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ADR Case Update 2020 - 22

Federal Circuit Courts

- **UNIVERSITY BARRED FROM SEEKING ARBITRATION OF CLAIMS FOR BREACH OF CONTRACT AND MISREPRESENTATION**

  Young v. Grand Canyon University
  2020 WL 6707528
  United States Court of Appeals, Eleventh Circuit
  November 16, 2020

  Doctoral student Donrich Young sued Grand Canyon University for breach of contract, intentional misrepresentation, and violations of the AZ Consumer Fraud Act, asserting that GCU misled students about requirements to complete a Ph.D. The court granted GCU's motion to compel arbitration under its arbitration agreement with Young. Young appealed.

  The United States Court of Appeals for the Eleventh Circuit reversed and remanded. The Court considered the meaning of a federal regulation prohibiting a college or university that accepts federal student-loan money from enforcing pre-dispute arbitration agreements and class-action waivers when a student brings what the regulation calls a borrower defense claim. The regulation defines a borrower defense claim to mean "a claim that is or could be asserted as a borrower defense as defined in" 34 CFR §685.222(a)(5), "including a claim other than one based on §682.222(c) or (d)." At issue was whether "including a claim other than" meant to include or exclude claims based on §682.222(c) or (d), which referred to claims alleging breach of contract and substantial representation. A plain-text reading of the regulation showed that borrower defense claims included breach of contract and misrepresentation claims. GCU was thus prohibited from enforcing its pre-dispute arbitration agreement for Young's claims.

Washington State

- **TERMS OF AGREEMENT REQUIRE PARTIES TO ARBITRATE DISPUTES**

  Healy v. Seattle Rugby, LLC
  No. 79658-5-1
  Court of Appeals, Division 1, State of Washington
  November 23, 2020

  Seattle Rugby CEO Adrian Balfour hired Anthony Healy as head coach of the Seattle Seawolves, a U.S. Major League Rugby team. After Healy was unable to obtain a necessary visa and his employment was terminated, he sued Seattle Rugby. Seattle Rugby's motion for arbitration was granted, and Healy sought discretionary review of the order. The Court of Appeals, Division 1, State of Washington granted discretionary review on the issue of whether the court erred by compelling arbitration in New York in light of an apparent conflict between the arbitration and governing clauses of the agreement.

  The Court of Appeals, Division 1, State of Washington affirmed as modified. The agreement's arbitration clause provided that disputes would be decided by one arbitrator, under AAA rules, and in NY. The governing clause of the contract provided that Washington law would govern, and that jurisdiction and venue would be in Washington. Healy's argument that the use of the word "litigated" in the governing law provision evidenced a conflict as to who the agreement designated as a decision-maker mistakenly attributed a narrow meaning to the word "litigated". Litigation is not limited to the designation of only courtroom proceedings; many jurisdictions recognize that the so-called litigation privilege includes statements made in arbitration. There is no conflict between the words litigation and arbitration. While one is broader than the other, here the narrowest meaning controls, reflecting the parties' agreement that an arbitrator would decide disputes. Given that venue is not a gateway issue, it was a dispute to be resolved by the arbitrator, not the court.

Delaware

- **SECOND ARBITRATION WAS COLLATERAL ATTACK ON FIRST AWARD**

  Gulf LNG Energy, LLC v Eni USA Gas Marketing LLC
  2020 WL 6737438
  Supreme Court of Delaware
  November 17, 2020

  Gulf and Eni entered into a Terminal Use Agreement under which Eni would pay Gulf for using the Pascagoula Facility to receive, store, re-gasify, and deliver LNG to downstream businesses. The TUA included an arbitration clause. Eni filed for arbitration, asserting that the TUA's purpose was frustrated and terminated due to unforeseeable changes in the U.S. natural gas market, making importing LNG economically unsustainable. The arbitration panel declared the TUA terminated and ordered Eni to pay Gulf $400 million in compensation for their partial performance of the TUA. The panel also determined that Eni's breach of contract claim deserved no further consideration in light of their finding. After the court confirmed the award, Eni filed a second notice of arbitration, seeking 1) declaratory relief that Gulf breached the TUA; 2) damages and restitution for Gulf's breaches of contract; and 3) declaratory relief, damages, and restitution for Gulf's alleged negligent misrepresentations in the first arbitration. The court enjoined arbitration of Eni's negligent misrepresentation claims; it declined to enjoin Eni's breach of contract claims because the tribunal never reached the claim's merits for breach of contract and did not grant relief based on that claim. Gulf appealed, and Eni cross-appealed.

  The Supreme Court of Delaware affirmed in part, reversed in part, and remanded with instructions. The lower court had jurisdiction to enjoin Eni from pursuing the second arbitration. The parties agreed to a broad arbitration clause; they also agreed that the arbitral tribunal's award would be final and binding and waived the right to appeal or challenge the decision except with respect to the limited grounds for modification or non-enforcement under the FAA. Eni should have been enjoined from pursuing all claims in the second arbitration. The focus was not

the nature of the claims in the second arbitration, but whether Eni sought through the second arbitration to, in effect, appeal the final award outside the FAA's review process. The Court found that Eni's breach of contract claim aimed to modify the award by revisiting the core issue in the first arbitration – was the contract terminated, and, if so, what was the appropriate remedy?

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

Contact Information
David Brandon
Program Manager
JAMS Institute
415-774-2648
DBrandon@jamsadr.com