

May 5, 2021

ADR Case Update 2021 - 9

Federal Circuit Courts

- **ARBITRATOR DID NOT EXCEED AUTHORITY**

Goldgroup Resources v. DynaResources
2021 WL 1432953
United States Court of Appeals, Tenth Circuit
April 16, 2021

DynaResources and Goldgroup's Option Agreement relating to a gold mining operation in Mexico contained a dispute resolution provision specifying that "[a]ll questions or matters in dispute under this Agreement shall be submitted to binding arbitration in Denver, CO" under AAA Rules. The agreement also stated that Mexican law would apply regarding the shares of DynaMexico and that venue and jurisdiction for any dispute under the Option Agreement would be in Denver. After the parties' relationship broke down, DynaResources sued Goldgroup in TX state court for various tort claims. Goldgroup then filed an action in federal court in Mazatlan, Mexico, seeking annulment of an action taken at a DynaResources meeting that diluted Goldgroup's interest in DynaMexico. The court awarded Goldgroup declaratory and injunctive relief. DynaResources dismissed the TX suit, and Goldgroup initiated arbitration in Denver to resolve the parties' disputes. DynaResources filed suit in CO district court to prevent the arbitration from moving forward. The court determined that at least some of Goldgroup's claims were subject to arbitration and instructed the arbitrator to address DynaResources' remaining arguments about why the arbitration should not proceed. DynaResources also filed a separate suit against Goldgroup and AAA in federal court in Mexico City. That court determined that Goldgroup waived its right to arbitration by submitting to the jurisdiction of Mexican courts in prior disputes. The arbitration proceeded, and DynaResources refused to participate. The arbitrator ruled in Goldgroup's favor and made several findings connected with the award, including that Goldgroup had not waived its right to arbitration under Mexican or U.S. law by filing the Mexico lawsuit and defending the TX lawsuit. After the court issued an order to confirm the award, DynaResources appealed.

The United States Court of Appeals for the Tenth Circuit affirmed. DynaResources asserted that the award should be vacated because the arbitrator exceeded his authority by deciding whether Goldgroup waived its right to arbitration. First, concluding that FAA defenses were available in proceedings to confirm a non-domestic arbitration award rendered in or under the law of the U.S., the Court found that the contracting parties' incorporation of the AAA rules into their arbitration agreement constituted clear and unmistakable evidence that the parties had agreed to arbitrate arbitrability. Even assuming that the arbitrator exceeded the scope of his authority, DynaResources failed to demonstrate that any alleged error by the arbitrator in ruling on the waiver issue warranted vacatur of the award. DynaResources's argument that vacatur of the award was justified based on the Mexico City Court's order finding was likewise unconvincing.

Article 5(1)(e) of the Panama Convention permitted a court to vacate an arbitration award if the award had been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision had been made. DynaResources provided no authority, however, to support its contention that Article 5(1)(e) encompassed effective or presumptive annulment of an arbitration award not yet rendered.

- **CLEAR LANGUAGE OF ARBITRATION AGREEMENT ENCOMPASSES EMPLOYMENT DISPUTES**

Zoller v GCA Advisors
2021 WL 1396405
United States Court of Appeals, Ninth Circuit
April 14, 2021

Shannon Zoller worked with GCA Advisors as an investment banker. As part of her contract, Zoller signed an agreement committing to final and binding arbitration of all controversies or claims arising out of her employment. She also signed a second document that specified the arbitration procedures. After GCA fired Zoller, Zoller brought action in federal district court alleging various contract claims and claims of gender discrimination and denial of equal pay. Zoller agreed to arbitrate some of her claims but refused to arbitrate her statutory claims, asserting that the judiciary rather than an arbitrator should consider those. GCA's motion to compel arbitration was denied, and GCA appealed.

The United States Court of Appeals for the Ninth Circuit reversed and remanded with instructions. The employment agreement and the confidentiality, non-solicitation, and arbitration agreements included explicit language regarding employment disputes so that Zoller's statutory claims were clearly encompassed by the agreement. The circumstances surrounding Zoller's review and acceptance of the documents made clear that Zoller knowingly waived her right to a judicial forum: she had full access to the documents and the opportunity to consult with counsel before signing and signed multiple documents with parallel arbitration provisions.

- **VOLUNTARY DISMISSAL OF CLAIMS FOLLOWING ORDER COMPELLING ARBITRATION DOES NOT CREATE APPELLATE JURISDICTION**

Sperring, et al., v. LLR
2021 WL 1586406
United States Court of Appeals, Ninth Circuit
April 23, 2021

Consultants for clothing company LuLaRoe brought a putative class action, alleging that the company operated an illegal pyramid scheme in violation of CA and federal law. After the court granted LuLaRoe's motion to compel arbitration under the agreement each consultant had signed, the consultants filed a motion to voluntarily dismiss the case with prejudice so they could immediately appeal the court's order compelling arbitration. The court granted the dismissal, and the consultants appealed.

The United States Court of Appeals for the Ninth Circuit dismissed the appeal for lack of jurisdiction. The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. The voluntary dismissal of claims following an order compelling arbitration does not create appellate jurisdiction.

California

- **NEUTRAL ARBITRATOR DID NOT VIOLATE DISCLOSURE RULES**

Speier v. The Advantage Fund, LLC
2021 WL 1526386
Court of Appeal, Fourth District, Division 3, California

April 19, 2021

Speier, an investment fund manager, sued his former employer, the Advantage Fund, for breach of operating agreements and breach of implied covenant of good faith and fair dealing. After the court appointed the Honorable Gail A. Andler (Ret.) to serve as the arbitrator, JAMS and the arbitrator provided the parties with disclosures under the CA Rules of Court Ethics Standards for Neutral Arbitrators in Contractual Arbitration (the Ethics Standards) and the JAMS Ethical Guidelines for Arbitrators. The disclosures included the arbitrator's statement: "I practice in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS. In addition, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in an arbitration, mediation, or other dispute resolution proceeding with the parties, counsel, or insurers in this case and may do so in the future." The arbitrator further disclosed that, within the preceding 5 years, she had served as a neutral arbitrator in other matters involving a party, a lawyer for a party, or law firm for a party to the current arbitration, and JAMS provided the parties with reports showing matters involving the arbitrator and Speier, Speier's counsel (Alston & Bird), the Funds, and the Funds' counsel (O'Melveny & Myers). No party filed any objection to the arbitrator's assignment. Speier did not object to the interim award, which denied him relief and awarded the Funds damages. When the Funds submitted an application for attorney fees and costs, Speier opposed and, after retaining new counsel, was granted opportunity to submit a supplemental opposition. The arbitrator then issued a final award stating that the Funds had established their counterclaims and were entitled to a principal award and attorneys' fees and costs. The Funds moved to confirm and Speier's counsel requested, for the first time, information relating to the ownership interest of the arbitrator in JAMS and the number of arbitrations JAMS has had with O'Melveny & Myers in the last five years. JAMS provided information regarding ownership and matters with both O'Melveny & Myers and Alston & Bird. Speier filed an opposition and a motion to vacate the final award, both based on the ground the arbitrator failed to make material disclosures by failing to disclose her ownership interest in JAMS and the amount of business JAMS has conducted with O'Melveny. The court denied the motion to vacate and confirmed the final arbitration award. Speier appealed.

The Court of Appeal, Fourth District, Division 3, California affirmed. Speier did not contend that the arbitrator was actually biased – only that the arbitrator did not disclose information that could cause a reasonable person aware of the facts to entertain a doubt that the arbitrator would be able to be impartial. Speier's relied solely on his contention that the arbitrator's ownership interest in JAMS and JAMS's prior business relationship with O'Melveny & Myers was required to have been disclosed under this category. Based on the facts, circumstances, and analysis, the Court held that the arbitrator's and JAMS's disclosures were sufficient, and the arbitrator was not required to disclose more information about the extent of the arbitrator's ownership interest in JAMS or JAMS's business with O'Melveny & Myers. There were no facts or circumstances in the record and Speier did not point to any, that showed how the arbitrator's receipt of a distribution of not more than .1% of JAMS's total revenue in a given year in any way favored one party or party's law firm. The parties' arbitration attorneys were from law firms that had the same number of matters before JAMS in the five years prior to the arbitrator's assignment to the case. Therefore, the information Speier contended should have been known and disclosed by the arbitrator, whether considered independently or collectively as a whole, did not reasonably raise a doubt about the arbitrator's impartiality. As the arbitrator did not fail to make a required disclosure, and Speier offered no other challenges to the arbitration award, the trial court did not err by denying Speier's motion to vacate, confirming the award, and entering judgment accordingly.

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

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