September 15, 2021

ADR Case Update 2021 - 17

Federal Circuit Courts

- **ARBITRATORS ACTED WITHIN SCOPE OF CONTRACT**

  Continental Casualty Co., et al. v. Certain Underwriters at Lloyds of London
  2021 WL 3720110
  United States Court of Appeals, Seventh Circuit
  August 23, 2021

  Primary insurance companies Continental Casualty and Continental Insurance purchased reinsurance policies from Lloyds. For over 40 years, the parties agreed on the methodology for calculating reinsurance obligations. In 2010, Continental outsourced its claims handling to a third-party administrator that made higher demands from Lloyds under a new methodology. Lloyds objected and sought arbitration pursuant to the parties' arbitration clause. The Panel found Continental's new methodology contrary to the parties' established course of dealings. Continental asked the Panel to clarify the Final Award and whether the statement "Petitioners have paid the full amount due" was meant to cover past and future billings. The Panel issued Interim Order No. 3, in which it denied Continental's motion for clarification but added that Lloyds had "fully and finally discharged its past, present, and future obligations for the accounts," thus precluding future billing for asbestos losses for certain insureds. The Panel denied Continental's motion for reconsideration in a Post-Final Award Order. Continental sought confirmation of the Final Award but vacatur of Interim Order No. 3 and the Post-Final Award Order. The court confirmed the Final Award, Interim Order No. 3, and the Post-Final Award Order, and Continental appealed.

  The United States Court of Appeals for the Seventh Circuit affirmed. The only issue before the Court was whether the district court erred in confirming Interim Order No. 3 and the Post-Final Award Order. An arbitral award must draw its essence from the contract. It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses their own brand of industrial justice that his decision may be unenforceable. The Court noted that it is commonplace to give arbitrators broad discretion in formulating remedies. The Court had no trouble seeing how the arbitrators, in this case, might have thought that implicit in Lloyds' request for resolution of the aggregate billing question was the consequence of a ruling either way. By

ruling on liability, the Panel members – all from industry – may have been trying to effectuate the broader purpose of the agreement. That was enough to show that the arbitrators' final two orders fell within the scope of their authority.

- **AWARD DRAWS ESSENCE FROM CBA AND "LAW OF THE SHOP"**

  Independent Laboratory Employees' Union v. Exxon Mobil Research and Engineering Company
  2021 WL 3779530
  United States Court of Appeals, Third Circuit
  August 26, 2021

  The Union represents 165 employees at an Exxon Mobil Research and Engineering Facility (EMRE). EMRE and the Union have a long history of negotiation, arbitration, and litigation concerning EMRE hiring independent contractors to do work typically done by bargaining unit members. This history includes prior grievances and arbitrations about the duration of independent contracts initiated in 1977, 1983 (the Stark Award), and 1984 (the Florey Award). This dispute arose in 2015 when a bargaining unit member in the position of materials coordinator retired, and EMRE contracted independent contractors to staff the position. The Union filed a grievance. Relying on the CBA text, prior statements of EMRE officials, and past awards, the arbitrator issued an award in favor of the Union. EMRE appealed.

  The United States Court of Appeals for the Third Circuit affirmed. EMRE argued that the arbitrator's award (the Klein Award) did not draw its essence from the CBA and that the Arbitrator improperly relied on extrinsic evidence. The Court disagreed, finding that Arbitrator Klein properly read the Recognition Clause in the CBA as providing some limitation to the Company's ability to hire contractors. As far as the extrinsic evidence, this Court and the Supreme Court have explained that the labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the CBA. Thus, it was appropriate for the Arbitrator to consider the overall relationship between the Union and the Company and their unique history as part of the law of the shop. The Arbitrator's conclusion was not only plausible but reasonable, given the prior awards, the statements of EMRE officials, and the CBA.

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