February 13, 2019

ADR Case Update 2019 - 3

Federal Circuit Courts

- **ARBITRATION PANEL DID NOT "IMPERFECTLY EXECUTE" THEIR POWERS**

  Great American Insurance Company v. Russell
  2019 WL 387032
  United States Court of Appeals, Eighth Circuit
  January 31, 2019

  Russell submitted claims to insurer Great American for damage to his corn and soybean crops. The case proceeded to arbitration, pursuant to federal regulations covering the crop insurance policy, and a three-arbitrator panel awarded Russell over $1 million for damage to his corn crop. Great American appealed the award under 9 U.S.C. §10(a)(4), asserting that the arbitrators "imperfectly executed" their powers. Great American alleged the arbitrators failed to comply with the regulations requiring the panel to provide a written description of issues in dispute, factual findings, determinations, and the amount and basis for any award and breakdown by claim for any award. The court vacated the award and Russell appealed.

  The United States Court of Appeals for the Eighth Circuit vacated and remanded. Great American argued that the panel did not break down the award by county, pursuant to the "breakdown by claim" requirement, did not explain how the award was calculated, and impermissibly interpreted the regulations. The Court was not convinced that the panel's failure to break down the award by county amounted to imperfect execution of its powers. Nothing in the regulations required the panel to segregate the claim into separate claims. The panel's written explanation for the award was adequate. It adopted the calculation of Russell's expert, but Great American did not contest the calculation or provide an alternative at the evidentiary hearing. The regulations did not require the decision to be especially detailed; as long as it explained the disposition of each claim at issue, it should be upheld.

- **ARBITRATOR EXCEEDED AUTHORITY, VACATUR CONFIRMED**

  Aspic Engineering and Construction Company v. ECC Centcom Constructors, LLC
  2019 WL 333339
  United States Court of Appeals, Ninth Circuit

January 28, 2019

Aspic was a subcontractor to ECC Centcom Constructors (ECC), which had two prime contracts with the United States Army Corps of Engineers (USACE) to construct buildings in Afghanistan. The contracts provided for termination by convenience and outlined that Aspic owed to ECC the same obligations that ECC owed to the U.S. Government, as set forth in the Federal Acquisition Regulation (FAR). When the prime and, subsequently, subcontracts were terminated for convenience, Aspic sought payment for its expenses. ECC refused to pay the proposed settlement and the case proceeded to arbitration, with the arbitrator awarding Aspic over $1 million. Aspic petitioned to confirm the award. ECC removed the cases and moved to vacate the award. The court vacated the award, holding that it conflicted with the contract, and Aspic appealed.

The United States Court of Appeals for the Ninth Circuit affirmed the vacatur, concluding that the arbitrator failed to draw the essence of the award from the subcontract.

The subcontracts incorporated numerous FAR provisions for termination by convenience, requiring that each settlement request be supported by data and information sufficient for adequate review by the U.S. Government. The arbitrator found that the subcontracts required Aspic to comply with the FAR, but Aspic was not held to these provisions based on Aspic conducting its business practices in a manner "normal to Afghanistan." The arbitrator explained that there was no meeting of the minds when the parties formed the subcontracts because "the normal business practices and customs of subcontractors in Afghanistan were more 'primitive' than those of U.S. subcontractors" and ECC could not have expected Aspic to strictly conform to U.S. Government regulations. The arbitrator found that rejecting Aspic's supporting materials for payment because they were not translated or aligned with the Gregorian calendar would be unfair. In doing so, the arbitrator based his conclusion not on the agreement, but upon his rationalization that to enforce the FAR clauses on Aspic would be unjust.

- **COUNTERCLAIMS OUTSIDE SCOPE OF ARBITRATION AGREEMENT**

Sargent v. Williams
2019 WL 454536
United States Court of Appeals, Eighth Circuit
February 6, 1019

Bradley and Kerry Williams hired law firm Sargent to represent them in a condemnation action regarding a proposed oil pipeline across the Williamses property. They asserted that the firm mishandled the case and that they ended the representation when they learned the firm was unavailable on the trial date. The firm brought a state court action against the Williamses to recover unpaid fees. After removal, the Williamses stayed the action to allow the unpaid fees claim to go to arbitration. Once there, the Williamses raised counterclaims of breach of contract, estoppel, forfeiture, negligence, breach of fiduciary duty, deceit, and defamation. They also sought a declaration that they did not owe money to the firm. Sargent asked the court for a declaration addressing the scope of the arbitration proceeding. The court issued an order dividing the counterclaims into those that could be raised in arbitration and those that could not. The Williamses appealed.

The United States Court of Appeals for the Eighth Circuit affirmed in part, vacated in part, and remanded. The Court found that although the court had not yet entered a final judgment, it did have appellate jurisdiction because this was, essentially, an injunction against arbitration. The question in the case was whether the Williamses counterclaims were within the scope of what the parties agreed to arbitrate. The parties' fee agreement provided: "If Client terminates Firm's employment before conclusion of the case without good cause, Client shall pay the Firm a (termination) fee…If any disagreement arises about the termination fee" the parties would arbitrate. The provision was narrow, requiring arbitration only of disagreements about the termination fee. The counterclaims enjoined do not fit this definition; rather than concerning what fee to pay the firm, they sought an award of damages from the firm. The counterclaims that remained in the arbitration invoked the firm's misconduct as a basis to deny a termination fee altogether. The Court found that the lower court should not have determined that the Williamses terminated the relationship. The court recognized that the question of good cause was for the

arbitrators to decide and should have concluded the same about the question of termination.

- **ONLINE ARBITRATION AGREEMENT ENFORCEABLE**

  Petrie v. GoSmith, Inc.
  2019 WL 423064
  United States District Court, D. Colorado
  January 31, 2019

  Petrie, a residential contractor, sued GoSmith, an online nationwide home improvement marketplace for consumers and service professionals, alleging GoSmith's text messages violated the Telephone Consumer Protection Act. GoSmith moved to compel arbitration, arguing that Petrie agreed to the arbitration clause in GoSmith's Terms of Use. Petrie argued that he never agreed to GoSmith's Terms of Use.

  The United States District Court, D. Colorado granted the motion to compel arbitration. GoSmith met its burden of demonstrating an enforceable arbitration agreement. GoSmith argued that Petrie had reasonable notice of the agreement because the Terms of Use were accessible from the online registration website via hyperlink. GoSmith asserted that Petrie affirmatively checked the box to assent to the Terms of Use before clicking "Job Matches". GoSmith asserted that Petrie manifested assent to the arbitration agreement when he continued to use GoSmith's services following his registration. GoSmith provided supporting data, based on the information it collects when users register. Petrie failed to raise a genuine dispute of material fact regarding the existence of an agreement. He denied that he accepted the Terms of Use, but denials and statements that a user does not recall visiting a website or agreeing to arbitrate are insufficient to defeat arbitration. Petrie challenged the reliability of the data; however, he presented no evidence to refute the data showing that on May 7, he pressed the "Job Matches" button, an action allowed only after agreeing to the Terms of Use and the arbitration clause.

- **"EFFECTIVE VINDICATION OF RIGHTS" DOCTRINE STILL APPLICABLE**

  Mantooth et al., v. Bavaria Inn Restaurant, Inc. et al.
  2019 WL 339858
  United States District Court, D. Colorado
  January 28, 2019

  Mantooth et al. (plaintiffs) sued Bavaria et al. (defendants), asserting that defendants improperly classified them as independent contractors and underpaid them in violation of the Fair Labor Standards Act (FLSA). Defendants moved to compel arbitration pursuant to the arbitration clauses in its Entertainment License Agreements with the plaintiffs. The court compelled arbitration, but struck certain fee shifting provisions and arbitrator selection clauses in the parties' agreements, as well as the cost shifting clause in some of the plaintiffs' agreements. Defendants moved for partial reconsideration, the plaintiffs moved for partial relief, and defendants moved to strike certain exhibits.

  The United States District Court, D. Colorado granted in part defendants' reconsideration motion; granted in part plaintiffs' relief motion; and granted in part defendants' motion to strike. The defendants asked the Court to revisit the decision to sever provisions under the effective vindication doctrine based on the recent decision in *Epic Systems*. They asserted that *Epic* "implicitly, if not directly, rejected the imposition of policy-based reasons for invalidating provisions in arbitration agreements such as the 'effective vindication of rights' doctrine." The Court found that the defendants "misapprehended" the scope of *Epic. Epic* broadly favored enforcing arbitration agreements as written, but it had not been construed so expansively to eliminate the effective vindication of rights doctrine. Plaintiffs made sufficient showings that the burden of costs would effectively prevent them from arbitrating their claims; the Court would not revisit the conclusion that those provisions prospectively prevented them from effectively vindicating their statutory FLSA rights in arbitration and that severance of those provisions was appropriate. The Court clarified that the fee- and cost-shifting provisions were severed and the arbitrator could award attorneys' fees and costs as authorized by federal law. The Court also clarified that the order severed portions of the agreements of certain plaintiffs establishing an obligation to split the costs of arbitration equally. Here, the Court severed similar cost splitting

provisions in the agreements of plaintiffs Mantooth and Lopez “in the interests of justice, and consistent with the remedial purpose of the FLSA, to resolve FLSA claims on their merits” rather than prevent resolution due to inability to pay arbitration costs.

New York

- **LANGUAGE OF ARBITRATION DEMANDS NOT SUBJECT TO STRICT STANDARDS OF CONSTRUCTION; ARBITRATOR DID NOT EXCEED SCOPE OF AUTHORITY**

  Chef Chloe, LLC v. CCSW, et al.
  2019 WL 346586
  Supreme Court, Appellate Division, First Department, New York
  January 29, 2019

  Chef Chloe and CCSW had an operating agreement providing that all disputes concerning the terms of the agreement would be submitted to arbitration and that they would be bound by the arbitrator’s award. A case between them proceeded to arbitration, with the award providing that Chloe was terminated for just cause pursuant to the terms of the operating agreement between the parties. The Supreme Court, New York County, entered the award, and Chloe appealed, seeking vacatur or modification of the award on the ground that the arbitrator exceeded her authority by granting relief that was not specifically demanded in CCSW’s statement of claim.

  The Supreme Court, Appellate Division, First Department, New York affirmed. The language of arbitration demands is not subject to the strict standards of construction applicable to formal court pleadings. To hold that the arbitrator was acting outside the scope of her authority when she determined that Chloe was terminated for cause would “elevate form over substance and preclude an otherwise meritorious arbitration award merely because” the statement of claim did not specifically demand that relief.

- **PARTIES’ DISPUTE NOT SUBJECT TO PUBLIC POLICY EXCEPTION**

  In the Matter of Arbitration between City of Watertown and Watertown Professional Firefighters
  2019 WL 408819
  Supreme Court, Appellate Division, Fourth Department, New York
  February 1, 2019

  Watertown Professional Firefighters (Union) alleged that the City of Watertown (City) violated the parties’ collective bargaining agreement (CBA) relating to minimum staffing levels within the Fire Department. The City sought a permanent stay of arbitration. The court granted the petition, finding that the staffing provisions were job security provisions subject to the public policy exception and could not be arbitrated. The Union appealed.

  The Supreme Court, Appellate Division, Fourth Department, New York reversed. In deciding a motion to stay arbitration, the court must conduct a two-part analysis: 1) determining whether there is any statutory, constitutional, or public policy prohibition against arbitration of the grievance and 2) if no prohibition exists, determining whether the parties agreed to arbitrate the dispute by examining the CBA. The court erred in determining that the staffing provisions were job security provisions subject to the public policy exception. The provisions did not mandate a total number of firefighters that must be employed; rather, they related to the minimum number of firefighters required to be present during shifts and regular operations. On the second point, the parties agreed to arbitrate the labor grievance.
  Their agreement was broad and there was a reasonable relationship between the subject matter of the dispute (staffing provisions) and the general subject matter of the CBA.

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

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