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## ADR Case Update 2019 - 6

### Federal Circuit Courts

- **DISPUTE OUTSIDE SCOPE OF ARBITRATION CLAUSE**

*Papalote Creek II, LLC v. Lower Colorado River Authority (LCRA)*  
2019 WL 1218501  
United States Court of Appeals, Fifth Circuit  
March 15, 2019

Wind farm operator Papalote entered into a Power Purchase Agreement (PPA) with LCRA, under which LCRA agreed to purchase all of the energy at a fixed price for an 18-year term. The PPA contained a clause to calculate Papalote's liquidated damages should LCRA fail to take all of the project energy. The PPA also contained an arbitration clause, providing that if a dispute arose "with respect to either party's performance hereunder," the parties should proceed to binding arbitration. In 2015, LCRA initiated arbitration to resolve a dispute regarding LCRA's limitation of liability under the agreement. Papalote refused to arbitrate, arguing that LCRA's "academic question" on liability did not constitute a dispute covered by the arbitration clause. The court granted LCRA's motion to compel and Papalote appealed. The court denied a stay of arbitration pending appeal and the arbitrator decided for LCRA, finding that its liability was limited to \$60 million. Papalote moved to reinstate its appeal. While the appeal was pending, LCRA notified Papalote that it would cease taking energy under the PPA and that its liquidated damages would be capped at \$60 million. The court vacated the order to compel, finding that the dispute was not ripe when the court compelled arbitration because LCRA was still taking energy from Papalote. On remand, the court vacated the arbitration award as the "fruit of an order" entered without subject matter jurisdiction. The court compelled arbitration, finding that the dispute was now ripe and fell within the scope of the arbitration clause. Papalote appealed.

The United States Court of Appeals for the Fifth Circuit reversed and remanded, finding that LCRA's dispute was outside the scope of the arbitration clause. The arbitration clause limited arbitration to performance-related disputes. LCRA's dispute regarding whether the agreement limited LCRA's liability to \$60 million was arbitrable only if it constituted a dispute regarding performance. LCRA's dispute did not; it related to the Agreement's interpretation and was outside the scope of the arbitration clause.

- **AGREEMENT TO ARBITRATE NOT SUBSTANTIVELY UNCONSCIONABLE**

*Bekele v Lyft, Inc.*

2019 WL 1146759

United States Court of Appeals, First Circuit

March 13, 2019

Yilkal Bekele, a Lyft driver, brought a putative class action, alleging that Lyft wrongfully classified drivers as independent contractors in violation of the Massachusetts Wage Act. Lyft moved to dismiss in favor of individual arbitration, pursuant to an arbitration clause in the Terms of Service (TOS) agreement providing that all disputes between the parties be resolved by one-on-one arbitration. The court granted the motion and dismissed the case in favor of individual arbitration. Bekele appealed.

The United States Court of Appeals for the First Circuit affirmed. Bekele contended that the agreement to arbitrate was unconscionable and unenforceable. Unconscionability under MA law requires both substantive and procedural unconscionability. Bekele argued that the arbitration-fee-splitting arrangement in the agreement rendered it substantively unconscionable because Lyft drivers could not afford high fees. His argument was defeated by Lyft's offer before the district court to pay all fees for arbitration. In MA, an arbitration fee-splitting arrangement is not substantively unconscionable when the arbitration fees a plaintiff would owe amount to less than the damages the plaintiff claims. Here, Bekele faced \$0 in fees, an amount lower than his potential recovery, which he estimated close to \$1000. Bekele asserted that Lyft's offer to pay could not be considered because unconscionability was determined at the time of contracting; however, MA courts are allowed to consider facts developed during litigation on this issue. Bekele also asserted that the cost-splitting provision was substantively unconscionable because it could deter litigants from seeking to vindicate their rights. The case-by-case approach in MA, however, looks not at other potential litigants but at the individual claimant. Bekele also argued that Lyft's right to unilaterally modify the terms of the agreement was substantively unconscionable. This provision, however, required notice to and acceptance by the user of the new terms. Because Bekele did not show substantive unconscionability, the court set aside Bekele's procedural attack.

## Georgia

- **CONFIRMATION OF ARBITRATION AWARD VACATED DUE TO PREMATURE ENTRY AND LACK OF EVIDENCE OF DELIVERY**

*Mughni v. Beyond Management Group, Inc.*

2019 WL 1122773

Court of Appeals of Georgia

March 12, 2019

Beyond Management Group (BMG) and Mohammed Hafeez Mughni (Hafeez) had an employment contract that allowed Hafeez to work in the U.S. under the H1B Visa Program. When Hafeez left BMG to work for another company, BMG filed for arbitration to recover monies allegedly owed by Hafeez under the contract. The arbitrator awarded BMG damages and attorney fees. Hafeez argued that he was never served with the complaint and did not learn of the matter until he was served with BMG's petition to confirm the award. The court confirmed the award and denied Hafeez's motion to vacate, reconsider the confirmation order, and reopen the case. Hafeez appealed.

The Court of Appeals of Georgia vacated the confirmation order, reversed the denial order, and remanded for further proceedings. The Court confirmed that it had jurisdiction over the appeal because the confirmation order was a final, appealable order. The Court went on to find that the lower court's entry of the confirmation order was premature. Generally, a defendant shall serve an answer within 30 days after service of a summons. Where the process server files proof of service more than 5 days after the service date – as happened here – the 30 days to answer process begins to run when proof of service is filed. Given this, Hafeez had until the "last minute"

on November 9th to answer. The court entered the confirmation order at 2:20 pm on the 9th, thus not providing Hafeez the statutorily prescribed time to respond. The court erred when it determined that Hafeez did not file a timely motion to vacate, modify, or correct the award before it confirmed the award. Under the Georgia Arbitration Act, a reviewing court shall confirm an award upon application of a party made within one year after delivery unless the award is vacated or modified by the court. BMG's petition did not allege or present evidence of delivery to Hafeez. Thus, the court had "no evidence on which to base its determination that Hafeez failed to file any timely motions to vacate or modify the arbitration award at the time it signed the confirmation order." The lower court also lacked jurisdiction to rule on Hafeez's motion for reconsideration and enter the Denial Order. A notice of appeal of a judgment divests the trial court of jurisdiction to consider a motion for reconsideration of that judgment or to vacate.

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

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