June 11, 2020

ADR Case Update 2020 - 11

U.S. Supreme Court

- **CONVENTION DOES NOT CONFLICT WITH ENFORCEMENT OF ARBITRATION AGREEMENTS BY NONSIGNATORIES UNDER DOMESTIC LAW EQUITABLE ESTOPPEL DOCTRINES**

  GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC
  2020 WL 2814297
  Supreme Court of the United States
  June 1. 2020

  ThyseenKrupp contracted with F.L. Industries to construct cold rolling mills at its Alabama plant. Each contract contained an arbitration clause providing that all disputes arising between both parties in connection with or in performance of the contract "shall be submitted to arbitration for settlement." F.L. entered into a subcontractor agreement with GE to build motors for the cold rolling mills. Soon after, Outokumpu Stainless acquired the plant. After GE's motors failed, Outokumpu and its insurers sued GE in Alabama state court. GE removed the case to federal court under 9 USC §205, which authorizes removal if the action relates to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. GE's motion to dismiss and compel arbitration was granted. The Eleventh Circuit reversed the court's order compelling arbitration, interpreting the Convention to include a requirement that the parties actually sign an agreement to arbitrate their disputes. It also held that GE could not rely on the state law equitable estoppel doctrines to enforce the agreement as a non-signatory because equitable estoppel conflicted with the Convention's signatory requirement. The Supreme Court granted certiorari.

  The Supreme Court reversed and remanded. The FAA Chapter 1 permits courts to apply state-law doctrines related to the enforcement of arbitration agreements, with Section 2 providing that an arbitration agreement in writing shall be enforceable save upon such grounds as exist at law or equity for the revocation of any contract. The question before the Court was whether the equitable estoppel doctrine under FAA Chapter 1 conflicted with the Convention. That the text of

the Convention was silent as to whether non-signatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel was dispositive because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines. The only provision of the Convention addressing the enforcement of arbitration agreements is Article II(3), which states that courts of a contracting state shall refer parties to arbitration when the parties entered into a written agreement to arbitrate and one of the parties requested referral. The provision, however, contained no exclusionary language to restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances. In short, there was nothing in the text of the Convention that conflicted with the application of domestic equitable estoppel doctrines permitted under the FAA Chapter 1. This understanding was supported by the drafting history of the Convention and by the post-ratification understanding of other contracting states. The weight of authority from contracting states indicated that the Convention did not prohibit the application of domestic law addressing the enforcement of arbitration agreements.

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Washington State

- **DEFENDANT WAIVED RIGHT TO ARBITRATE**

  Lee & McFarland, on their own and on behalf of others similarly situated, v. Evergreen Hospital
  No 97201-0
  Supreme Court of the State of Washington
  June 4, 2020

  Jeoung Lee sued her former employer, Evergreen Hospital, for failing to give her breaks in accordance with Washington law. After nine months of litigation and the addition of a second named plaintiff, Evergreen moved to compel arbitration, alleging that the claims were covered under the CBA between Evergreen and the Washington State Nurses Association. The trial court denied the motion to compel arbitration and the Court of Appeals affirmed. Evergreen petitioned the Supreme Court of the State of Washington to review whether the claim was subject to arbitration and whether Evergreen waived its right to compel arbitration.

  The Supreme Court of the State of Washington affirmed the Court of Appeals and remanded to the superior court. Evergreen knew of its existing right to arbitrate, since it raised arbitration as a potential affirmative defense in its answer to Lee's initial complaint. Still, Evergreen chose to litigate for months before moving to compel arbitration, behavior inconsistent with a party seeking to arbitrate. Granting the motion to compel arbitration would prejudice the Plaintiffs, who had incurred legal fees, sent notice of the class action, and secured expert witnesses.

Colorado

- **ARBITRATION AGREEMENT VALID, DESPITE UNAVAILABILITY OF ARBITRATOR**

  Johnson-Linzy v. Conifer Care Communities
  No. 18CA2405
  Colorado Court of Appeals
  June 4, 2020

  When her husband was admitted to Amberwood Court Care Community, Shalandra Johnson-Linzy signed an arbitration agreement providing that any legal claim against Amberwood shall be resolved by binding arbitration in accordance with the Colorado Uniform Arbitration Act (CUAA) and the Code of Procedure of the National Arbitration Forum (NAF). After her husband died, Johnson-Linzy sued Conifer Care for negligence and wrongful death. The district court denied Conifer's motion to compel arbitration, finding that compliance was impossible because the NAF

exited the consumer arbitration business in 2009. Conifer appealed.

The Colorado Court of Appeals reversed the district court's order. The lower court had jurisdiction to determine whether the arbitration was unenforceable. If a party to an agreement incorporates a rule that empowers the arbitrator to determine arbitrability, that incorporation amounts to clear and unmistakable evidence of the parties' intent to delegate that issue to the arbitrator. Here, the parties incorporated the CUAA and the NAF, which created ambiguity as to which entity was to decide arbitrability. The parties agreed to arbitrate without regard to who was named as arbitrator. The agreement did not state that arbitration would be conducted by NAF or even by an arbitrator affiliated with or approved by NAF. The core goal from the language in the agreement was that arbitration was required.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke

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Contact Information
David Brandon
Program Manager
JAMS Institute
415-774-2648
DBrandon@jamsadr.com