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ADR Case Update 2020 - 15

Federal Circuit Courts

- **ARBITRATION AGREEMENT(S) UNENFORCEABLE – TWO CASES**

  Deborah Gibbs, et al., v. Haynes Investments, et al.
  2020 WL 4118239
  United States Court of Appeals, Fourth Circuit
  July 21, 2020

  Gibbs, et al., borrowed money from lenders owned by the Chippewa Cree Tribe and the Otoe-Missouria Tribe. Each borrower signed an Agreement and Agreement to Arbitrate that required the application of tribal law. The borrowers brought a putative class action against Haynes Investments, et al., alleging that the LLCs and their principal used the tribe's ownership status to make usurious loans, in violation of VA laws and RICO. Defendants moved to compel arbitration or, alternatively, to dismiss the complaint. The court denied both motions, holding that the choice of law provisions in the agreements operated as a prospective waiver of a party's right to pursue statutory remedies and that the arbitration agreements were unenforceable. Defendants appealed.

  The United States Court of Appeals for the Fourth Circuit affirmed. Each of the arbitration agreements contained a delegation clause stipulating that the parties would arbitrate any issue concerning the validity, enforceability, or scope of the Agreement or Agreement to Arbitrate. Because the borrowers specifically challenged the validity of the delegation clauses, the question of agreement enforceability was for the court to decide. The language of the arbitration agreements, providing that tribal law shall preempt the application of any contrary law, made the effective vindication of federal statutory protections and remedies unavailable to the borrowers. The choice-of-law clauses amounted to a prospective waiver such that the arbitration agreements, including the delegation clauses, were unenforceable.

Deborah Gibbs, et al., v. Sequoia Capital Operations, LLC, et al.
2020 WL 4118283
United States Court of Appeals, Fourth Circuit
July 21, 2020

This case considered the same agreements that were at issue in *Gibbs v. Haynes*. As in those cases, the court held that because the choice-of-law provisions of the arbitration agreements sought to apply tribal law to the exclusion of federal law, including the assertion of any federal statutory claims by the borrowers, the agreements contravened the prospective waiver doctrine and the arbitration agreements were unenforceable. Defendants appealed.

The United States Court of Appeals for the Fourth Circuit affirmed. Because the borrowers sufficiently challenged the enforceability of the delegation clauses, the court was correct to consider the enforceability of the arbitration agreements. The choice-of-law provision stymied the vindication of federal statutory claims and amounted to a prospective waiver, rendering the entire arbitration agreement unenforceable.

- **ISSUE OF MATERIAL FACT ABOUT AGREEMENT TO ARBITRATE FOR COURT, NOT ARBITRATOR**

Jin v. Parsons Corporation
2020 WL 4248732
United States Court of Appeals, District of Columbia Circuit
July 24, 2020

When long-time employee Jin O. Jin sued the Parsons Corporation for employment discrimination. Parsons moved to compel arbitration. The parties disagreed about whether Jin agreed to arbitrate disputes with Parsons. Parsons argued that Jin's continued employment after notification of updates to the Employee Dispute Resolution Program constituted acceptance of the Agreement. Jin submitted a declaration saying that he had no recollection of the 1998 EDR Program, did not recall emails about the 2012 updates, and never reviewed nor signed the Agreement. The court denied the motion to compel, concluding that Jin's intent to be bound by the agreement presented a genuine issue of material fact. The court then ordered Parsons to answer Jin's complaint on the merits and directed the parties to confer regarding discovery. Parsons appealed.

The United States Court of Appeals for the District of Columbia Circuit vacated and remanded. Under Section 4 of the FAA, once a court concludes that a genuine issue of material fact exists as to whether a party assented to an arbitration agreement, the court should try the issue of arbitrability. If the court finds that no arbitration agreement was made, the case proceeds to the merits; if the court finds a valid agreement, the parties proceed to arbitration. As a matter of first impression, the Court held that proper procedure for the district court to follow, upon finding that a genuine dispute of material fact existed, was to hold the motion to compel arbitration in abeyance pending a trial on the issue of arbitrability.

California

- **ARBITRATOR LACKED AUTHORITY TO ISSUE THIRD-PARTY SUBPOENA**

Aixtron, Inc., v. Veeco Instruments Inc. et al., Veeco Instruments Inc. v. Aixtron, Inc., et. al.
H045126 and H045464
Court of Appeal of the State of California, Sixth Appellate District
July 16, 2020

While working for Veeco Instruments, Miguel Saldana signed an Employee Confidentiality and Inventions Agreement that contained an arbitration clause. After Saldana moved to competitor Aixtron in 2017, Veeco sued Saldana for injunctive relief, on causes of action for breach of contract, conversion, and breach of the duty of loyalty. Two weeks later, Veeco filed a notice of

claim and demand for arbitration with JAMS. Aixtron was not a party to the superior court action or to the arbitration. Early in the arbitration proceeding, Veeco circulated a proposed subpoena for the production of Aixtron's business records. Saldana objected and Veeco filed a motion with the arbitrator to enforce the subpoena. The arbitrator modified the language of two of Veeco's demands and approved the subpoena, finding that the revised subpoena was reasonable as to subject matter and scope, and that he had the authority, including under JAMS Employment Arbitration Rule 21, to order issuance of third-party subpoenas for discovery purposes. Aixtron filed written objections to the subpoena in arbitration. The arbitrator granted Veeco's motion to compel and ordered Aixtron to comply with the subpoena within 20 days. Aixtron initiated a special proceeding in the Superior Court to challenge the order and Veeco filed a petition to enforce the same order. The court granted Veeco's petition and Aixtron filed a timely appeal.

The Court of Appeal of the State of California, Sixth Appellate District, reversed, after first finding the order appealable. The Court determined that it need not resolve the question whether the Arbitration Clause was subject to the FAA or the CAA because under either statutory scheme, the arbitrator did not have the authority to issue a discovery subpoena to Aixtron. The Court agreed with federal appellate cases that hold there is no right to pre-hearing discovery under the FAA. With respect to the CAA, the Court ruled, as a matter of first impression, that California's statutory scheme did not grant an arbitrator broad powers to issue such subpoenas either, where such pre-hearing discovery is not specifically authorized in the parties' arbitration agreement. Though the arbitration agreement called for the application of AAA Rules, Veeco contended (without written agreement) that the parties agreed to abide by JAMS Rules, prompting the Court to examine what JAMS Rules provided in terms of discovery. JAMS Rule 17 did not provide the parties to the arbitration broad rights to discovery or authorize discovery from non-parties. JAMS Rule 21 provides that subpoenas may be issued in accordance with applicable law. Since the discovery subpoena was not authorized by the FAA or the CAA, it was not authorized by JAMS Rule 21. Moreover, only Veeco and Saldana, the parties to the arbitration, agreed to be bound by JAMS Rules. The arbitration and application of JAMS Rules obtained their legal force based on party consent as reflected in the terms of the arbitration agreement or statutes that authorized limited discovery in arbitration. Aixtron did not consent to be bound by JAMS Rules, the Arbitration Clause did not authorize discovery from non-parties, and neither the FAA nor the CAA authorized non-party discovery in this case.

- **NO FINDING OF PROCEDURAL OR SUBSTANTIVE UNCONSCIONABILITY**

Torrecillas v. Fitness International, LLC
2020 WL 4187851
Court of Appeal, Second District, Division 8, California
July 21, 2020

During his long tenure with Fitness International, Torrecillas signed two arbitration agreements, one in 2008 and one in 2013. The first was a two-page document that incorporated the 10-page "Dispute Resolution Rules and Procedures" (Rules). The second was a document that Torrecillas signed while negotiating and executing the terms of his promotion to VP. After his firing in 2017, Torrecillas sued, alleging that Fitness failed to pay him wages on time and failed to reimburse him for business expenses in violation of Unfair Competition Law (UCL). The court denied Fitness's motion to compel arbitration, finding that the agreement was unconscionable. Fitness appealed.

The Court of Appeal, Second District, Division 8, California reversed. There was little or no procedural or substantive unconscionability. During the time he negotiated the 2013 agreement, Torrecillas could easily access the Rules and was encouraged to consult a lawyer before signing. The agreement included a term allowing amendments if both parties agreed. The fonts were conventional and the language was direct and clear. There was no time pressure. The limits on depositions and interrogatories were standard in arbitration and Torrecillas could get additional discovery if he requested it and showed a substantial need. The assertion by Torrecillas that an unpublished case involving a gym employee had preclusive effect and prevented Fitness from compelling arbitration was without merit. That case had different facts and a different holding.

New York

- **NY SUPREME COURT ENFORCES STATE LAW PROHIBITING MANDATORY ARBITRATION OF EMPLOYMENT DISCRIMINATION CLAIMS**

  Newton v. LVMH Moët Hennessy Louis Vuitton Inc.
  Index No. 154178/2019 slip op.
  New York Supreme Court
  July 13, 2020

  Andowah Newton worked at the NY HQ for LVMH Moët Hennessy Louis Vuitton, the largest luxury group in the world. Newton sued the company, alleging that she was sexually harassed by a senior level management employee for years. Newton asserted that the company did little to remedy the harassment and tried to intimidate her not to pursue her claims. LVMH moved to compel arbitration, pursuant to an arbitration agreement signed by Newton. Newton argued that in doing so, LVMH ignored NY State Law CPLR § 7515 prohibiting the enforcement of agreements that force victims of sexual harassment to arbitrate their claims. Newton contested LVMH's assertion that CPLR § 7515 was preempted by the FAA, arguing that the sexual harassment claim fell outside the FAA's scope because it was not a contract evidencing a transaction involving interstate commerce.

  The Supreme Court, N.Y. County denied the motion to compel arbitration. The Court found that the agreement could not "be reasonably characterized as a 'contract evidencing a transaction involving commerce,'" particularly insofar as it sought application to sexual harassment or other discrimination-based claims. The express provisions of CLPR § 7515 prohibited and nullified clauses mandating arbitration of such claims. Additionally, LVMH's push for arbitration was inconsistent with its handbook of November 2018, which included a policy that addressed avenues in which victims can lodge complaints, one of which was state court.

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

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