September 2, 2020

ADR Case Update 2020 - 17

Federal Circuit Courts

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

  Interactive Brokers, LLC v. Saroop, et al.
  2020 WL 4668551
  United States Court of Appeals, Fourth Circuit
  August 12, 2020

  Investors' contracts with Interactive Brokers (Broker) included mandatory arbitration and choice of law provisions (CT law). After suffering substantial losses, Investors filed a claim with FINRA's arbitration division, alleging nine causes of action against Broker. The Broker counterclaimed, seeking attorneys' fees and recovery of the debt owed to the firm in the wake of the losses. Neither party requested a reasoned decision and the arbitrators did not provide one when they found for the Investors and imposed damages in the amount of the accounts before the losses. The panel based its decision to dismiss the counterclaim "on [the Broker's] violation of FINRA Rule 4210." The Broker moved to vacate and Investors cross-moved to confirm the award. The court said it was unable to determine which of the nine claims was the source of liability, and asked the arbitrators for an explanation. The arbitrators issued a modified award, but did not explicitly identify which of the causes of action formed the basis of liability. The court vacated the modified award, finding that the arbitrators manifestly disregarded the law. Investors appealed.

  The United States Court of Appeals for the Fourth Circuit vacated and remanded. The Broker argued that the award language "Any and all claims for relief not specifically addressed herein, including punitive damages, are denied" meant that the FINRA Rule was the only plausible cause of action undergirding liability because it was the only theory the arbitrators endorsed. The Court highlighted the distinction between "causes of action" and "claims for relief," noting that the denial of "claims for relief not specifically addressed herein" in the damages and costs section of the award was a rejection of other remedies, not a description of the predicate of liability. Imposing liability based on a contractual obligation to comply with the FINRA rules was an arguable

interpretation of the parties' contracts. CT law allowed for damages in the amount of the Investors' accounts prior to the losses and an award of attorneys' fees in this case.

- **ATTORNEYS' FEES AVAILABLE IN COURT BUT NOT IN ARBITRATION**

  Bay Shore Power Co. v. Oxbow Energy Solutions, LLC
  2020 WL 4696674
  United States Court of Appeals, Sixth Circuit
  August 13, 2020

  Oxbow Energy had a Limestone Supply Agreement (LSA) with Bay Shore Power. After Oxbow began to provide lower quality limestone than contracted, Bay Shore initiated arbitration proceedings pursuant to the dispute resolution procedures in the contract. The arbitration panel ruled in favor of Bay Shore but did not award attorneys' fees, finding that it did not have jurisdiction to do so. After the court confirmed the award, the parties filed cross-motions for summary judgment on attorneys' fees. The court granted Oxbow's motion, finding that the LSA provisions on attorneys' fees contradicted each other and "it was impossible under OH law to harmonize the clauses." Bay Shore appealed.

  The United States Court of Appeals for the Sixth Circuit reversed. Bay Shore asserted that the LSA provision that stripped the panel's jurisdiction to award attorneys' fees indicated that parties were meant to initially bear their own fees, but the prevailing party could then seek reimbursement in court; the other sections of the LSA that referenced attorneys' fees thus permitted recovery through a legal action. The Court agreed, noting that "ultimately, the provisions at issue can either be read together to permit the recovery of attorneys' fees in court but not before an arbitration panel, or they are hopelessly contradictory and unenforceable." Bay Shore presented a reasonable construction of the terms and none of Oxbow's assertions to the contrary rendered Bay Shore's interpretation impossible.

- **CLAIMS WITHIN THE SCOPE OF ARBITRATION AGREEMENT**

  Mey v. DirectTV, LLC
  2020 WL 4660194
  United States Court of Appeals, Fourth Circuit
  August 7, 2020

  Mey sued DirectTV and others, alleging that they violated the Telephone Consumer Protection Act (TCPA) by calling her cell phone to advertise DirectTV products and services even though her number was listed on the National Do Not Call Registry. DirectTV moved to compel arbitration, asserting that the dispute was covered by an arbitration agreement in the contract governing Mey's cell phone service from AT&T, a DirectTV affiliate. The court denied the motion, finding that the dispute did not fall within the scope of the agreement. Mey appealed.

  The United States Court of Appeals for the Fourth Circuit vacated and remanded. When she opened the new line of service for her cell phone number, Mey signed an acknowledgement expressly agreeing to the arbitration provision of the Wireless Customer Agreement, providing that "AT&T and you agree to arbitrate all disputes and claims between us" and "references to AT&T, you, and us include our respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns." Though DirectTV became an AT&T affiliate after Mey signed the agreement, the agreement contained no explicit limitation on the term. In light of the expansive text requiring arbitration of "all disputes and claims," the categories of claims it specifically included ("claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory"), and the parties' instruction to interpret the provisions broadly, the Court concluded that the agreement was susceptible of an interpretation that covered Mey's claims.

- **EXERCISE OF PERSONAL JURISDICTION OVER AND SERVICE OF FOREIGN COMPANY WAS PROPER**

  Compania de Inversiones Mercantiles (CIMSA) v. Grupo Cementos de Chihuahua (GCC)

2020 WL 4743833
United States Court of Appeals, Tenth Circuit
August 17, 2020

Pursuant to their agreement, Bolivian company CIMSA and Mexican company GCC agreed to give each other a right of first refusal if either party decided to sell its shares in SOBOCE, a Bolivian cement company. GCC sold its SOBOCE shares to a third party after taking the position that CIMSA failed to properly exercise its right of first refusal and CIMSA initiated arbitration in Bolivia. The tribunal found in favor of CIMSA and awarded it tens of millions of dollars for GCC's breach. GCC initiated Bolivian and Mexican court actions to challenge the tribunal's decision, and the Bolivian highest court issued arguably contradictory orders, with one seeming to suggest that a trial court's decision granting GCC's request for relief remained in effect and another seeming to reverse the nullification of the award. Invoking the New York Convention, CIMSA filed a confirmation action in the U.S. District Court for the District of Colorado. After encountering difficulties with conventional service of process in Mexico under the Hague Service Convention, CIMSA received permission from the court to serve GCC through its American counsel pursuant to Federal Rule of Civil Procedure 4(f)(3). The court rejected GCC's challenges to personal jurisdiction and GCC's defenses to CIMSA's claim under the Convention, finding that the tribunal's ruling on damages was sufficiently binding to allow confirmation. GCC appealed.

The United States Court of Appeals for the Tenth Circuit affirmed. The lower court properly determined that CIMSA's injury arose out of or related to GCC's nationwide contacts. The parties' meetings in Miami in 2005, 2009, and 2010, and in Houston in 2011 related to CIMSA's understanding that the parties had agreed on terms for CIMSA to exercise the right of first refusal and were relevant to the merits of CIMSA's claim and satisfied the applicable version of the test for proximate cause. The court correctly decided that exercising personal jurisdiction comported with fair play and substantial justice because CIMSA established minimum contacts and GCC did not make a compelling case to the contrary. Substitute service on GCC's U.S. counsel did not run afoul of the Hague Service Convention or Rule 4(f)(3). The Court also affirmed the confirmation of the tribunal's decision. The best reading of the Bolivian proceedings was that the arbitration panel's merit award had not been set aside because the court order supporting the decision favoring GCC lost legal effect after Bolivia's highest court affirmed the initial decision favoring CIMSA. The arbitration tribunal's damages award could be confirmed in the U.S. under the New York Convention even while GCC's Bolivian judicial challenge was pending. Though Bolivian law may permit a judicial challenge to the damages award, that did not detract from the "binding" nature of the arbitration under the Convention.

- **ARBITRATION AGREEMENT EXEMPT FROM FAA**

Rittman, et al. v. Amazon
2020 WL 4814142
United States Court of Appeals, Ninth Circuit
August 19, 2020

Rittman, et al. (plaintiffs) contracted with Amazon Logistics, Inc. (a division of Amazon) to provide delivery services for AmFlex. In the AmFlex program, Amazon contracts with individuals to make "last mile" deliveries of products from Amazon warehouses to the products' destination. AmFlex participants occasionally cross state lines to make deliveries, but most of their deliveries are intrastate. The AmFlex Terms of Service include an arbitration clause and a class waiver. Three of the plaintiffs opted out of arbitration when they signed up for AmFlex and were not subject to the arbitration provision. Lawson did not opt out and went on to make deliveries in the LA area. Plaintiffs filed a proposed collective and class action against Amazon, alleging that Amazon misclassified AmFlex users as independent contractors rather than employees. The court denied Amazon's motion to compel Lawson's claim to arbitration, finding that there was no valid agreement to arbitrate. Amazon appealed.

The United States Court of Appeals for the Ninth Circuit affirmed. The FAA exempts certain contracts from its scope, including employment contracts of "workers engaged in foreign or interstate commerce." Amazon's asserted that its delivery providers were not engaged in interstate commerce because they participated in purely intrastate activities. The plain meaning of the relevant statutory text, case law interpreting the exemption's scope and application, and the construction of similarly statutory language, however, all supported the conclusion that

transportation workers need not cross state lines to be considered engaged in foreign or interstate commerce. AmFlex workers picked up packages that had been distributed to Amazon warehouses, across state lines, and transported them for the last leg of their shipment. The Amazon packages they carried were goods in the stream of interstate commerce until they were delivered. AmFlex delivery providers were thus transportation workers engaged in the movement of interstate commerce and exempt from the FAA's application. Amazon argued that the Court may nevertheless enforce the arbitration agreement pursuant to federal law and Washington state law. The contractual provision for application of the FAA did not preclude the finding that the drivers were exempt. The Court could not sever the clause that applied Washington law to the contract "except for Section 11 of the Agreement" (which was governed by the FAA and applicable federal law) from the governing law provision without impermissibly rewriting the contract. Because there was no law that governed the arbitration provision, there was no valid arbitration agreement.

- **COURT CORRECT TO DENY UBER'S MOTION TO COMPEL ARBITRATION IN ADA CASE**

  Namisnak v. Uber
  2020 WL 4930650
  United States Court of Appeals, Ninth Circuit
  August 24, 2020

  Namisnak and Falls sued Uber under the ADA for not providing wheelchair-accessible ride-sharing options in their hometown of New Orleans. Uber asserted that because Plaintiffs did not have the Uber app and did not use Uber, they could not satisfy the injury-in-fact prong of the Article III standing analysis – and even if they could, they should be equitably estopped from avoiding Uber's arbitration agreement. The district court disagreed and Uber appealed.

  The United States Court of Appeals for the Ninth Circuit affirmed. Plaintiffs satisfied the injury-in-fact requirement for standing under the deterrent effect doctrine, which recognizes that when a plaintiff who is disabled within the meaning of the ADA has actual knowledge of illegal barriers at a public accommodation to which he/she desires access, that plaintiff need not engage in the futile gesture of attempting to gain access in order to show actual injury. Here, the plaintiffs alleged that they: knew that Uber did not offer uberWAV (wheelchair accessible vehicles) in New Orleans; could not use Uber because of this, planned to use the Uber App if it became wheelchair accessible; and feared they would encounter the mobility-related barriers which existed within Uber's app and services. The plaintiffs plausibly alleged causation and redressability: the alleged injuries would not exist absent Uber's actions and the injuries could not be redressed without enjoining Uber to comply with the ADA. Uber asserted that plaintiffs should be equitably estopped from avoiding arbitration pursuant to the Terms and Conditions, arguing that the plaintiffs' standing theory only worked if they were assumed to be like another party who downloaded the Uber App (thus agreeing to the Terms and Conditions) and faced discrimination. Equitable estoppel exists for situations in which a non-signatory is "relying on an agreement for one purpose while disavowing the arbitration clause of the agreement." In this case, however, the plaintiffs did not rely on the terms and conditions – their case arose entirely under the ADA. The ADA claims were fully viable without reference to the Terms and Conditions.

California

- **NON-SIGNATORIES NOT ENTITLED TO ENFORCE ARBITRATION AGREEMENT**

  Jarboe v. Hanlees Auto Group
  2020 WL 4744995
  Court of Appeal, First District, Division 3, California
  August 14, 2020

  Hanlees is a group of auto dealerships in Northern CA that function as separate corporate entities. When Jarboe was hired by DKD of Davis, Inc., (doing business as Hanlees Davis Toyota), he signed two separate agreements, both of which included arbitration provisions. The Application provided that all terms, conditions, and agreements in the Application would be

enforceable by Jarboe and “other such companies/employers,” with no definition of the terms company, companies, employers. The Employment Agreement was between DKD of Davis, as the named “Company” and Jarboe as the named “Employee.” After his termination in 2018, Jarboe filed a putative class action against Hanlees, its 12 affiliated dealerships, and the three individual owners, alleging numerous Labor Code violations and including a PAGA claim. Defendants moved to stay the action and compel arbitration. Except for Jarboe’s individual claims against DKD of Davis, the court denied the motion to compel and denied defendants’ motion to stay the PAGA claim pending completion of the arbitration of Jarboe’s private claims.

The Court of Appeal, First District, Division 3, California affirmed. While the language in the Application, referencing owners, might support the Defendants’ interpretation that Jarboe was required to arbitrate, the Employment Agreement between Jarboe and the Company - defined as DKD of Davis – did not. Defendants could not enforce the Employment Agreement as third party beneficiaries because there was no basis to conclude that Jarboe intended the arbitration provision in the Employment Agreement to apply to all the defendants. Defendants’ assertion that Jarboe should be equitably estopped from proceeding in court against non-signatories to the Employment Agreement also failed. Here, the relationship between Hanlees and its affiliated dealerships was unclear and it was not shown to be integral to support the equitable estoppel application. The court was correct to decline to stay the PAGA action pending the arbitration of Jarboe’s individual claims because a PAGA claim is representative and does not belong to an employee individually.

- **AWARD CONFIRMATION AFFIRMED**

Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC
2020 WL 4760203
Court of Appeal, First District, Division 5, California
August 18, 2020

The Golden State Warriors and the Oakland County Coliseum Authority negotiated an agreement in which the GSW would continue to play in the Oakland arena in exchange for a renovated arena. The parties agreed to an MOU providing that if GSW failed to exercise its renewal options after the initial 20- year term, then they were required to continue to make debt payments until 2027 (Section 5.1). The new license agreement drafted by the Authority, which took provisions of the MOU and “grafted them into the text of the existing license agreement,” provided that ”if the licensee terminates this License Agreement for any reason prior to June 30, 2027,” then the licensee would continue to make payments (Section 6.4). In 2012, GSW opted not to exercise its renewal option and initiated arbitration proceedings seeking a declaration that it was not obliged to make payments if it allowed the agreement to expire rather than terminate it. The arbitrator issued an award in favor of the Authority, determining, based on extrinsic evidence, that the word terminates in the LSW encompassed the decision of GSW not to renew its option, consistent with the MOU. GSW moved to vacate and the Authority moved to confirm. The court confirmed the award and GSW appealed.

The Court of Appeal, First District, Division 5, California affirmed. Because Section 6.4 of the License Agreement was ambiguous, parol evidence was admissible to prove what the parties intended. The Court found that the arbitrator’s interpretation of the contract was factual, not legal, which placed the interpretation beyond judicial review pursuant to section 39.3.11 of the License Agreement providing that either party may file a petition to correct or vacate an award or an application for de novo review “on all questions of law.” Even assuming, however, that the arbitrator addressed a question of law when she interpreted section 6.4 of the License Agreement, the Court found the parties intended this section to include a termination of the agreement upon GSW’s failure to exercise the options to renew. GSW’s argument that the arbitrator and trial court failed to give effect to the License Agreement’s integration clause failed because courts have long recognized that even when a contract is integrated, the meaning of the terms of the contract must still be ascertained. The Court declined to apply the rule that in cases of uncertainty, the language of the contract should be interpreted against the party who caused the uncertainty to exist because that applied in instances where extrinsic evidence was lacking – which was not the case here.

- **TEMPORARY CONSERVATORS LACKED POWER TO BIND PARTIES TO ARBITRATE**

  Holley v. Silverado Senior Living Management
  2020 WL 4558940
  Court of Appeal, Fourth District, Division 3, California
  August 7, 2020

  Diane Holley and her father, James Holley, were temporary conservators of Elizabeth Holley's person, but not her estate. When Elizabeth was admitted to Silverado, Diane and James signed a Resident-Community Arbitration Agreement for Elizabeth. After Elizabeth passed away, Diane and James sued Silverado for elder abuse and neglect, negligence, and wrongful death. Silverado moved to arbitrate pursuant to the arbitration agreement. The court denied the motion, finding that at the time Diane signed the agreement, there was insufficient evidence to demonstrate that she had the authority to bind Elizabeth to the agreement. Silverado appealed.

  The Court of Appeal, Fourth District, Division 3, California affirmed. When Elizabeth and James signed the agreement, they were temporary conservators of Elizabeth's person and thus lacked the power to bind Elizabeth to an agreement like this without her consent or a prior adjudication of her lack of capacity. As temporary conservators, Elizabeth and James were constrained from making long-term decisions without prior court approval. Because there was no substantial evidence that the Elizabeth and James intended to sign the agreement on their own behalf it could not be enforced against their individual claims.

Washington

- **AGREEMENT PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE**

  Burnett v. Pagliacci Pizza
  2020 WL 4876925
  Supreme Court of Washington
  August 20, 2020

  When Burnett was hired as a Pagliacci Pizza delivery driver, he was required to sign an Employee Relationship Agreement (ERA) to begin work. He was also given Pagliacci's "Little Book of Answers" and told to read it at home. The ERA directed employees to learn and comply with the rules outlined in the Little Book, including the Fair and Amicable Internal Resolution Policy (FAIR). When his employment was terminated, Burnett filed a putative class action against Pagliacci, alleging wage and break-related claims. Pagliacci moved to compel arbitration pursuant to the Little Book's mandatory arbitration policy. Burnett objected that the policy was procedurally and substantively unconscionable. The trial court did not reach those arguments, but found no agreement to arbitrate because the Little Book was not incorporated by reference into the ERA. Pagliacci appealed and the Court of Appeals affirmed on the grounds that Pagliacci's arbitration policy was both substantively and procedurally unconscionable.

  The Supreme Court of Washington affirmed. The facts demonstrated that Burnett lacked reasonable choice regarding the arbitration policy, a key factor for finding procedural unconscionability. Essential terms were hidden, and Burnett had no reasonable opportunity to understand the arbitration policy before signing the employment contract. The Court of Appeals correctly held that Pagliacci's two-step mandatory arbitration policy was so one-sided and harsh that it was substantively unconscionable. An employee could not commence arbitration until he or she complied with all of the FAIR steps, including first reporting the matter to a supervisor for review and if that was unsatisfactory, proceeding to conciliation. For terminated employees, the process was a bar to arbitration and suit unless the employee was aware of the claim while still employed. The limitations provision also shortened the time frame for employees to assert claims. An employee needed to build-in time to comply with FAIR before applicable limitations periods expired – but the employee had no control over the time frame. The FAIR policy also contained no exception to review by a supervisor even when the supervisor was the subject of

the complaint. Where unconscionable provisions pervaded an arbitration agreement – as here - severance was inappropriate.

New Jersey

- **EMPLOYEE ASSENTED TO ARBITRATION AGREEMENT**

  Skuse v. Pfizer, et al.
  2020 WL 47660077
  Supreme Court of New Jersey
  August 18, 2020

  Four years after it hired Skuse, Pfizer notified her of a new arbitration policy that would become a condition of her employment. Under the policy, if an employee continued to work for Pfizer for 60 days after receiving a copy of Pfizer's Mutual Arbitration and Class Waiver Agreement (Agreement), that employee would be deemed to have assented to the agreement. Skuse opened emails that linked to the Agreement, completed a training module regarding the arbitration policy, and clicked a box on her computer screen to "acknowledge" her assent to the Agreement as a condition of her continued employment after 60 days. After Pfizer terminated her employment, Skuse sued Pfizer, asserting claims based on the Law Against Discrimination. The court granted Pfizer's motion to compel arbitration and dismiss the complaint. The Appellate Division reversed and Pfizer appealed.

  The Supreme Court of NJ reversed and reinstated. Pfizer's Agreement and its related communications clearly informed Skuse that by continuing to be employed for 60 days, she would waive her right to pursue employment discrimination claims against Pfizer in court and instead be required to submit those claims to arbitration as described in the Agreement. The Agreement and Pfizer's subsequent communications, including emails, an FAQs document, and a module "left no question that Skuse's continued employment would be deemed to constitute her assent." Pfizer's decision to communicate the Agreement and related materials to its employers by email did not warrant invalidation of the Agreement. No principle of NJ contract law barred enforcement of a contract because that contract was communicated by e-mail. The Court agreed with the Appellate Division that Pfizer's characterization of its four slide summary of the Agreement as a training module was not the most accurate word choice to use in informing employees that it had adopted an arbitration policy. Poor word choice, however, did not invalidate the Agreement. Similarly, Pfizer's request that employees "click here to acknowledge" at the end of its electronic dissemination of the arbitration agreement, rather than click here to "agree," did not mean that Skuse did not assent to the agreement's terms.

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