December 15, 2021

ADR Case Update 2021 - 23

Federal Circuit Courts

- **ARBITRATOR DID NOT MANIFESTLY DISREGARD THE LAW**

  Constellium Rolled Products Ravenswood, LLC v. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Indust'l &Service Workers Internat'l Union and Local 5668
  2021 WL 5549053
  United States Court of Appeals, Fourth Circuit
  November 29, 2021

  In 2013, the Union sued Constellium and its pension plan, arguing that Constellium could not unilaterally alter retirement health benefits for existing retirees. In Barton v. Constellium, the Court rejected the Union's argument, ruling that because the CBA and its incorporated documents stated that retiree health benefits would endure only for the term of the CBA, they did not vest. After Constellium and the Union negotiated another CBA and Constellium announced major changes to the healthcare coverage of its Medicare-eligible retirees, the Union initiated a grievance, asserting that the change violated the CBA's guarantee of retiree health benefits for the duration of the CBA's term. Constellium denied the grievance, claiming that to the extent the change impacted retirees who retired under previous CBAs, Barton permitted it. The court denied Constellium's motion for a declaratory judgment on preclusion grounds and granted the Union's action for a preliminary injunction to halt the changes from taking effect until the arbitration concluded. The arbitrator found that reliance on Barton was a red herring because the Union's new claims did not depend on the nature of the benefits in question, vested or durational, and that Constellium's unilateral change to the benefits violated the CBA. The court denied Constellium's motion to vacate the award, and Constellium appealed.

  The United States Court of Appeals for the Fourth Circuit affirmed. The Court disagreed with Constellium's contention that the court should have decided Barton's preclusive effect on this dispute, noting that absent an agreement to the contrary, the preclusive effect of a prior court judgment is for the arbitrator to decide. Out of regard for the FAA, the Court declined to expand its review of legal errors in arbitral awards beyond review for manifest disregard of the law, finding no legal basis for adopting Constellium's proposed plenary review standard. Applying the correct standard, the Court found that the arbitrator did not manifestly disregard the law of res

judicata or collateral estoppel. The arbitrator demonstrably weighed the parties' arguments, applied the law to the facts, and found that res judicata and collateral estoppel did not bar the Union's claim. The arbitrator did not exceed his authority by returning an award contrary to the contractual language when he held that the 2017 CBA secured benefits for past retirees – in so deciding, the arbitrator was doing his job, exercising the authority granted to him by the parties.

- **JOINT ARBITRATION NOT APPROPRIATE**

  P&A Construction, Inc. v. International Union of Operating Engineers Local 825
  United States Court of Appeals, Third Circuit
  November 18, 2021

  P&A Construction had a CBA with United Steelworkers Local 15024. Under pressure from Local 825 to employ them, P&A created Utility Systems, which signed a CBA with Local 825. After Utility subcontracted a number of construction projects to P&A, which used workers from Local 15024, Local 825 brought multiple grievances against Utility, which proceeded to arbitration. P&A and Utility filed an LMRA suit in the district court and requested an order compelling joint arbitration with both employers and both unions. The court held that joint arbitration under the LMRA would be inappropriate here because there was insufficient risk that P&A would face conflicting arbitration awards and P&A and Utility could not be deemed a single or joint employer. P&A and Utility appealed.

  The United States Court of Appeals for the Third Circuit affirmed. The Court adopted the view precedentially that joint arbitration is available under the LMRA and a party may seek joint arbitration either before or after bipartite arbitration awards have become final. The Court outlined factors to consider – the breadth of the relevant arbitration provisions, the existence or likelihood of conflicting arbitration awards, the compatibility of the arbitration procedures in the two CBAs, the retrospective or prospective nature of the awards, and whether the employer should have known of the conflict in its incipiency and acted to prevent it – and added two qualifications: as a threshold matter, the party seeking joint arbitration must demonstrate a contractual nexus as to both the parties and the subject matter; and the existence or likelihood of conflicting arbitration awards carries particular weight in the equitable analysis. Joint arbitration was not a suitable remedy in light of the record and given the nature of the problem presented. Because P&A and Utility failed to establish the necessary contractual nexus connecting the parties and the subject matter, they could only seek joint arbitration if they were considered a single or joint employer for purposes of the LMRA, which they failed to do. The other equitable considerations also weighed against compelling joint arbitration. The court properly rejected the Harmony Agreement, a contract between Local 15024's and Local 825's parent unions, as an alternative basis to compel arbitration. Local 825 and Local 15024 were not parties to the agreement and P&A and Utility, as non-signatories, had no power to enforce the Harmony Agreement unless they could establish that they were third-party beneficiaries – a showing they did not make.

- **ARBITRATOR DID NOT ENGAGE IN MISCONDUCT OR EXCEED HIS POWERS**

  CPR Management v. Devon Park Bioventures
  2021 WL 5443144
  United States Court of Appeals, Third Circuit
  November 22, 2021

  CPR Management and Deutsche Bank both claimed entitlement to proceeds emanating from a $50 million partnership interest in Devon Park Bioventures. After an arbitrator directed Devon Park and its general partner, Devon Park Associates, to distribute the proceeds to CPR, CPR sought to confirm the award, and Devon Park and Deutsche Bank sought to vacate it. Devon Park, with no claim to the proceeds, also sought to interplead Deutsche Bank for a determination as to who was entitled to the proceeds. The court struck Devon Park's interpleader claim, confirmed the award, and awarded pre-judgment interest, and Devon Park and Deutsche Bank appealed.

  The United States Court of Appeals for the Third Circuit affirmed. When the court entered the interpleader order, it still had to address the arbitration dispute between CPR and Devon Park; therefore, the interpleader order was not a final, appealable order. The court properly struck

Devon Park's Rule 22 interpleader complaint. This action was one to confirm an arbitration award, governed by the FAA, which provides for motion practice rather than pleading practice. Devon Park's effort to invoke Rule 22 conflicted with the FAA's motion approach. Devon Park's claim that the award should be vacated based upon §10(a)(3) (arbitrator misconduct) for the arbitrator's refusal to postpone the hearing and consider evidence had no basis. Misconduct is conduct that so affects the rights of a party that it may be said he was deprived of a fair hearing. Here, the arbitrator provided the parties an opportunity to have a fair hearing and was prepared to hear relevant evidence. CPR and Devon Park were provided with notice of the claims, were given an opportunity to obtain discovery about the validity of the Assignment Agreement, and had the chance to present their evidence and arguments to an unbiased arbitrator. The arbitrator's refusal to postpone the hearing also did not amount to misconduct because the arbitrator had a reasonable basis to deny the requested stay. The arbitrator did not exceed his powers in finding in favor of CPR. This award was supported by the evidence and rationally derived from the parties' agreement. Furthermore, the arbitrator's interpretation of the LP Agreement was supported by its terms. The arbitrator also correctly awarded pre-judgment interest.

- **APPLICATIONS UNDER FAA TO VACATE AWARDS MUST BE MADE AS MOTIONS**

  PG Publishing v. The Newspaper Guild of Pittsburgh (the Union)
  2021 WL 5575570
  United States Court of Appeals, Third Circuit
  November 30, 2021

  PG and the Union proceeded to arbitration over PG's contributions to its employees' health insurance fund. After the arbitrator found that PG violated the CBA by failing to maintain agreed-upon health care benefits, PG sought to vacate the award in federal court Styling its filing as a complaint, PG sought to invoke the district court's jurisdiction under both LMRA Section 301 and FAA Section 10. The court dismissed PG's action with prejudice as time barred pursuant to Rule 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6). It also entered an order for enforcement of the Arbitration Award in favor of the Union. PG appealed.

  The United States Court of Appeals for the Third Circuit affirmed. PG's bid to vacate the Arbitration Award was untimely. Although PG filed its complaint within 90 days of the arbitrator's award, the limitations period applicable to motions to vacate under the FAA, PG's general references to the FAA in its complaint were insufficient to invoke FAA Section 10 as a means of seeking vacatur. As a matter of first impression, applications under FAA to vacate arbitration awards must be made as motions and motions under FAA to vacate arbitration awards are to be addressed through summary proceedings. Even if PG had intended to move to vacate the Award under the FAA, the substance of its complaint and its manner of litigating the dispute were insufficient to put the Union and the court on notice that PG was proceeding via FAA motion. PG's LMRA Section 301 action, though properly invoked, was untimely because the limitations period was 30 days and PG filed more than 30 days after the arbitrator issued his award.

- **COURT MUST DECIDE WHETHER ARBITRATION AGREEMENT SUPERSEDED**

  McKenzie v. Brannan
  2021 WL 5446060
  United States Court of Appeals, First Circuit
  November 22, 2021

  Michael McKenzie produced and distributed a line of art products in collaboration with the late artist Robert Indiana, pursuant to a 2008 publishing agreement (2008 Agreement). Amidst a flurry of litigation following Indiana's death, McKenzie and representatives of Indiana's estate (the Estate) commenced arbitration in New York per the 2008 Agreement's arbitration clause, but subsequently submitted their dispute to mediation in Maine. The mediation produced a signed "Confidential and Binding Term Sheet" (Term Sheet) purporting to terminate the 2008 Agreement and dismiss the New York arbitration. After the parties failed to execute a formal settlement agreement as the Term Sheet required, the Estate sought to resume the New York arbitration. McKenzie sued, seeking a declaratory judgment that the Term Sheet was binding and enforceable, and moving to enjoin the New York arbitration. The Estate moved to stay the proceedings and compel arbitration, arguing that the Term Sheet's enforceability should be

decided by the arbitrators. The court denied McKenzie's requests, granted the Estate's motion to compel and, following an arbitration ruling that the parties remained subject to the 2008 Agreement's arbitration clause, dismissed the case. McKenzie appealed.

The United States Court of Appeals for the First Circuit vacated and remanded. The Court acknowledged that clear and unmistakable evidence may overcome the general presumption that courts, rather than arbitrators, determine arbitrability of gateway disputes. The 2008 Agreement's broadly drafted delegation clause might provide such evidence, the Court said, were it not for the possibility that the 2008 Agreement had been superseded by the Term Sheet. The issue here was not whether an arbitration agreement applied, but whether it existed. For this reason, the Court followed other appellate courts in holding that review of a superseding-contract argument must fall to the courts.

- **DENIAL OF RULE 60(b)(5) MOTION NOT APPEALABLE FINAL JUDGMENT**

  Gross v. Keen Group Solutions, LLC
  2021 WL 5702674
  United States Court of Appeals, Fifth Circuit
  December 2, 2021

  Barry Gross, president of BillCutterz, LLC, a "bill reduction business," licensed his services and intellectual property to Keen Group Solutions, LLC (KGS). After KGS failed to pay Gross commissions and royalties, the matter proceeded to arbitration and an arbitrator ordered KGS to make retrospective and prospective payments. After the order was confirmed, KGS remitted retrospective payments but disputed prospective payments, claiming that KGS had terminated the licensing agreement. KGS moved for relief from the judgment under Rule 60(b)(5), arguing that it had satisfied the judgment in full. Gross opposed the motion and moved to compel discovery, alleging that KGS continued to use the licensed properties while operating under a different trade name. The court denied KGS's Rule 60(b)(5) motion and granted Gross's motion to compel discovery. KGS appealed.

  The United States Court of Appeals for the Third Circuit dismissed the appeal. Denial of the Rule 60(b)(5) motion did not constitute a final, appealable judgment. A decision is final when it resolves the litigation, leaving nothing undone beyond execution of the judgment. Here, the court's decision to authorize discovery demonstrated that factual and legal issues relating to KGS's purported termination and continued operations remained unresolved.

- **CONTINUED USE OF WEBSITE CONSTITUTED ACCEPTANCE OF REVISED ARBITRATION AGREEMENT**

  In re: StockX Customer Data Security Breach Litigation
  2021 WL 5710939
  United States Court of Appeals, Sixth Circuit
  December 2, 2021

  StockX is an e-commerce website specializing in rare sneakers. To buy or sell on StockX, a user must create an account, which requires agreement to the site's Terms of Service and Privacy Policy (Terms). When StockX updated its Terms in 2018, including changes to its arbitration clause, it notified registered users by email (Notification Email), stating, "Your continued use of the site and/or services after we change these terms constitutes your acceptance of the changes."

  Following a data breach, eight users brought a putative class action against StockX for failing to protect their personal account information. StockX moved to dismiss and compel arbitration. Plaintiffs opposed, arguing that some plaintiffs had not agreed to the 2018 Term changes; that the arbitration clause was invalid on grounds of unconscionability; and that, under the infancy doctrine, no agreement existed with respect to two minor clients. The court dismissed and granted the order to compel arbitration. Plaintiffs appealed.

  The United States Court of Appeals for the Sixth Circuit affirmed. StockX sent the Notification Email to all plaintiffs; their continued use of the site constituted acceptance. Infancy and

unconscionability are not issues of contract formation. Infancy may render an agreement "void or voidable," and unconscionability may render it unenforceable, but neither renders the agreement nonexistent. Both issues should be resolved in arbitration.

- **COURT SHOULD HAVE GRANTED STAY REQUEST RATHER THAN DISMISSING**

  Arabian Motors Group W.L.L. v. Ford Motor Company
  2021 WL 5755304
  United States Court of Appeals, Sixth Circuit
  December 3, 2021

  Ford Motor Company and Arabian Motors, for decades the sole authorized dealer of Ford brands in Kuwait, revised the terms of their business relationship in a 2005 Resale Agreement (Agreement) including a binding arbitration clause. Ford later terminated the Agreement and sought arbitration for a declaration that it had permissibly done so. In litigation to enjoin the arbitration, Arabian raised common law claims against Ford for breach of contract and fraud. When the court denied its motion, Arabian renewed the common law claims in arbitration, but withdrew them before the arbitration concluded. The arbitration tribunal held that Ford had permissibly terminated the Agreement and awarded Ford legal fees and costs. Arabian sued to vacate the award; Ford moved to confirm. The court denied Arabian's motion and confirmed the award, a decision upheld on appeal. On remand, Ford moved to stay the federal action to allow arbitration of Arabian's remaining common law claims. The court determined that those claims were subject to arbitration, and, on its own initiative, dismissed the federal case without prejudice. The parties filed cross-appeals.

  The United States Court of Appeals for the Sixth Circuit reversed. The court should have granted Ford's request for a stay, rather than dismissing the case on its own initiative. Where the court determines an issue to be arbitrable, FAA Section 3 requires that the court "shall" grant a party's request to stay trial of the action until arbitration can be completed. Granting a stay allows the judge to retain jurisdiction over the case for purposes of facilitating the arbitration; a dismissal inefficiently forces the parties to file a new action, possibly in front of another judge. Dismissal also undercuts FAA Section 15, which provides immediate appeal when a court denies arbitration, but defers review of favorable arbitration decisions until confirmation proceedings. Dismissal enables the parties to "sidestep" Section 15 by making a pro-arbitration decision an immediately appealable final judgment. The Court therefore reversed the dismissal and granted the stay to allow arbitration of Arabian's common law claims.

California

- **EMPLOYER DID NOT ESTABLISH VALIDITY OF ARBITRATION AGREEMENT**

  Gamboa v. Northeast Community Clinic
  2021 WL 5575536
  Court of Appeal, Second District, Division 7, California
  November 30, 2021

  Gamboa worked for the Northeast Community Clinic as a scanner. After sustaining an injury to her hand that affected her work, Gamboa requested medical accommodations. The Clinic denied the accommodations and terminated Gamboa's employment. Gamboa sued the Clinic for discrimination, retaliation, and failure to provide reasonable accommodation. The Clinic filed a motion to compel arbitration, asserting that Gamboa had signed an arbitration agreement while onboarding and that claims in Gamboa's lawsuit were subject to arbitration. In support of the motion, the Clinic filed a declaration by HR Director Marina Lopez, who said that Gamboa had signed an arbitration agreement that was in effect while she worked for the Clinic. Lopez attached the agreement as an exhibit; the agreement appeared to be signed by a representative of the Clinic and an employee. Gamboa opposed the motion, and filed a declaration in support of her opposition, saying that she reviewed the arbitration agreement attached to Lopez's declaration but did not remember the documents. The Clinic filed a reply brief, arguing that Gamboa's failure to remember the arbitration agreement did not invalidate the agreement but did not file a

supplemental declaration. The court denied the motion, and the Clinic appealed.

The Court of Appeal, Second District, Division 7, California, affirmed. A trial court must grant a motion or petition to compel arbitration only if it determines that an agreement to arbitrate the controversy exists. The burden of persuasion is always on the moving party to prove the existence of an arbitration agreement with the opposing party by a preponderance of the evidence. However, the burden of production may shift in a three-step process: first, the moving party bears the burden of producing prima facie evidence of a written agreement to arbitrate the controversy. If the moving party meets this burden and the opposing party disputes the agreement, then the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement. If the opposing party meets its burden of producing evidence, then the moving party must establish with admissible evidence a valid arbitration agreement between the parties. The Clinic met is burden on the first step by attaching to Lopez's declaration a copy of the arbitration agreement purporting to bear Gamboa's signature. Gamboa likewise met her burden by filing an opposing declaration saying she did not recall the agreement – and would not have signed if she had been aware of it. Once Gamboa did so, the Clinic was required to rebut the challenge by establishing by a preponderance of the evidence that the agreement was valid. The Clinic proffered no admissible evidence to do so, which was insufficient to meet its burden.

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