April 9, 2019

ADR Case Update 2019 - 7

Federal Circuit Courts

- **APPRAISAL TREATED SAME AS ARBITRATION**

  Milligan v CCC Information Services and GEICO
  2019 WL 1461002
  United States Court of Appeals, Second Circuit
  April 3, 2019

  Milligan totaled her car and GEICO paid $45,924 to the lienholder, based on a Market Valuation Report by CCC Information Services. Milligan filed a putative class action against GEICO and CCC for breach of contract, negligence, unjust enrichment, and violations of NY Insurance Law Regulation 64, which provides that if an insured vehicle is a current model year, then the insurer should pay to the insured the reasonable purchase price of a new identical vehicle. The purchase price for Milligan's car was $51,400. GEICO submitted a demand for appraisal, pursuant to the insurance policy providing for two appraisers and a jointly selected umpire. The magistrate judge's Report and Recommendation allowed Milligan's claim for deceptive business practices and recommended that the court deny the motion to compel. The court did and GEICO/CCC appealed.

  The United States Court of Appeals for the Second Circuit affirmed. The Court determined that it had appellate jurisdiction because the appraisal process constituted arbitration for purposes of the FAA. Inclusion of the term "arbitrate" and reference to a final and binding conclusion by a third party need not appear in a contract to invoke FAA benefits. A contractual provision that "clearly manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution" is arbitration within the meaning of the FAA. The appraisal process here identified a category of disputes, provided for submission of those disputes to specified third parties, and made the third parties' resolution binding by stating that an award in writing of any two will determine the amount of the loss. With that said, appraisal was not appropriate in this case. An appraiser may not resolve coverage disputes raising legal questions about the interpretation of the insurance policy and this dispute concerned a legal issue about the meaning of Regulation 64. The denial of CCC's motion to compel appraisal was correct, since CCC was not a signatory to the policy and had no other contractual relationship with Milligan.

- **ARBITRATION AGREEMENT COVERS RICO CLAIMS**

  Alvarez-Mauras v. Banco Popular of Puerto Rico
  2019 WL 1323929
  United States Court of Appeals, First Circuit
  March 25, 2019

  Alvarez-Mauras invested over a million dollars with Alexander Garcia, a securities broker at Banco Popular's affiliate, Popular Securities (PS). His agreement with PS contained an arbitration clause. When a third of his money disappeared, Alvarez filed a claim for arbitration with FINRA, covering the conduct of PS and Garcia. During the arbitration, a forensic document examiner found that Garcia forged authorizations to transfer money out of Alvarez's account. Despite this, the arbitrator dismissed Alvarez's claims with prejudice for failing to make out a *prima facie* case. The Court of First Instance of Puerto Rico confirmed the award. Alvarez appealed and the decision was again confirmed. One year later, Alvarez filed federal RICO claims against Garcia and Banco Popular. The court granted Garcia and Banco Popular's motion to dismiss and Alvarez appealed.

  The United States Court of Appeals for the First Circuit affirmed. Alvarez asserted that because RICO confers jurisdiction on federal district courts, his RICO claims against Garcia were distinct from his claims litigated through arbitration and not precluded. The Court disagreed. The arbitration agreement was broad, covering all controversies between the parties, including Alvarez's RICO claims, which could not be pursued outside arbitration. Though Banco Popular was not a party to the arbitration agreement, Alvarez's RICO claims against BP were precluded by RICO's four-year statute of limitations. Alvarez contended that the statute of limitations should be calculated from the time when he learned of the forgeries; however, the statute of limitations for RICO begins to run when a plaintiff knew or should have known of his injury. The Court found that Alvarez knew of his injury, at the latest, when he filed his claim with FINRA. At that point, there were sufficient warning signs – including $400k missing from the investment account - to put him on notice that something was amiss. Alvarez argued that the issue of when he knew/should have known was a question for the jury. A motion to dismiss may be granted on the basis of an affirmative defense, such as statute of limitations, as long as the facts are clear. Here, the facts were "unassailable."

- **ARBITRATOR FAILED TO PROVIDE REASONED EXPLANATION FOR DENIAL OF FEES**

  AFGE Local 3599 v. Equal Employment Opportunity Commission
  2019 WL 1412545
  United States Court of Appeals, Federal Circuit
  March 29, 2019

  EEOC mediator Hamilton was removed from his position after exhibiting erratic behavior during a mediation, including using racial epithets and engaging in physical violence toward the parties. Per the collective bargaining agreement (CBA), Hamilton's Union, AFGE Local 3599, invoked arbitration in place of an appeal to the Merit Systems Protection Board (MSPB). The arbitrator found that the agency did not establish that it had just cause to remove Hamilton and directed that the removal be set aside. The arbitrator denied the union's request for arbitration costs and fees. Both parties petitioned for reconsideration and the arbitrator reaffirmed the award. The union filed a petition for review, challenging the arbitrator's decision on attorney's fees.

  The United States Court of Appeals for the Federal Circuit vacated and remanded with instructions. An arbitrator may require an agency to pay an employee's reasonable attorney's fees if the employee is the prevailing party and the adjudicator determines that payment is warranted in the interest of justice. Five factors are considered in this assessment, identified in the MSPB decision *Allen v. U.S. Postal Service*. The record did not contain undisputed evidence that would have compelled an arbitrator to find that the five factors "indisputably" favored granting fees. Though the union argued that the arbitrator could not consider facts other than those included in his decision on the merits, the Court found that several of the factors may not ordinarily be discussed in a decision on the merits – and that it "made no sense" for the arbitrator to be limited to the merits opinion when deciding fees. The Court found that the arbitrator erred by failing to provide an explanation for his decision on fees. For the Court to conduct a review, it

is “ordinarily necessary” for the adjudicator to provide an explanation for its action. A court will uphold a decision if the agency path is reasonably discerned; however, it may not supply a basis for agency action that the agency did not provide. The EEOC argued that the fees should be denied because the parties’ CBA provided fees and expenses to be borne equally by both parties. While that argument was plainly invalid, the arbitrator failed to explain his decision, providing no indication that the arbitrator rejected that argument. The case was remanded for the arbitrator to reconsider the issue of fees and include a statement of reasons for his decision.

- **SUPPLEMENTAL DECISION TO REAFFIRM WAS ENFORCEABLE**

  Postal Police Officers Association v. USPS
  2019 WL 1324022
  United States District Court, E.D. Michigan, Southern Division
  March 25, 2019

  Geoff Bailey, a USPS police officer, was removed from his job for making an intentional misrepresentation on a promotion application. Per the collective bargaining agreement (CBA), the matter proceeded to arbitration. The arbitrator found that Bailey provided false information; however, USPS did not establish that he made an intentional misstatement. The arbitrator determined that discharge was too severe a penalty for the violation and that Bailey should be reinstated without pay. The arbitrator also indicated that he would retain jurisdiction to address any issues related to award implementation. Following this, USPS placed Bailey on administrative leave and, citing the arbitrator’s decision to support its determination, revoked his security clearance due to false statements. The Postal Police Officers Association (PPOA) returned to the arbitrator for assistance in implementing the award. The arbitrator issued an order reaffirming the earlier award and ordering USPS to cease and desist its “attempted end run.” The arbitrator noted that the term "reinstatement" as used in the parties’ CBA had a common and accepted meaning. PPOA brought an action under the Postal Reorganization Act and the FAA, seeking to confirm the arbitration awards for USPS to reinstate Bailey and cease and desist actions to avoid compliance with the reinstatement order. USPS brought a counterclaim to vacate.

  The United States District Court, E.D. Michigan, Southern District, granted plaintiff’s motion and denied defendant’s. The parties disagreed about the arbitrator’s supplemental decision that the USPS was attempting an end run around the reinstatement award and needed to cease and desist. The supplemental order incorporated a decision on arbitrability. The CBA expressly provided that disputes as to arbitrability were to be submitted to the arbitrator. As to whether they elected to do so in this case, both PPOA and USPS argued the arbitrability issue to the arbitrator when supporting or contesting lack of compliance with the initial award. While the Supreme Court has recognized that merely arguing arbitrability does not indicate a clear willingness to be bound by the arbitrator’s decision on that point, USPS did not identify a basis for the Court to set aside the determinations. The next question was whether the arbitrator’s award and order drew their essence from the CBA. An award draws its essence from a contract so long as the arbitrator was “arguably construing or applying the contract.” Here, the arbitrator’s order plainly rested on his interpretation of the term "reinstatement", as it was used in the CBA. In addition, the order was entitled to enforcement as an appropriate exercise of the arbitrator’s authority “to see that his earlier award was implemented.” USPS argued that its decision to revoke Bailey’s clearance was separate from the original dispute and that the arbitrator could not resolve it without exceeding his authority. This posed another question of arbitrability for the arbitrator. Though USPS said its action was a subsequent development, USPS relied on the arbitrator’s original order when it acted. The arbitrator was not addressing new facts when it considered the revoked clearance and leave. To hold otherwise would “permit Defendant to exercise a veto over the arbitrator’s handling of an employment grievance and order of reinstatement by adopting a new, post-arbitration ground for the employment decision."

- **COURT ERRED IN SETTING ASIDE ARBITRAL AWARD**

  Adam Joseph Resources (AJR) v. CNA Metals
  2019 WL 1345409
  United States Court of Appeals, Fifth Circuit
  March 26, 2019

AJR, a Malaysian business, brought a complaint against TX Corporation CNA Metals, invoking federal diversity jurisdiction and alleging breach of contract claims. CNA moved to compel arbitration based on its arbitration agreement with AJR and pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention). The arbitration, conducted by AAA, went on for two years. Represented by law firm Brown Sims (Brown), AJR prevailed. Per AJR's retention agreement, Brown was assigned a 37% interest in the recovery against CNA. On the day the award was issued, however, CNA's attorney, Ronald Cohen, died unexpectedly. This was not communicated to Brown or the court. Instead, CNA hired a different law firm, which proceeded to negotiate and execute another settlement with AJR, cutting out Brown's fee. Still unaware of Cohen's death, the court proceeded on Brown's motion to confirm and when it received no answer from CNA's counsel, entered final judgment. CNA moved the court to set aside the judgment under Rule 60(b)(5). Brown filed a Rule 60(b)(6) motion for relief from judgment, asking the court to reform the final judgment to reflect CNA's liability to AJR for its portion and to Brown directly for its assigned interest in the award. The court denied the Rule 60(b)(6) motion and granted the Rule 60(b)(5) motion, vacating the earlier final judgment and dismissing the action as moot. Brown filed a Rule 24 motion to intervene and a Rule 59(e) motion to alter or amend. The court denied the motions and Brown appealed.

The United States Court of Appeals for the Fifth Circuit reversed, vacated, and remanded. The Court established that it had jurisdiction, pursuant to a recent decision in *Stemcor*. The lower court analyzed Brown's claim under the well pleaded complaint rule, looking only to the ground of jurisdiction asserted in the initial complaint – diversity – to deny the motions. *Stemcor* made clear that there is another path to jurisdiction: when there is an arbitration agreement or award falling under the Convention and a dispute that relates to the arbitration agreement. Both were present here. Brown was entitled to intervene because he timely filed. He also had a right to intervene, demonstrating a substantial interest in the contingency fee; impaired ability to protect his interests without intervention; and parties who would not adequately represent his interest. The court abused its discretion when it dismissed Brown's motion for relief from judgment and granted CNA's motion to set aside the arbitral award as settled. The matter was remanded to the court to consider whether Brown had a viable and legal interest in the award and if so, whether CNA was liable to Brown for its claimed interest in the award.

New York

- **SECOND CAUSE OF ACTION DENIED SUB SILENCIO BY ARBITRATOR**

  Hament v. Fitzgerald
  2019 WL 1442101
  Supreme Court, Appellate Division, First Department, New York
  April 2, 2019

  Fitzgerald, a corporate officer of ARK Construction, contracted with Hament to complete construction work. The relationship soured and Hament commenced arbitration against ARK and filed a Supreme Court complaint against Fitzgerald, involving the same agreement, scope of work, and personnel. With the exception of claims involving countertop installation and damage to a sink, resulting in a small award, the arbitrator denied all other claims in an award that incorporated by reference the causes of action set forth in the Supreme Court complaint against Fitzgerald. When Hament brought a second cause of action against Fitzgerald for intentional tortious injury to property, Fitzgerald moved to dismiss. The court denied the motion and Fitzgerald appealed.

  The Supreme Court, Appellate Division, First Department, New York reversed and granted the motion. The second cause of action was denied sub silencio by the arbitrator, which barred relitigation of the claim by Fitzgerald, who was in privity with ARK, by res judicata and collateral estoppel.

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

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