May 16, 2018

**ADR Case Update 2018 - 10**

## Federal Circuit Courts

- **ARBITRABILITY A THRESHOLD QUESTION TO BE DECIDED BEFORE CLASS CERTIFICATION**

  *Edwards v. DoorDash Inc.*
  2018 WL 1954090
  United States Court of Appeals, Fifth Circuit
  April 25, 2018

  DoorDash is a CA food delivery company that employs independent contractors called Dashers. Dasher Edwards brought suit against DoorDash under the Fair Labor Standards Act (FLSA) and sought conditional certification for collective action. DoorDash filed an emergency motion to stay the conditional certification and moved to compel arbitration pursuant to the arbitration clause in its independent contractor agreement (ICA) with Edwards. The magistrate judge recommended that Edwards be compelled to arbitrate. The court agreed and Edwards appealed.

  The United States Court of Appeals for the Fifth Circuit affirmed. Edwards contended that the court erred in determining that arbitrability was a threshold question to be decided before class certification. The Court reiterated a previous holding that the question of arbitrability is to be addressed at the outset, consistent with the national policy favoring arbitration. Edwards also contended that the arbitration agreement was unenforceable because DoorDash never signed it, never delivered it, and retained the ability to unilaterally modify it. Under CA law, "(a)n arbitration agreement can be enforced against the signing party regardless of whether the party seeking enforcement has also signed, providing that the party seeking enforcement has performed or offered to do so." DoorDash performed its obligations under the ICA. Edwards provided no authority that required both parties to retain a copy of the arbitration agreement. The power to unilaterally modify the arbitration agreement did not render the agreement unenforceable: CA courts have held that a binding arbitration agreement exists even when an employer retains the right to modify. Edwards' contention that the agreement was unconscionable was one for the arbitrator. As for the delegation clause, the agreement incorporated AAA rules in the arbitration agreement, something that the Court had previously held constituted clear evidence that the parties agreed to arbitrate arbitrability. The Court did not consider Edwards' argument that the ICA was unenforceable, since the arbitration agreement was severable.

- **DISPUTE RESOLUTION PROVISIONS INCORPORATED BY REFERENCE ARE APPLICABLE**

  *Axia NetMedia Corporation v. Massachusetts Technology Park Corporation (MTC)*
  2018 WL 1940220
  United States Court of Appeals, First Circuit
  April 25, 2018

  Massachusetts Technology Park Corporation (MTC) entered into two contracts to bring broadband to western and north central MA. Under the Network Operator Agreement (NOA), KCST agreed to operate the network built by MTC, committing to pay all costs of operating the network. Under the second contract, Axia NetMedia Corp (Axia) guaranteed KCST's performance. Both contracts contained arbitration clauses. KCST's contract also provided "The Parties agree to continue performing their respective obligations under the Agreement while (a) dispute is being resolved." Axia's contract incorporated by reference "all…provisions relating to dispute resolution or arbitration contained in the NOA." When KCST declared bankruptcy, Axia preemptively sought a declaratory judgment that MTC had breached the NOA by failing to build sufficient Community Anchor Institutions (CAIs) to connect the network, and consequently, Axia had no responsibility under the Guaranty. MTC demanded arbitration and moved for a TRO and preliminary injunction requiring Axia as a guarantor to perform KCST's obligations. The court denied the motion to compel and granted the motion for a preliminary injunction. Axia appealed.

  The United States Court of Appeals for the First Circuit affirmed (as modified) and remanded. One prong of the test for a preliminary injunction is likelihood of success on the merits. The Court found that the district court focused on the proper question of whether MTC was likely to succeed in its argument that the Guaranty imposed an obligation on Axia to continue performing during the dispute resolution process and did not err when it answered this in the affirmative. The Court then dispensed with Axia's additional arguments: that only KCST had FCC authorization to operate the network; that the court erred in ordering Axia to hand over network passwords to MTC; that the preliminary injunction order was not specific enough; and that the order ran afoul of the automatic bankruptcy stay's prohibition on actions that exercise control over property of the estate, which was mooted when the bankruptcy court lifted the stay. The Court remanded to the district court to amend the order and clarify that Axia's obligations would terminate once it properly expended $4 million, in keeping with the Guaranty provision capping liability at $4 million.

- **NO PREVAILING PARTY ENTITLED TO FEES WHEN CLAIMS ORDERED TO ARBITRATION**

  *Cortes-Ramos v. Sony*
  2018 WL 2077275
  United States Court of Appeals, First Circuit
  May 4, 2018

  In 2014, Cortes-Ramos filed a complaint against Sony in connection with a songwriting contest that Sony had co-sponsored, alleging various claims under the Copyright Act. The court dismissed the claims on the grounds that they were subject to mandatory arbitration – and this Court affirmed. Sony then moved for attorneys' fees pursuant to §505 of the Copyright Act. The court granted the motion and awarded Sony $47,601 in fees. Cortes-Ramos appealed.

  The United States Court of Appeals for the First Circuit reversed. A prevailing party may be allowed attorneys' fees as part of the costs. The touchstone of a prevailing party inquiry is whether there was a material alteration of the legal relationship of the parties. Here, there was no alteration. When this court affirmed the lower court's order dismissing the claims, they made clear that Cortes' claims were not "extinguished" – they were "merely left to the arbitrator." The Copyright Act reflects no congressional policy favoring or disfavoring arbitration of claims – thus there was no material alteration of the legal relationship of the parties in a manner which Congress sought to promote when it enacted §505 of the Act.

- **NO JURISDICTION TO RESOLVE CLAIM OF BREACH OF CONTRACT TO ARBITRATE**

  *Webb v. FINRA*
  2018 WL 2111883

United States Court of Appeals, Seventh Circuit
May 8, 2018

After brokers Webb and Beversdorf (Webb) were fired by their employer, Jefferies & Co., they challenged their termination and, per their employment contracts with Jefferies, filed their claims with FINRA's arbitration forum. The arbitration proceeded for over two years and Webb withdrew the claim before a final decision was issued. Subsequently, Webb sued FINRA, alleging that FINRA breached its contract to arbitrate their dispute. FINRA removed the case to federal court, where it moved to dismiss on multiple grounds. The court dismissed the case on the basis of arbitral immunity and Webb appealed.

The United States Court of Appeals for the Seventh Circuit vacated and remanded. The Court considered the threshold question of whether it had the authority to resolve the dispute and determined it did not due to lack of diversity jurisdiction or federal question jurisdiction. Webb (from IL) and FINRA (principal place of business in DE) met the diversity of citizenship requirement, but the amount in controversy did not meet the requirement of $75,000. No federal question was raised in the suit: the question was whether FINRA breached its arbitration agreement, a state-law contract claim. The case was remanded to district court with instructions to remand to state court.

## California

- **DELEGATION CLAUSE AND ARBITRATION AGREEMENT UNENFORCEABLE**

*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.*
2018 WL 2054580
Court of Appeal, Fourth Circuit, Division 1, California
May 3, 2018

In 2012, Nielsen Contracting (Nielsen) signed a "Request to Bind" with Applied Underwriters, Inc., under which it was issued a guaranteed-cost workers' compensation policy by California Insurance Company, one of Applied's subsidiaries. The Request to Bind required Nielsen to sign a Reinsurance Participation Agreement (RPA) with one of Applied's subsidiaries, AUCRA. The RPA modified many of the CIC policy terms, and added an arbitration provision. When Nielsen sued Applied and other defendants for fraudulently providing workers' compensation policies that were illegal and contained unconscionable clauses, defendants moved to compel arbitration based on the RPA clause. The court denied the motion and defendants appealed, asserting that the court erred in deciding whether the delegation clause and the arbitration agreement were enforceable.

The Court of Appeal, Fourth Circuit, Division 1, California affirmed. California courts have recognized that a court is the appropriate entity to resolve challenges to a delegation clause nested in an arbitration clause when a specific contract challenge is made to the delegation clause. Defendants argued that Nielsen's challenge to the enforceability of the delegation clause was not adequate to require judicial resolution of the challenge. This was unsupported. Nielsen expressly raised contract challenges to the delegation clause: that the clause was unenforceable because it constituted a material change to CIC's filed insurance policy and the RPA's delegation clause was a collateral agreement that should have been filed with the Insurance Commissioner pursuant to Insurance Code section 11658 and title 10 of the California Code of Regulations section 2268 (which require that Workers' Compensation policies be filed with the Insurance Commissioner and the Workers Comp Insurance Rating Bureau.) The court properly found that the delegation clause and arbitration provision were void and unenforceable. The RPA superseded the CIC and the arbitration clause substantially modified the CIC's provisions. "Under the plain language of section 11658 and Regulations section 2268, defendants were required to file the delegation clause and the arbitration provision with the Insurance Commissioner because these provisions were collateral side agreements that materially modified the CIC policies." They were not filed, and were, therefore, unenforceable.

- **PLAINTIFFS' FINANCIAL CIRCUMSTANCES RELEVANT TO WHETHER THEY CAN CONTINUE IN ARBITRATION**

  *Weiler v. Marcus & Millichap Real Estate Investment Services, Inc.*
  2018 WL 2011048
  Court of Appeal, Fourth District, Division 3, California
  April 30, 2018

  Rae Weiler (Weiler) and her husband were quite wealthy when they contracted with the defendants to represent them in exchanging two of their properties for a commercial property in TX. Weiler lost millions on the TX property and sued the defendants for breach of fiduciary duty, negligence, negligent misrepresentation, and elder abuse. Weiler and the defendants proceeded to arbitration, pursuant to the arbitration clauses in the contracts. After three years of arbitration (and still going!), Weiler informed the arbitrators that her financial status had changed and she could no longer afford to pay 50% of the arbitration costs. Relying on *Roldan v. Callahan & Blaine* ( 219 Cal. App. 4th 87), she asked the arbitrators to give the defendants two options: continue with the arbitration and pay 100% of the costs or have the matter tried in superior court. The arbitrators ordered Weiler to ask the superior court to determine whether *Roldan* applied. Weiler did and the defendants moved for summary judgment, which the court granted. Weiler appealed.

  The Court of Appeal, Fourth District, Division 3, California reversed and remanded. The Court found this case similar to *Roldan*, where a group of elderly individuals sued the lawyers who had represented them in litigation concerning toxic mold. After beginning the arbitration, the plaintiffs were declared indigent by the court. This Court found that presenting defendants with the option to pay 100% of the costs or proceed to superior court would allow the plaintiffs an affordable forum to resolve their claims without stripping the defendants of their ability to stay out of court. From a public policy standpoint, this made sense since defendants should not be permitted to avoid potential liability by making arbitration so expensive that the plaintiff gives up. The Court also emphasized that this case was not about unconscionability, but about a party's ability to participate in the arbitral forum despite changing financial circumstances. The Court remanded with directions to deny the defendants' motion for summary judgment and determine if there was sufficient evidence to show that Weiler was unable to afford arbitration.

- **ARBITRATION AWARD PROCURED BY UNDUE MEANS; VACATED**

  *Baker Marquart LLP v. Kantor*
  2018 WL 1940490
  Court of Appeal, Second District, Division 2, California
  April 25, 2018

  Baker Marquart LLP (Baker) successfully represented James Kantor on a contingency basis in litigation. At the end of the case, Kantor filed a demand for fee arbitration per the contingency fee agreement. In his arbitration brief, Kantor asserted that Baker charged him an incorrect fee because it did not complete two of the nine tasks on which an increase in the contingency fee (from 30% to 35%) was conditioned. Prior to the arbitration, Kantor submitted to the 3-person arbitration panel a confidential arbitration brief that it did not provide to Baker. The arbitration panel, relying on the claims in the confidential brief, ruled in favor of Kantor and awarded him a refund of some of the fees he had paid to Baker. Baker moved to vacate, arguing that the award was procured by "corruption, fraud, or other undue means" since the confidential brief was an improper ex parte communication to which Baker had no opportunity to respond. The court denied Baker's motion and confirmed the award. Baker appealed.

  The Court of Appeal, Second District, Division 2, California reversed and remanded. Baker was not aware of the new claims raised by Kantor until they were referenced in the arbitration hearing. When Baker objected, the panel informed him that the claims were in a confidential brief that he would not be allowed to review. While the merits of an arbitrator's decision are not typically subject to judicial review, there are statutory exceptions to the no review rule. Code of Civil Procedure 1286.2 requires a court to vacate an arbitration award if the court determines the award was procured by "corruption, fraud, or other undue means." The Court found undue means applicable here: "An ex parte communication between a party's representative and a neutral arbitrator while the outcome of the case is still under consideration undermines the fairness and

integrity of the arbitration process." The confidential ex parte communication in this matter left Baker unable to respond to new demands, rendering the arbitration fundamentally unfair.

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