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ADR Case Update 2019 - 10

Federal Circuit Courts

- **CONVENTION PREEMPTS STATE STATUTE PROHIBITING ARBITRATION IN INSURANCE CONTRACTS**

McDonnell Group, LLC v. Great Lakes Insurance SE, UK Branch
2019 WL 2082905
United States Court of Appeals, Fifth Circuit
May 13, 2019

McDonnell Group purchased an insurance policy from Great Lakes Insurance for a construction project. The policy provided for arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention). The policy also included a “conformity to statute” clause, instructing that when Policy terms conflicted with the statutes of the jurisdiction where the insured property was located, the terms would be amended to conform with such statutes. When the property suffered water damage and Great Lakes refused to pay, McDonnell filed an action seeking declaratory relief and damages for breach of contract and breach of the duty of good faith and fair dealing. Great Lakes moved to dismiss pursuant to the arbitration provision. McDonnell argued that the arbitration provision was “amended out” of the contract by the conformity to statute provision due to a Louisiana statute prohibiting arbitration agreements in insurance contracts covering property in the state. The court held that the allegedly conflicting statute was preempted by the Convention and dismissed the case in favor of arbitration.

The United States Court of Appeals for the Fifth Circuit affirmed. While federal law, including treaties, are the “supreme Law of the Land,” the McCarran-Ferguson Act protects state laws regulating the insurance industry from the preemptive effect of federal law. The Act provides that “no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. In *Safety National*, the Fifth Circuit found that an Act of Congress does not include a treaty - such as the Convention - which is an “international agreement or contract negotiated by the Executive Branch.” The argument that the arbitration provision did not conform with the state statute prohibiting arbitration in insurance contracts was thus unavailing because the Convention preempted the state statute. The conformity provision applied only when the terms of the contract conflicted with statutes of the jurisdiction. The conformity provision was not triggered because there was no conflict.

- **PLAINTIFFS DID NOT CHALLENGE DELEGATION CLAUSE; QUESTION OF ARBITRABILITY GOES TO THE ARBITRATOR**

Vargas, Rivera, and others similarly situated v. Bay Terrace Plaza, LLC
2019 WL 2067118
United States District Court, E.D. New York
May 10, 2019

Vargas and Rivera (plaintiffs), former employees of restaurant corporation Bay Terrace Plaza (Bay), sued Bay for failing to pay overtime in violation of the FLSA and the New York Labor Law (NYLL) and failing to provide wage statements in violation of the NYLL. Bay moved to compel arbitration pursuant to arbitration agreements signed by both plaintiffs, requiring parties to submit all disputes arising from employment to binding arbitration. The plaintiffs contended that the agreements were unenforceable under the FLSA and general contract principles. Bay argued that enforceability should be decided by the arbitrator and that the agreements were enforceable.

The United States District Court, E.D. New York granted the motion to compel arbitration. Pursuant to *Rent-A-Center*, there are two types of challenges to arbitration agreements: the first challenges the validity of the precise agreement to arbitrate and the second challenges the contract as a whole. If the party challenges the validity of the precise agreement to arbitrate, then the federal court must consider the challenge before ordering compliance with the agreement - unless parties delegated the question of arbitrability itself to arbitration. In this case, the arbitration agreements delegated the question of arbitrability to the arbitrator. The law is clear that absent a specific challenge to the delegation provision specifically, the delegation of the questions of unconscionability and enforceability of an arbitration agreement to an arbitrator must be upheld. Plaintiffs did not challenge the delegation clause specifically.

Texas

- **FAILURE TO DISCLOSE FRIENDSHIP WITH PARTY'S CO-COUNSEL DEEMED EVIDENT PARTIALITY**

In the Matter of the Marriage of William Edward Piske, Jr. and Jamie Krivan Lange
2019 WL 2004580
Court of Appeals of Texas, Houston (14th Dist.)
May 7, 2019

Piske filed a petition for divorce from his wife, Lange. The parties proceeded to arbitration, pursuant to their prenuptial agreement, and appointed Warren Cole as arbitrator. Under the Family Law Arbitration Rules that applied to the case, Cole was to disclose any circumstances likely to affect his impartiality, including past or present relationships with the parties or their counsel. Cole represented that he did not have a material relationship with the parties or counsel. When Joan Jenkins joined the case as Piske's co-counsel, Cole did not supplement his initial disclosures. Lange later learned of a social and professional relationship between Cole and Jenkins. When Cole ruled in favor of Piske, Lange filed a motion for a continuance and an emergency motion to vacate the arbitration award, asserting that her rights were prejudiced by Cole's failure to disclose. The court denied the motion to vacate and motion for a new trial and Lange appealed.

The Court of Appeals of Texas, Houston (14th District) affirmed the divorce decree granting the divorce, reversed the remainder of the divorce decree, and remanded. Under the Texas Arbitration Act, the standard for evident partiality requires vacating an award if an arbitrator fails to disclose facts which, to an objective observer, create a reasonable impression of the arbitrator's partiality. The social and professional relationship between Cole and Jenkins spanned over 30 years, including multiple dinner parties, a joint getaway to a mutual friend's ranch, and frequent contact in their respective practices in the area of high wealth/high profile divorces. Cole had also served as a mediator and arbitrator for Jenkins on a number of cases. The Court agreed with Lange that Cole's failure to disclose his connections with Jenkins satisfied the evident-partiality standard. The interactions at issue were not trivial and to an objective observer might

create a reasonable impression of Cole's partiality. Lange did not waive her complaint as to Cole's partiality by failing to raise the objection until two months after an email exchange between Jenkins and Cole that alerted her to their friendship. The email did not constitute a full disclosure of the relationship between Cole and Jenkins, thus Lange was not fully aware of the extent until later.

Florida

- **COMPANY WAIVED RIGHT TO ARBITRATION BY ACTIVELY PARTICIPATING IN LITIGATION**

Wilson v. AmeriLife of East Pasco, LLC
2019 WL 2017576
District Court of Appeal of Florida, Second District
May 8, 2019

Wilson was an insurance agent for AmeriLife Insurance. After terminating Wilson's employment, AmeriLife filed a complaint, alleging that Wilson violated provisions of the agent and noncompete agreements and seeking damages for breach of contract, tortious interference with contractual and advantageous business agreements, and misappropriation and use of confidential trade secrets. AmeriLife also sought an injunction and restitution for unjust enrichment. Wilson filed an answer and asserted counterclaims for declaratory and injunctive relief, breach of contract, and violations of FLSA. AmeriLife filed a motion to compel arbitration, pursuant to the arbitration clause in the agent agreement providing that all claims arising out of or relating to the agreement shall be resolved by arbitration. The trial court entered an order granting AmeriLife's motion and staying litigation relating to the counterclaims. The order did not contain any factual findings. Wilson appealed.

The District Court of Appeal of Florida, Second District reversed and remanded. The outcome of the case rested on whether AmeriLife waived its right to arbitration by actively participating in a lawsuit. The Court found that it did. The agent agreement provided that nothing in the agreement would deprive any party of the right to seek a TRO, injunction, or other equitable relief in court. In addition to seeking equitable relief, AmeriLife sought legal relief on arbitrable claims arising out of the agent agreement. AmeriLife argued that its claim for misappropriation and misuse of trade secrets was an exception to the arbitration provision because these were included in the agent agreement and also incorporated into the noncompete agreement, which did not include an arbitration provision. The arbitration provision in the agent agreement, however, made clear that all claims shall be resolved by arbitration and the parties never excepted these claims. Wilson's counterclaims did not revive AmeriLife's right to arbitrate legal claims under the agent agreement. Wilson's claims arose out of the agent agreement and were reasonably foreseeable in the context of AmeriLife's complaint.

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