

September 16, 2020

ADR Case Update 2020 - 18

Federal Circuit Courts

- **ARBITRATOR DID NOT EXCEED POWERS**

Axia Netmedia Corporation v. Massachusetts Technology Park Corporation
2020 WL 5104565
United States Court of Appeals, First Circuit
August 31, 2020

Mass Tech Park Corp (MTC), a public instrumentality of the Commonwealth of Massachusetts, contracted with KCST to operate and market its fiber-optic network and secured a Guaranty of KCST's obligations under the contract from KCST's parent company, Axia. After the relationship between MTC and Axia soured, Axia sued MTC over the Guaranty agreement. MTC procured an order compelling arbitration of the dispute. The arbitrator found that MTC had materially breached the underlying contract with KCST and that the Guaranty was void for failure of consideration. Axia sought to confirm the award and MTC sought vacatur or modification. Concluding that the arbitrator had exceeded the scope of his powers, the court vacated the portion of the award that voided the Guaranty. Axia appealed.

The United States Court of Appeals for the First Circuit reversed and remanded. An arbitrator's decision may be vacated when the arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice. That did not happen here. The question of the Guaranty's validity was squarely before the arbitrator as a result of MTC's strategic choices. The dispute resolution provision of the Guaranty gave MTC the power to seek arbitration of disputes with Axia at its sole election. MTC elected to pursue arbitration and sought a declaration in the arbitration that the Guaranty and Network Operator Agreement (NOA) were valid and enforceable contracts not subject to recession nor rendered null and void. It is clear from the text of the award that the arbitrator did not stray outside the scope of the parties' agreement with his decision. The arbitrator concluded that MTC's failure to fulfill its promise to build the network as described in the NOA constituted a material breach of the NOA and that

constituted a failure of consideration for the Guaranty, which rendered the Guaranty void. With its explicit reasoning, the arbitrator's decision drew its essence from the contracts underlying the proceeding; the arbitrator acted within the scope of his authority in rendering it.

- **DECISION THAT RIDESHARE DRIVERS DO NOT FALL WITHIN FAA §1 EXEMPTION NOT CLEARLY ERRONEOUS AS A MATTER OF LAW**

Grice v. Uber
2020 WL 5268941
United States Court of Appeals, Ninth Circuit
September 4, 2020

Uber driver Grice filed a putative class action against Uber, alleging that the company failed to safeguard personal information and mishandled a data security breach in which that information was stolen by online hackers. Uber moved to compel arbitration pursuant to the Technology Services Agreement (TSA) that Grice and other Uber drivers signed. Grice asserted he qualified for the FAA's §1 exemption. The court disagreed and compelled arbitration. Grice petitioned for a writ of mandamus seeking to vacate the district court's referral to arbitration.

The United States Court of Appeals for the Ninth Circuit denied the petition. The court contrasted the nature of Uber's business with that of Amazon and other companies that are engaged in delivering products in the stream of interstate commerce, agreeing that those companies' employees are exempt even if they do not themselves deliver items across state lines. Grice asserted that the court's focus on the fact that he transported passengers as opposed to goods and that he never personally crossed state lines was in tension with caselaw that emphasized the interstate nature of an employer's business as the critical factor in determining whether the exemption applied. That tension was not enough, however, to render the district court's decision clear error as a matter of law, the necessary condition for granting a writ of mandamus. Given the lack of controlling precedent forbidding the result, the Court found that it was not "firmly convinced" that the district court erred.

California

- **ARBITRATION AGREEMENTS IN PREVIOUS CONTRACTS DID NOT APPLY TO PRESENT DISPUTE**

Moritz v. Universal City Studios
2020 WL 5228531
Court of Appeal, Second District, Division 1, California
September 2, 2020

Moritz and Moritz Inc. worked for Universal as producers for the "The Fast and the Furious" film and several sequels. Moritz asserted that after he and Universal orally agreed to a producer deal for a spin-off of the Fast & Furious franchise – "Fast & Furious Presents: Hobbs & Shaw" - Universal failed to honor the terms of the oral agreement. Moritz sued for breach of contract, breach of implied contract, and promissory fraud. Universal moved to compel arbitration based on arbitration agreements in written producer contracts between Moritz and Universal for the Fast & Furious franchise. The court held the arbitration agreements did not apply to the Hobbs & Shaw dispute and denied the motion. Universal appealed.

The Court of Appeal, Second District, Division 1, California affirmed. Arbitration of a claim is appropriate only where the court is satisfied that the parties agreed to arbitrate that dispute. Here, the parties agreed to arbitrate any controversy, claim, or dispute arising out of or relating to the Fast & Furious 6 and 7 agreements. The Hobbs & Shaw dispute neither arose from nor related to those agreements. Although Moritz mentioned the agreements in his complaint when explaining the background of Hobbs & Shaw, the mere mention of a contract did not mean the dispute related to it in a substantive sense. Universal argued that the provisions applied because the delegation clauses provided that any controversy, claim, or dispute arising out of or relating to this agreement to arbitrate would be arbitrated. The delegation clauses of earlier agreements,

however, did not require the arbitrator to determine arbitrability of unrelated disputes between the parties.

- **ARBITRATION BINDING; NO EVIDENCE OF ARBITRATOR BIAS**

Rivera v. Shivers, et al.
2020 WL 5104035
Court of Appeal, Fourth District, Division 3, California
August 31, 2020

Rivera filed an unlawful detainer against former tenants, the Shivers, alleging non-payment of rent and property damage. At a scheduled status conference, counsel informed the court that the parties stipulated to arbitration before a retired judge, Honorable Dennis Choate. Judge Choate found for the Shivers, who filed a petition to confirm. Rivera opposed the petition on the grounds that the arbitrator was biased. The court denied the petition, noting that the stipulation for arbitration was entered into by counsel on the grounds that the arbitration was non-binding. The Shivers appealed.

The Court of Appeal, Fourth District, Division 3, California reversed and remanded with instructions. The question of whether arbitration before Judge Choate was judicial or contractual in nature was critical given that contractual arbitration is generally regarded as binding and judicial arbitration is not. Though the stipulation did not indicate the type of arbitration contemplated, there were clues that it was contractual: the stipulation referenced Judge Choate, rather than a judicial arbitrator; the parties told the court that the arbitration was binding; upon completion of the arbitration, the Judge did not file his order with the court, which would have been necessary to trigger Rivera's window to request trial de novo were it a judicial arbitration. Rivera opposed confirmation on the grounds that the Judge was biased, not on the basis that the arbitration was judicial. Moreover, the trial court was unable to order judicial arbitration because unlawful detainer cases such as this are exempt from the procedure. The stipulation signed by counsel was sufficient to show an arbitration agreement. A stipulation of the attorneys will be presumed to have been authorized by the client unless the opposing side and the court are aware that the client has not consented to the stipulation. The parties' conduct was consonant with a binding arbitration; thus, the failure to obtain the clients' signatures on the stipulation was harmless. Rivera's motion to vacate due to arbitrator bias was not duly served and filed, and the court had no authority to hear it. Even if it did, however, the request to vacate lacked merit because the only evidence of bias that Rivera submitted was a declaration in which his attorney said that Choate told counsel that Shivers' counsel's father had been a mentor to him. Rivera introduced no evidence that Choate was aware counsel was the late judge's son at the time he made his required disclosures prior to the arbitration and did not submit evidence that he moved to disqualify Judge Choate.

Washington

- **NO MID-ARBITRATION JUDICIAL RELIEF FROM ARBITRATION PROCEEDINGS**

Burgess v. Lithia Motors
2020 WL 5241273
Supreme Court of Washington
September 3, 2020

Burgess filed suit against her employer, Lithia Motors, alleging claims of discrimination, harassment, and wrongful termination. Lithia requested that the parties move to arbitration per the terms of an arbitration clause that Burgess signed as a condition to employment. Neither party challenged the validity of the clause. During arbitration, Burgess filed a motion with the arbitrator to compel Lithia's answers to the first set of discovery, arguing that the responses were untimely, inadequate, and made in bad faith. She also argued that Lithia waived its right to a privilege log. The arbitrator denied the motions, finding that Lithia, though untimely, had provided answers to the first set of interrogatories and did not waive its right to seek a protective order. Burgess filed a motion in superior court to vacate the arbitrator's order denying discovery,

terminate arbitration, and issue a case scheduling order. The court denied the motion for lack of jurisdiction but granted the request to certify the matter for review around the following question: does the superior court have jurisdiction to address an employee's contractual breach argument based upon acts alleged in the course of binding arbitration or is the superior court's jurisdiction in a contractual arbitration limited to issues occurring before and after – but not during – the proceeding?

The Supreme Court of Washington affirmed and remanded. In considering the question of whether and to what extent the FAA authorized a court to review a challenge to the arbitration agreement once claims were submitted to arbitration, the Court found that this case fell squarely within the circumstances where judicial review was precluded under the FAA. Burgess and Lithia were engaged in ongoing litigation. Neither party challenged the validity of the arbitration agreement beforehand and the final award had not yet been issued. The Court could not intervene and rescind the arbitration agreement when it was between those two stages.

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

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