July 23, 2020

ADR Case Update 2020 - 14

Federal Circuit Courts

- **ARBITRATOR ACTED WITHIN THE SCOPE OF AUTHORITY**

  Exide Technologies v. International Brotherhood of Electrical Workers
  2020 WL 3885613
  United States Court of Appeals, Eighth Circuit
  July 10, 2020

  Exide and the Union for production and maintenance employees at the Fort Smith, Arkansas plant are parties to a CBA with an arbitration clause. After Exide decided to use a third-party administrator to process FMLA leave requests, the Union filed a grievance, arguing that Exide could not unilaterally make this change. The parties proceeded to arbitration. The arbitrator sided with the Union, finding that the parties expressly modified the CBA by incorporating Exide's FMLA policies and procedures document; the new FMLA procedures violated the terms of that document; and this was a material, substantial, and significant change in the employees' terms and conditions of employment, in violation of §8 of the NLRA. The court confirmed the CBA ruling and found it lacked jurisdiction to review the NLRA ruling, since the decision and remedy on a §8 claim is to be considered by the NLRB. Exide appealed.

  The United States Court of Appeals for the Eighth Circuit affirmed. The Court will vacate an arbitrator's award where relevant language was not considered by the arbitrator or it appears that the arbitrator has not interpreted the specific contract at issue. Here, the arbitrator discussed the CBA's management rights policy, used his authority to incorporate Exide's entire HR Policies and Procedures, and considered Exide's past practice of using third-party administrators for disability leave policies. The separate issue of whether the CBA violation also contravened the NLRA was assigned to the NLRB in the first instance.

- **ARBITRATION AGREEMENT CONSTITUTED AN IMPERMISSIBLE WAIVER OF STATUTORY RIGHTS**

  Williams v. Medley Opportunity Fund II, LP, et al.
  2020 WL 3968078
  United States Court of Appeals, Third Circuit

July 14, 2020

- Christina Williams and Michael Stermel entered into payday loans with AWL, Inc., an entity owned by the Otoe-Missouria Tribe of Indians. Their agreement provided that it was "governed only by Tribal Law and such federal law as is applicable under the Indian Commerce Clause" and was not subject to any other federal or state law or regulation. Plaintiffs sued defendants in federal court, alleging AWL's lending practices violated RICO and various Pennsylvania consumer protection laws. The court denied defendants' motion to compel arbitration pursuant to the agreement's arbitration clause, finding the agreement was unenforceable because the arbitrator was permitted only to consider tribal law. Defendants appealed.

  The United States Court of Appeals for the Third Circuit affirmed. The Court had jurisdiction because the plaintiffs challenged the arbitration agreement, including the delegation clause. The plain language of the arbitration agreement and the loan agreement showed that only tribal law claims may be brought in arbitration. As a result, the arbitration agreement constituted an impermissible waiver of statutory rights, found by the Supreme Court to be unenforceable. As a law passed pursuant to Congress' foreign and interstate commerce powers – not Indian commerce power – RICO was not a federal law made applicable under the Indian Commerce Clause and as a result, under the loan agreement, plaintiffs could not bring their RICO claim in arbitration. PA courts have held that if an essential term of a contract is deemed illegal, it rendered the entire contract unenforceable and could not be severed.

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- **ARBITRATOR SELECTION PROVISION INVALID**
  Trout v. Organizacion Mundial de Boxeo, Inc.
  2020 WL 3887871
  United States Court of Appeals, First Circuit
  July 10, 2020

  Professional boxer Austin Trout sued the Puerto Rico-based World Boxing Organization (WBO) in New Mexico state court, alleging that the WBO's decision to remove him from its rankings for a certain weight class cost him a chance to pursue the world championship in that class. The complaint included a claim under the Muhammed Ali Boxing Reform Act (MABRA), as well as claims under PR law for breach of contract, fraud, and negligence. Pursuant to a clause in its Championship Regulations, the WBO successfully moved to transfer the case to the U.S. District Court for the District of PR. Once there, the WBO moved to compel arbitration pursuant to the FAA and the WBO Appeal Regulations, which provided that disputes pursuant to the Championship Regulations would be submitted to a WBO Grievance Committee made up of three persons designated by the WBO President. The court granted the motion and dismissed Trout's claims without prejudice. Trout appealed.

  The United States Court of Appeals for the First Circuit vacated and remanded. Asserting that the process set forth under the WBO Appeal Regulations did not provide him with a fair opportunity to pursue his claims under MABRA and PR law, Trout pointed to the arbitrator selection process, under which the WBO had exclusive control over the appointment of arbitrators and could even appoint its own employees to the arbitration panel without input from Trout. The Court agreed, finding the selection process so unreasonable and unjust as to be unconscionable under PR law and remanding the case to the District Court to determine whether the arbitrator selection provision was severable from the remainder of the agreement.

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- **DISCOVERY DENIED IN SUPPORT OF FOREIGN PRIVATE ARBITRATION**

  Guo v. Deutsche Bank Securities, et al.
  2020 WL 3816098
  United States Court of Appeals, Second Circuit
  July 9, 2020

  Guo invested in Ocean Entities, companies founded by music executive Guomin Xie. After Guo sold his shares for less than they were worth and Ocean Entities became part of Tencent Music, Guo initiated arbitration against Xie, Tencent, and others before the China International Economic and Trade Arbitration Commission (CIETAC), claiming that he was entitled to compensation and to have his equity stake restored. Soon after, Guo filed a petition for discovery

pursuant to 28 USC §1782(a). The court denied the application and Guo appealed.

The United States Court of Appeals for the Second Circuit affirmed the district court's denial of the petition. While 28 USC §1782(a) authorizes federal courts to compel the production of materials for use in a proceeding in a foreign or international tribunal upon the application of any interested person, in *NBC v. Bear Stearns* (165 F.3d 184), this Court held that the phrase foreign or international tribunal did not encompass arbitral bodies established by private parties. The Court disagreed with Guo's assertion that *NBC* had been overruled or otherwise undermined by the recent Supreme Court decision *Intel*, holding that *NBC* remained binding law. Critically, the question whether foreign private arbitral bodies qualified as tribunals under 28 USC §1782(a) was not before the *Intel* Court, which considered only whether the Directorate General-Competition, a public entity, qualified as such a tribunal. The only language in *Intel* that was even arguably in tension with *NBC*'s determination that the statute was limited to state-sponsored tribunals was a passing reference in dicta. Even assuming that passing reference could have the effect of abrogating precedent, the language quoted by *Intel* had no such impact, as it was not definitively at odds with *NBC*. Though CIETAC was originally founded by the Chinese government, the inquiry did not turn on the governmental or non-governmental origins of the administrative entity in question. CIETAC panels function in a manner nearly identical to that of private arbitration in the U.S. and can best be categorized as a private commercial arbitration for which 28 USC §1782(a) assistance was unavailable.

California

- **ARBITRATOR DID NOT EXCEED AUTHORITY**

Lonky v. Patel
2020 WL 3602550
Court of Appeal, Second District, Division 2, California
July 2, 2020

Stewart Lonky and his medical practice sued his former partner, Paryus Patel, for conversion and embezzlement, breach of fiduciary duty, breach of contract, and dissolution of medical practice. The parties proceeded to arbitration pursuant to the arbitration clause in the Agreement of Partnership and agreed to break the arbitration proceedings into three phases: one to determine liability, compensatory damages, and eligibility for punitive damages; one to decide the amount of punitive damages and entitlement to attorney fees and costs; and a third to decide the attorney fees and costs. After the first interim ruling (entitled "Interim Award"), that Patel had stolen over a half a million dollars in checks and that the facts allowed for consideration of punitive damages, Patel moved to decrease damages to those incurred during the 3-year statute of limitations period for breach of fiduciary duty and conversion. The arbitrator granted the motion and reduced the award to $310,138.62. The second Interim Award specified the reduced amounts for compensatory damages, pre-judgment interest and punitive damages, and left blank attorney fees and costs. The plaintiff moved to correct the interim ruling to the statute of limitation period of 4 years for breach of contract. The arbitrator accepted this argument in the third and final award, issued 101 days after the Second Interim Ruling was served, providing compensatory damages of $434,158.25, pre-judgment interest, punitive damages, and close to $800K of attorney fees and costs. The language of the Final Award provided: "this award resolves all issues submitted for decision in this proceeding." Plaintiff petitioned to confirm and Patel petitioned to correct on the grounds that the arbitrator exceeded her powers by increasing compensatory damages from the Second Interim Ruling more than 30 days after that award was served. The court agreed and corrected the Final Award to $310,138.62.

The Court of Appeal, Second District, Division 2, California affirmed in part and reversed in part. The California Arbitration Act defines an award as a written ruling that includes a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy. Because the Second Interim Ruling did not meet the definition of an award in that it did not determine all issues necessary to resolve the controversy, it was not subject to the substantive and procedural limits on modifying awards and the arbitrator did not

exceed her statutory authority by incorporating a modification to the Ruling in the Final Award.

- **MUTUAL ASSENT EXISTED TO ARBITRATE ALL DISPUTES**

  Martinez v. BaronHR
  2020 WL 3819180
  Court of Appeal, Second District, Division 4, California
  July 8, 2020

  When employment staffing agency BaronHR hired Martinez, it provided him several employment -related documents, including an arbitration agreement. Both parties signed the agreement to arbitrate; however, neither initialed on the initial lines next to bolded language providing "In agreeing to arbitration, both Employer and Employee explicitly waive their respective rights to trial by jury." After Martinez sued BaronHR for discriminatory and retaliatory practices, BaronHR moved to compel arbitration. The court denied the motion, finding that there was ambiguity about whether Martinez agreed to arbitrate and waive his right to a jury trial. BaronHR appealed.

  The Court of Appeal, Second District, Division 4, California reversed and remanded. The language of the agreement between Martinez and BaronHR established their mutual assent to submit the employment-related disputes to arbitration and waive a jury trial. Three separate terms of the agreement acknowledged in explicit and unmistakable language the parties' mutual intent to arbitrate all disputes; two of those terms also acknowledged the parties' mutual intent to waive their right to jury trial. Though Martinez claimed that by withholding his initials next to one of these provisions, he was manifesting his intent not to agree to arbitrate, unexpressed subjective intentions are irrelevant to the issue of mutuality.

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

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