, and that Toddle could recover reasonable attorneys' fees and costs incurred in any legal action or other proceeding if a dispute arose. After KPJ notified Toddle that it was ending the franchise agreement and would open another daycare at the same site the following Monday, Toddle filed a federal complaint, charging unfair competition under the Lanham Act, plus breach of contract and trade-secret misappropriation under ME law. Toddle also asked for an injunction to stop KPJ from infracting the contract's post-termination provisions, for payments of all sums owing to Toddle, and for attorneys' fees and costs. A few weeks later, Toddle moved to compel arbitration and stay court proceedings, arguing that the dispute came within the contract's arbitration clause. The judge compelled arbitration, and the arbitrator found for Toddle. KPJ appealed.

The United States Court of Appeals for the First Circuit affirmed. The Court found that the Lanham Act claim was not frivolous, wholly unsubstantial, or foreclosed by precedent, and thus the lower court had subject matter jurisdiction. The right to arbitrate may be waived explicitly or through an implicit course of conduct; however, there is a strong presumption against inferring waiver. As the party arguing waiver by conduct, KPJ bore the burden of showing more than a mere delay. During a less-than-a-month stretch, Toddle sparred a bit with KPJ over the TRO issue and asked KPJ to preserve evidence in KPJ's possession – hardly the kind of foot-dragging delay tactics that are inconsistent with Toddle's right to arbitrate. Toddle also did not waive its right to arbitrate by pursuing injunctive relief – the injunctive relief clause in the contract unambiguously carved out an exception for this relief. The judge did not slip in awarding Toddle attorneys' fees and costs. While the contract here did let the arbitrator make an award of

attorneys' fees and costs, it did not say only the arbitrator could make such an award.

- **DELEGATION CLAUSE PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE**

  Santiago Lim v. TForce Logistics
  2021 WL 3557294
  United States Court of Appeals, Ninth Circuit
  August 12, 2021

  Lim, who worked as a delivery driver for TForce in CA, filed a putative class action, alleging that TForce violated CA law by misclassifying drivers as independent contractors rather than employees. TForce moved to compel arbitration under the arbitration clause in the Independent Contractor Agreement signed by Lim. The court denied the motion, holding that the delegation clause and the arbitration provision in the agreement were procedurally and substantively unconscionable, and therefore unenforceable as to Lim. TForce appealed.

  The United States Court of Appeals for the Ninth Circuit affirmed. The court correctly determined procedural and substantive unconscionability with respect to the delegation clause. The circumstances showed a degree of unfair surprise and oppression that left Lim without an ability to negotiate and to make only a take-it-or-leave-it decision. Given Lim's financial circumstances, the cost-splitting, fee-shifting, and Texas venue provisions rendered the delegation clause so prohibitively costly that it deprived Lim of any proceedings to vindicate his rights. The court did not abuse its discretion by not severing the pervasive unconscionable terms.

- **PARTY DID NOT IDENTIFY AN ERROR IN AWARD SO EGREGIOUS AS TO PERMIT VACATUR**

  Union Internacional UAW, Local 2415 v. Bacardi Corp
  2021 WL 3521140
  United States Court of Appeals, First Circuit
  August 9, 2021

  Article VIII of the CBA between UAW and Bacardi provided a three-tiered grievance process for complaints and grievances. In 2007, UAW initiated the first step of the grievance process, claiming that Bacardi was not in compliance with the CBA because it underpaid employees for mealtimes worked on weekends and holidays. The UAW then submitted its second step written complaint to Bacardi's HR Department. After Bacardi responded to the UAW complaint, the UAW requested arbitration (the third step), bringing its allegation on behalf of an individual employee, Luis Santiago, and others. Bacardi failed to act on the UAW's request for over five years. After the arbitrator rejected Bacardi's substantive arbitrability defense, which Bacardi appealed, the merits hearing took place in late 2018. At that hearing, Bacardi raised, for the first time, a procedural arbitrability defense, arguing that the UAW's claim was not arbitrable because the UAW had not followed the procedures required by the CBA to include sufficient detail of the alleged violation in the complaint and file the complaint within seven days of the alleged violation. The UAW argued that this defense was waived, and the arbitrator granted the parties time to brief the issue before dismissing UAW's claim. The arbitrator ruled that the UAW had not complied with the CBA because of the excessively late filing of the complaint, as well as the lack of specificity. UAW petitioned for review, and Bacardi filed a motion for summary judgment, which the court granted. UAW appealed.

  The United States Court of Appeals for the First Circuit affirmed. While the Court found merit to the UAW's argument that Bacardi's procedural arbitrability defense was waived, they determined that the UAW did not identify an error in the arbitration award so egregious as to permit the Court to vacate it. The arbitrator's decision to accept Bacardi's belated defense was consistent with a plausible interpretation of the Puerto Rico Arbitration Bureau regulations incorporated into the contract. Neither judicial estoppel nor the doctrine of law of the case provided a basis for vacatur. The UAW offered no case law indicating that this court – or any court – had ever vacated an arbitration award based on either of those doctrines. The arbitrator's acceptance of the belated defense did not violate public policy. The arbitrator's determination that the second step of the agreed-upon grievance procedure required a written complaint that contained certain specific details reflected a plausible interpretation of the contract. The UAW's written complaint did not

include those details and, thus, the arbitrator acted within the scope of his authority in dismissing the entire claim for lack of procedural arbitrability.

- **FAA TRANSPORTATION WORKER EXEMPTION CANNOT BE WAIVED BY TERMS OF PRIVATE CONTRACT**

  Romero v. Watkins and Shepard Trucking, Inc.
  2021 WL 3671380
  United States Court of Appeals, Ninth Circuit
  August 19, 2021

  After Alejandro Romero was laid off by Watkins & Shepard Trucking, he filed a putative class action suit, claiming Watkins did not give him and other ex-employees advance notice as the federal and California WARN Acts required. Romero, however, had agreed to a binding arbitration agreement, which waived his right to bring a class action. Watkins moved to compel individual arbitration of Romero's claims. The court granted the motion, determining that the FAA did not apply to the Arbitration policy that Romero signed because the statute exempts workers engaged in interstate commerce, and this provision cannot be waived by the terms of a private agreement. Romero appealed.

  The United States Court of Appeals for the Ninth Circuit affirmed. This Court had previously held that delivery drivers engaged in the movement of goods in interstate commerce fell within the FAA's transportation worker exemption, even if the drivers themselves did not cross state lines – which was the case with Romero. Under §1's plain text, the FAA's transportation worker exemption cannot be waived by the terms of a private contract. Because the exemption applied here, the FAA did not govern the Arbitration Policy.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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