September 30, 2020

ADR Case Update 2020 - 19

Federal Circuit Courts

- **NO EVIDENT PARTIALITY**

  OOGC America v. Chesapeake Explorations
  2020 WL 5511806
  United States Court of Appeals, Fifth Circuit
  September 14, 2020

  When Chesapeake sold OOGC partial interest in oil and gas properties, the parties executed Joint Operating Agreements (JOAs) that required Chesapeake to compensate work performed by affiliates "at competitive rates that do not exceed the prevailing rates in the area." The Agreements included an arbitration clause providing that an arbitrator must not have performed material work for affiliates within the preceding five years. The parties proceeded to arbitration after OOGC asserted that Chesapeake was overbilling its affiliates. Chesapeake chose Patrick Long to sit on the panel. The panel found that FTS – a company whose rates OOGC challenged – was not an affiliate and concluded that Chesapeake did not overbill the joint account for work performed by affiliates. OOGC filed an action to vacate the panel's awards, complaining that Long failed to disclose his relationship with the chairman of FTS and others and that his awards demonstrated evident partiality. The court vacated the awards with an "Opinion on Arbitration Corruption," saying that Long lied and demonstrated deceit and corruption. Long's Emergency Motion to Intervene was denied by the court. Chesapeake and Long appealed.

  The United States Court of Appeals for the Fifth Circuit vacated and remanded. To meet the test for evident partiality, an arbitrator's non-disclosure must involve a "reasonable impression of bias" stemming from a "significant compromising connection to the parties." The standard requires a concrete – not speculative – impression of bias. In the context of the panel's overall decision-making, the theory of Long's bias in favor of Chesapeake was more speculative and the conclusion that FTS was not an affiliate militated against OOGC's theory that Long's connection to FTS constituted a significant compromising connection to the parties. OOGC's argument that

Long exceeded his powers by violating the requirement that he be neutral because he had represented FTS was a gripe about the arbitrator's qualifications to serve, not a failure to select an arbitrator according to contract terms. The court lacked jurisdiction to hear Long's motion to intervene because "if an appeal is taken from a judgment which determines the entire action, the district court loses power" to take further action. Further, because the Court was vacating the lower court's decision, Long's motion to intervene on appeal was moot.

- **WHERE CBA SILENT, ARBITRABILITY FOR COURT TO DECIDE**

  SEIU Local v. Los Robles Regional Medical Center
  2020 WL 5583677
  United States Court of Appeals, Ninth Circuit
  September 18, 2020

  SEIU, a union representing registered nurses, sought to compel arbitration against Los Robles Medical Center, asserting that the hospital placed certain types of patients with nurses who were not trained to care for them. The court granted SEIU's motion to compel without reaching the question of whether the grievance was arbitrable. Los Robles appealed.

  The United States Court of Appeals for the Ninth Circuit reversed and remanded. In *First Options*, the Supreme Court established that a court determines questions of arbitrability in cases with broad arbitration clauses that are silent on the question. In *Desert Palace*, however, this Court said that labor cases are different and the arbitrator should decide arbitrability as long as the agreement includes a broad arbitration clause. In light of *Granite Rock*, where the Supreme Court rejected the notion that labor arbitration disputes should be analyzed differently than commercial arbitration disputes, the Court held that *Desert Palace* was no longer good law. In this case, the CBA was silent as to the arbitrator's authority to determine their own jurisdiction. Without clear and unmistakable evidence, the question of whether the parties agreed to submit this dispute to arbitration was an issue for judicial determination.

- **FEDERAL JURISDICTION OVER PETITION TO VACATE**

  Badgerow v. Walters, et al.
  2020 WL 5524837
  United States Court of Appeals, Fifth Circuit
  September 15, 2020

  Badgerow worked for REJ, a LA corporation whose principals – including Walters – were independent franchise advisors for Ameriprise. Badgerow initiated a FINRA arbitration proceeding against the principals, alleging tortious interference of contract and violations of the LA whistleblower law. After Ameriprise moved to compel arbitration in a separate federal lawsuit, Badgerow added a declaratory judgment against Ameriprise, seeking to hold it jointly liable for the alleged discriminatory conduct of REJ and principals. The arbitration panel dismissed Badgerow's claims and Badgerow brought an action in state court to vacate, naming only the principals as defendants. The principals removed the action and Badgerow moved to remand for lack of federal subject-matter jurisdiction. The principals moved to confirm. Finding that it had federal subject matter jurisdiction, the court denied vacatur, and confirmed the arbitration panel's dismissal. Badgerow appealed the denial of her motion to remand.

  The United States Court of Appeals for the Fifth Circuit affirmed. Applying the "look through" analysis, the Court held that the district court correctly found that: Badgerow's declaratory judgment claim against Ameriprise in the FINRA arbitration was a federal law claim; all of her claims in the FINRA arbitration arose from the same common nucleus of operative facts; and under the principle of supplemental jurisdiction, federal jurisdiction obtained over Badgerow's state law claims. Because there was federal jurisdiction over the removed petition to vacate, denial of remand back to state court was proper.

- **MOTION TO DISMISS UPHELD IN FAVOR OF ARBITRATION OF INDIVIDUAL CLAIMS**

  Laver v. Credit Suisse Securities
  2020 WL 5583673

United States Court of Appeals, Ninth Circuit
September 18, 2020

Laver worked as a financial advisor for CSSU's Private Banking Division. After his division was shut down, Laver filed a putative class action against CSSU, alleging breach of contract and other state law claims. CSSU moved to dismiss in favor of arbitration, citing the arbitration clause and general class waiver set forth in its Employee Dispute Resolution Program (EDRP). Laver argued that FINRA Rule 13204(a)(4), dealing with class action, barred CSSU, a FINRA member, from compelling arbitration of his claims. The court granted the motion to dismiss in favor of arbitration and Laver appealed.

The United States Court of Appeals for the Ninth Circuit affirmed. The Court rejected the argument that Rule 13204 invalidated the EDRP's class waiver. A class action waiver is a promise to forego a procedural right to pursue class claims. By contrast, an agreement to arbitrate is a promise to have a dispute heard in some forum other than a court. Rule 13204 restricted the latter but not the former. Although the Rule, on its face, might not expressly interfere with arbitration, the Supreme Court in *Concepcion* made clear that a rule not expressly targeting arbitration – like a rule restricting the availability of class waivers – could interfere with arbitration in a manner that impermissibly conflicted with the FAA. Laver's reading of Rule 13204 to bar class waivers would interfere with arbitration to an even greater extent by moving the resolution of class claims out of arbitration entirely. Because the class waiver survived, Laver relinquished his right to bring class claims in any forum, and because he was left with only individual claims, Rule 13204(a)(4)'s prohibition on enforcing arbitration agreements directed at putative or certified class claims did not apply.

- **ALLEGATION OF FRAUD IN THE EXECUTION OF THE CONTAINER CONTRACT PUT ARBITRATION AGREEMENT IN ISSUE**

MZM Construction Company v. New Jersey Building Laborers Statewide Benefit Funds
2020 WL 5509703
United States Court of Appeals, Third Circuit
September 14, 2020

MZM hired workers from a local labor union for a Newark Airport project. Soon after, MZM's president and sole shareholder signed a one-page short form agreement (SFA) with the union. The SFA stated that the parties agreed to be bound by the conditions of the Building, Site, and Construction Agreements (CBAs) from 1999 and 2002. Under the 2002 CBA, employers were required to contribute to the NJ Statewide Benefit Funds. After an audit, the Funds determined that MZM owed money. When MZM questioned the basis for the alleged liability, the Funds produced the SFA and the unsigned 2002 CBA. The 2002 CBA contained an arbitration clause providing that "The arbitrator shall have the authority to decide whether an Agreement exists, where that is in dispute." When the Funds unilaterally scheduled arbitration, MZM's president claimed that she never intended to execute an SFA incorporating statewide CBAs with an arbitration provision but rather intended to execute a single-project agreement with no mention of arbitration. MZM sought a declaratory judgment that: it was not a signatory to any CBA; had no obligation to arbitrate under any CBA; and was not liable to the Funds under any CBA. The court enjoined the arbitration pending resolution of factual issues. The Funds appealed.

The United States Court of Appeals for the Third Circuit affirmed. The threshold question was whether the District Court had the power to resolve questions about the formation or existence of a contract when the putative contract included a provision delegating to the arbitrator the authority to decide whether an Agreement existed. Expressing its belief that section 4 of the FAA – mandating that the court be satisfied that an arbitration agreement existed – tilted the scale in favor of a judicial forum when a party resisted arbitration on grounds that it never agreed to arbitrate at all, the Court held that unless the parties clearly and unmistakably agreed to arbitrate questions of contract formation in a contract whose formation was not in issue, those gateway questions were for the courts to decide. In stating a claim of fraud in the execution of the container contract, MZM put the formation of the delegation provision in issue, which triggered the District Court's power to adjudicate that claim.

New Jersey

- **OMISSION OF ARBITRATOR/ARBITRAL ORGANIZATION OR METHOD TO CHOOSE DID NOT PRECLUDE ENFORCEMENT OF AGREEMENT**

  Flanzman v. JC USA
  2020 WL 5491899
  Supreme Court of New Jersey
  September 11, 2020

  After Jenny Craig (JC) reduced her hours from 35 to 3, Flanzman sued, asserting claims for age discrimination, constructive discharge, discriminatory discharge, and harassment. JC moved to dismiss the complaint and compel arbitration pursuant to the parties' agreement. The court granted the motion and Flanzman appealed. The Appellate Division reversed and remanded to the lower court for further proceedings. JC filed a petition for certification.

  The Supreme Court of New Jersey reversed. Under federal law, an arbitration clause cannot be invalidated by state law defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. When it invalidated the Agreement, the Appellate Division did just that, providing that the absence of a designation of an arbitral institution such as AAA or JAMS, or description of the general process for selecting an arbitration mechanism or setting meant that the parties did not understand their rights under the arbitration agreement. This principle was not among the grounds as exist at law or in equity for the revocation of any contract. To the contrary, the NJAA made clear that its default provision for the selection of an arbitrator would operate in the absence of contractual terms prescribing such procedures. 1The NJAA reflected the Legislature's intent that the parties' omission of an arbitrator or arbitral organization, or their failure to set forth the method by which they chose an arbitrator, would not preclude the enforcement of their agreement.

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

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