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ADR Case Update 2019 - 4

## Federal Circuit Courts

- **ARBITRATOR'S WORK HISTORY NO BASIS TO VACATE AWARD**

*First Capital Real Estate Investments, LLC v. SDDCO Brokerage Advisors, LLC*  
2019 WL 5812278  
United States District Court, S.D. New York  
February 13, 2019

A placement agreement between First Capital Real Estate Investment Company (First Capital) and SDDCO Brokerage Advisors (SDDCO) provided that First Capital would pay SDDCO a 10% fee for any financing it obtained. When SDDCO obtained a \$2 million loan and First Capital did not pay the 10% fee, SDDCO initiated an arbitration proceeding pursuant to an arbitration clause providing that disputes related to the Placement Agreement would be arbitrated in accordance with the FINRA Code of Arbitration Procedure. The FINRA panel rendered an award against First Capital for the 10% fee plus interest and attorney fees and memorialized an earlier sanction against First Capital. First Capital petitioned to vacate the award and SDDCO petitioned to confirm.

The United States District Court, S.D. New York denied the petition to vacate and granted the petition to confirm and for attorney fees and pre-judgment interest. First Capital argued the arbitration was improperly conducted under FINRA's intra-industry rules rather than customer-related rules. Though FINRA's initial "form letter" correspondence to the parties stated that intra-industry rules applied, subsequent correspondence demonstrated that the arbitration proceeded pursuant to FINRA's customer-related rules. First Capital neither objected to the rules during the arbitration, nor demonstrated any meaningful difference between FINRA's intra-industry and customer-related rules. First Capital argued that the public arbitrator, Ms. Parker, was not qualified to serve because she previously represented clients in FINRA arbitrations and was employed by a broker dealer. Though Ms. Parker disclosed this information, First Capital neither moved to disqualify her prior to the arbitration nor objected to her role during the arbitration. There was no evidence that Ms. Parker unduly influenced the other panelists in reaching their unanimous decision. First Capital also asserted that SDDCO violated FINRA rules by failing to attempt to resolve their discovery dispute with First Capital prior to moving for sanctions. The motion for sanctions was filed only after First Capital failed to produce discovery for a second

time.

- **ARBITRATOR DID NOT EXCEED AUTHORITY; APPELLANT COLLATERALLY ESTOPPED**

*Patton and Marquardt v. Barry Johnson, Appellant, and The Johnson Law Firm*

2019 WL 516534

United States Court of Appeals, First Circuit

February 11, 2019

Patton and Marquardt (plaintiffs) hired the Johnson Law Firm (JLF) to represent them in a products liability suit. The parties' Attorney Representation Agreement (ARA) contained an arbitration provision that was not initialed or otherwise specifically acknowledged by plaintiffs. The case was transferred from TX to RI to join similar suits. Along the way, JLF hired appellant Barry Johnson and a local RI attorney to work on the litigation. When the suit was settled, a dispute arose among plaintiffs and counsel regarding representations concerning settlement amounts. When JLF initiated a JAMS arbitration proceeding against plaintiffs in TX, the JAMS arbitrator dismissed the proceeding, finding that the ARA did not contain a valid and enforceable agreement to arbitrate. Plaintiffs filed tort claims against their attorneys in RI, including a claim for legal malpractice. Appellant moved to compel arbitration, arguing that he was not a party to the first JAMS arbitration and not bound by the arbitrator's decision. The motion was referred to a magistrate judge, who ruled that collateral estoppel foreclosed appellant's attempt to invoke the ARA arbitration provision and recommended that the motion to compel be denied (R&R). Appellant served written objections to the R&R, but the district court overruled the objections, adopted the R&R, and denied the motion to compel arbitration. Barry Johnson appealed.

The United States Court of Appeals for the First Circuit affirmed. While the magistrate judge erred in treating the motion to compel as a dispositive motion, the district court recognized the error and treated the R&R as an order, thus rendering any procedural error harmless. Appellant claimed the arbitrator lacked authority to resolve the issue of arbitrability because that issue was resolved by the TX court when it rejected jurisdictional challenges raised by the plaintiffs and RI counsel. There was no holding on this point and the fact that the issue was briefed did not mean that the court decided the issue. There was no way to read the TX state court's judicial determination as a determination that a valid and enforceable arbitration agreement existed. Appellant argued that the JAMS arbitrator exceeded his authority because the parties did not agree to submit the question of arbitrability to the arbitrator. All of the parties to the first JAMS arbitration submitted briefs on arbitrability to the arbitrator. They did not question the arbitrator's authority to decide the issue and did not seek to vacate the decision on such a ground. Given this history, the parties to the first JAMS arbitration clearly and unmistakably accepted the proposition that the arbitrator possessed authority to determine questions of arbitrability. Appellant argued that the magistrate judge erred in applying the RI law of collateral estoppel and should have applied TX law. In his briefing before the magistrate judge, however, appellant stated that RI law should apply – he could not urge the Court to question that application because he was dissatisfied with the outcome. The case fit within the RI collateral estoppel framework, with: identity of issues; a final judgment warranting preclusive effect; an appellant in privity with JLF and thus bound by the arbitral decision; and determination that the application of the doctrine would not lead to inequitable results.

- **POLICE COMMITTED UNFAIR LABOR PRACTICE IN REFUSING TO ARBITRATE**

*United States Capitol Police v. Office of Compliance*

2019 WL 758011

United States Court of Appeals Federal Circuit

February 21, 2019

The Chief of Police for the United States Capitol Police terminated Officer Chris Donaldson due to his involvement in a domestic incident. The Fraternal Order of Police (Union) and the Police were parties to a collective bargaining agreement (CBA) providing that termination decisions by the Chief were subject to binding arbitration. The Union requested an arbitration panel to review the termination decision. The Police refused, arguing that termination actions were not subject to arbitration. The Union protested to the General Counsel (GC), Office of Compliance (OOC), arguing that the Police violated the Congressional Accountability Act (CAA) by refusing to

arbitrate an unresolved grievance. The GC determined there was sufficient evidence and cause to support the charges and filed a complaint with the OOC alleging unfair labor practice. A hearing officer granted judgment in favor of the OOC. The Board of Directors of the Congressional Accountability Office of Compliance (Board) affirmed and the Police petitioned for review of that decision.

The United States Court of Appeals for the Federal Circuit affirmed. The parties did not dispute that it is an unfair labor practice to refuse wrongfully to participate in arbitration. The question was whether the Police's refusal was excusable. The Police argued before the Board that it thought the CAA should be interpreted to mean that termination decisions should be excluded from arbitration under the governing CBA. The Police pointed to no clearly established law to support this point – and pointed to no such law on appeal. The Board correctly concluded that the Police committed an unfair labor practice.

- **ONLINE LOYALTY PROGRAM ARBITRATION CLAUSE ILLUSORY AND FAILED TO PROVIDE ADEQUATE NOTICE**

*National Federation of the Blind v. The Container Store*  
2019 WL 634783  
United States District Court, D. Massachusetts  
February 13, 2019

The National Federation of the Blind brought a class action against the Container Store under the Americans with Disabilities Act (ADA) and state discrimination laws, alleging that the Container Store unlawfully discriminated against blind customers by failing to use tactile key pads on its point-of-sale devices. The Court denied the Container Store's motion to compel arbitration pursuant to the arbitration clause in the terms and conditions for its customer loyalty program. The Container Store sought interlocutory review of the denial under the FAA exception to final judgment. The First Circuit affirmed this Court's order, holding that: 1) for the plaintiffs enrolled in the Loyalty Program, there was no contract formation with respect to the arbitration clause because they lacked actual or constructive notice of the clause at the time of their acceptance; and 2) for the plaintiff enrolled in the Loyalty Program online, the contract was illusory because the Container Store unilaterally retained the right to alter the terms and conditions of the Loyalty Program retroactively. The plaintiff moved for entry of final judgment and writ of enforcement.

The United States District Court, D. Massachusetts, denied the motion. The plaintiffs alleged that final judgment was warranted because this Court and the First Circuit held that the terms of the Loyalty Program were illusory and that injunctive relief was necessary to protect the rights of current customers since the Container Store continued to use the illusory terms. Rule 54(b) provides for entry of judgment on a subset of the claims asserted in a multi-plaintiff, multi-claim action. Courts have recognized a long-settled policy that a district court should certify a judgment under 54(b) only when the ruling in question is final and there is no persuasive reason for delay. Here, the ruling was not final, as there was not yet a finding as to the claim that the Loyalty Program violated the ADA and relevant state laws, which was intertwined with the question of whether the Loyalty Program was illusory. The plaintiffs did not demonstrate why entering timely judgment immediately was important. There was no evidence of a continued attempt by the Container Store to enforce arbitration on the plaintiffs' claims in this lawsuit.

## New York

- **REQUEST FOR FEES DID NOT IMPACT TIME FRAME FOR PETITION TO VACATE**

*Bradley Wendt v. Bondfactor Company, LLC*  
2019 WL 576004  
Supreme Court, Appellate Division, Second Department, New York  
February 13, 2019

Wendt was employed as Bondfactor President pursuant to an employment agreement. When Bondfactor terminated his employment, Wendt, along with another employee, filed a demand for

arbitration with AAA against Bondfactor. On February 10, 2015, the arbitrator issued a partial final award in which he dismissed all of Wendt's claims. The only issue that remained was the other employee's claim for attorneys' fees and costs. The award stated that it was final. On May 13, the arbitrator issued a final award dealing solely with the other employee's fees and costs. In August, Wendt petitioned to vacate the award as it applied to him. Bondfactor moved to dismiss the petition, arguing that it was not timely filed. In May 2016, the Supreme Court denied the motion to dismiss and, in effect, granted the petition. The Company appealed.

The Supreme Court, Appellate Division, Second Department, New York reversed. NY Civil Practice and Law Rules (CPLR) provide that an application to vacate or modify an arbitration award be made by a party within 90 days after its delivery to him. Wendt asserted that Bondfactor's submission of a request for attorney's fees to the arbitrator on February 27, 2015 extended his time to petition to vacate. This was not the case. After an arbitrator renders an award, the arbitrator has no power to render a new award or modify the original. The request for attorney's fees had no impact upon the statute of limitations set forth in the CPLR.

- **COURT ERRED IN CONFIRMING ARBITRATION AWARDS AFTER RULING THAT PETITION TO VACATE WAS TIME BARRED**

*Yates v. County of Nassau*

2019 WL 693169

Supreme Court, Appellate Division, Second Department, New York

February 20, 2019

Yates was a sewage treatment operator with the County of Nassau. After he was terminated, he filed a grievance pursuant to a collective bargaining agreement between the County and the Civil Service Employees Association. The matter proceeded to arbitration, with the arbitrator issuing a hearing and award on September 26, 2013; a final award on October 31, 2014; and a consent award on July 15, 2015. In late February, Yates petitioned to vacate the final award and reopen the award of September 26, 2013. The Supreme Court dismissed the proceeding as time-barred and confirmed the "awards of the arbitrator." The County appealed from the order confirming the three awards.

The Supreme Court, Appellate Division, Second Department, New York held that the court, upon determining that the proceeding was time-barred, should not have taken the additional step of confirming the three awards. Neither Yates nor the County moved to confirm any of the awards. The CPLR directive providing that upon the denial of a motion to vacate or modify, the court shall confirm applies where an application to vacate or modify has been denied on the merits. Where the proceeding was time-barred, the court had no discretion to address the merits. Doing so had the effect of impermissibly extending the statutory time limitations contained in the CPLR and denying the opportunity to object to confirmation.

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

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