July 31, 2018

ADR Case Update 2018 - 15

Federal Circuit Courts

- **PARTY NOT ENTITLED TO WRIT OF ATTACHMENT IN AID OF ARBITRATION**

  Stemcor v. CIA Siderurgica , Daewoo v. Thyssenkrupp Mannex v. America Metals Trading
  2018 WL 3371830
  United States Court of Appeals, Fifth Circuit
  July 11, 2018

  Daewoo, a South Korean trading company, contracted with America Metals Trading (AMT) to purchase pig iron; the contracts contained arbitration clauses. Thyssenkrupp Mannex (TKM), a German company, had similar contracts. AMT failed to fulfill its contracts with Daewoo and TKM. Daewoo sued AMT in the Eastern District of Louisiana, seeking attachment of AMT's pig iron onboard cargo ship Kasashio, in connection with a future arbitration against AMT. Daewoo invoked maritime attachment and the Louisiana non-resident attachment. TKM sued in state court, seeking a writ of attachment of the same pig iron on the Kasashio and moving to intervene in Daewoo's suit. TKM also sought a federal writ of attachment over the pig iron, which was granted and served on the cargo. The motion of all parties to sell the pig iron was granted. The court granted TKM's motion to vacate Daewoo's attachment and ordered that the proceeds from the sale be transferred to state court. Daewoo moved to stay the order, arguing that if its appeal was successful it would be difficult to retrieve the funds from state court. The court denied the stay because the motion was filed after the court had already sent the funds to state court. Daewoo appealed.

  The United States Court of Appeals for the Fifth Circuit affirmed. The parties disagreed on whether the non-resident statute, which allows attachments in any action for a money judgment, allowed for attachment in aid of arbitration. While this suit to compel arbitration was not directly an action for money judgment, Article 3502 of the Louisiana Code of Civil Procedure allows for attachments in aid of arbitration so long as the party seeking the attachment complies with the 3502 requirements and shows good cause for a pre-petition attachment. Because attachment is a harsh remedy, Louisiana statutes providing for a writ must be "strictly and literally complied with." Daewoo failed to strictly and literally comply and thus was not entitled to a writ of attachment in aid of arbitration.

- **DIFFERENTIATION IN STANDARD FOR DETERMINING EVIDENT PARTIALITY FOR NEUTRAL ARBITRATOR AND PARTY-APPOINTED ARBITRATOR**

  Certain Underwriting Members of Lloyds of London v. FL Department of Financial Services (as receiver for Insurance Company of America)
  892 F.3d 501
  United States Court of Appeals, Second Circuit
  June 7, 2018

  ICA insures workers' compensation claims in the construction industry. The Underwriters provided ICA with second and third layer reinsurance under a series of treaties. Each of the treaties contained an arbitration clause providing that disputes be adjudicated by a three-member arbitration panel consisting of one party-appointed arbitrator for each party and the neutral umpire. When the Underwriters denied ICA's claim for $12.5 million, ICA requested arbitration, appointing Alex Campos as its arbitrator. At the initial arbitration meeting, Campos failed to disclose numerous "close relationships" with ICA. After the panel found in favor of ICA and awarded it $1.5 million, the Underwriters moved to vacate the award on several grounds, including evident partiality on the part of Campos. The court granted the motion, finding that a reasonable person would have to conclude that Campos was partial, given his numerous relationships and "financial entanglements" with ICA. ICA appealed.

  The United States Court of Appeals for the Second Circuit vacated and remanded. The Court held that the district court applied the wrong standard for evident partiality. Unlike neutral arbitrators, party-appointed arbitrators are de facto advocates brought in because of their professional acuity. To expect of them the same level of institutional impartiality applicable to neutrals would "impair the process of self-governing dispute resolution." With that said, a party-appointed arbitrator is still subject to some baseline limits to partiality. An undisclosed relationship would be material if it violated the arbitration agreement. In this case, the agreement provided that the party-appointed arbitrator be disinterested, which would be breached if the arbitrator had a personal or financial stake in the outcome of the arbitration. This would also be breached if the party opposing the award could show that the party-appointed arbitrator's partiality had a prejudicial effect on the award. The Court vacated the case to determine whether the Underwriters had shown by clear and convincing evidence that the failure to disclose by Campos violated the qualification of disinterestedness or had a prejudicial impact on the award.

New Jersey

- **PARTY NOT ENTITLED TO EXPENSES BEYOND HIGH-LOW AGREEMENT MAXIMUM RECOVERY**

  Serico v. Rothberg and Mountainside Hospital
  2018 WL 3463316
  Supreme Court of New Jersey
  July 19, 2018

  Lucia Serico brought a medical malpractice claim against Dr. Rothberg and Mountainside (Rothberg), asserting that Rothberg failed to diagnose her husband with colon cancer. The parties entered into a high-low agreement during trial. After the jury awarded Serico $6 million, the court entered a judgment of $1 million pursuant to the high-low agreement. Serico moved for litigation expenses, including attorneys' fees, under 4:58, the rule governing offers of judgment. The trial court judge denied the motion and the appellate panel affirmed. Serico petitioned the Supreme Court for certification.

  The Supreme Court of New Jersey affirmed. 4:58 imposes financial consequences on a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment. All costs resulting from the rejection of an offer of judgment fall within the scope of 4:58. A high-low agreement, on the other hand, is a settlement in which a defendant agrees to pay a plaintiff a minimum recovery in return for the plaintiff's agreement to accept a maximum amount regardless of the outcome at trial. It is a contract. Here, the initial offer of judgment - $750,000 – expired.

The parties' high-low agreement made no reference to 4:58. The parties demonstrated their intent to set $1 million as the maximum recovery. Serico did not preserve her right to pursue 4:58 expenses when the offer of judgment expired and she entered into the high-low. She was not entitled to expenses beyond the high-low agreement maximum recovery.

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