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ADR Case Update 2020 - 2

Federal Circuit Courts

- **ARBITRATOR DID NOT EXCEED AUTHORITY**

Kemper Corporate Services, Inc. v. Computer Sciences Corporation v. Kemper
2020 WL 113985
United States Court of Appeals, Fifth Circuit
January 10, 2020

Kemper hired CSC to update its insurance software. The parties' contract (the Exceed Agreement) provided that all disputes would go to nonbinding mediation and, if not resolved, to binding arbitration; the Agreement prohibited the arbitrator from awarding consequential damages. The parties disputed about CSC's development of software and proceeded to mediation then arbitration. Finding that CSC breached the Agreement, the arbitrator awarded Kemper payments made to CSC, internal expenses, arbitration costs and expenses, and pre-judgment interest. Kemper moved to confirm and CSC moved to vacate. The court adopted the magistrate judge's recommendation to confirm and CSC appealed.

The United States Court of Appeals for the Fifth Circuit affirmed. CSC argued that the arbitrator lacked the authority to categorize damages as consequential or direct. The Court found that authority to categorize was conferred by the Exceed Agreement because it was essential to the arbitrator's task. Given that the arbitrator did not exceed the scope of his contractual authority by classifying and awarding damages to Kemper, the Final Award was subject to a very deferential review, to be upheld if the arbitrator even arguably interpreted the parties' contract. The arbitrator did.

- **ARBITRATOR ENTITLED TO RECONSIDER INTERIM AWARD**

Quezada v. Bechtel OG & C Construction Services, Inc.
2020 WL 205951
United States Court of Appeals, Fifth Circuit
January 14, 2020

As an employee of Bechtel, Nicole Quezada was required to participate in Bechtel's Employee Dispute Resolution Program (DRP), which required arbitration before AAA for "resolving

workplace disputes for both employees and the company.” Quezada and Bechtel proceeded to arbitration after Quezada claimed that Bechtel engaged in discrimination, failure to accommodate, and retaliation in violation of the ADA. The arbitrator issued an interim award finding that Quezada had shown discrimination but could not show discriminatory or retaliatory termination, awarding her \$500 in nominal damages. Quezada’s motion for reconsideration was granted. The arbitrator set aside the interim award, finding that he had overlooked key evidence, and issued a final award that included back pay, front pay, compensatory damages, attorneys’ fees, and post-judgment interest. Bechtel sought to vacate, arguing that the arbitrator exceeded his authority, and Quezada moved to confirm. The court concluded that it had subject matter jurisdiction over the matter, and that Bechtel was not entitled to vacatur. Bechtel appealed.

The United States Court of Appeals for the Fifth Circuit affirmed. The Court adopted the look-through approach endorsed in *Vaden* and held, as a matter of first impression, that the district court had authority under the FAA to resolve the parties’ motions to compel, confirm, or vacate the arbitrator’s award. Bechtel’s assertion that the arbitrator exceeded his authority by misapplying Fifth Circuit law amounted to a “freestanding claim” of manifest disregard for the law, a ground for vacatur that the Fifth Circuit had rejected. Bechtel also argued that the arbitrator exceeded his authority in reconsidering its earlier denial of back and front pay, an argument that ignored that the DRP contained a provision providing that either party may file a motion for reconsideration with the arbitrator. The arbitrator was entitled to reconsider his interim award.

- **NO CONTRACTUAL BASIS FOR CLASS ARBITRATION**

Catamaran Corporation v. Towncrest Pharmacy
2020 WL 110758
United States Court of Appeals, Eighth Circuit
January 10, 2020

Catamaran had agreements with pharmacies SXC Health Solutions and Catalyst Health Solutions to furnish prescription drugs to plan members. The agreements provided for arbitration. Following a dispute between the parties, the pharmacies filed a demand for class arbitration. The court found no contractual basis for class arbitration in the agreements between Catamaran and the pharmacies, granted Catamaran’s motion for summary judgment, and entered a declaratory judgment prohibiting class arbitration. The pharmacies appealed.

The United States Court of Appeals for the Eighth Circuit affirmed. A party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. An ambiguous agreement cannot provide the necessary contractual basis to conclude that the parties agreed to class arbitration. The pharmacies point to language from *Stolt-Nielsen*, providing that in certain contexts, it is appropriate to presume that the parties in an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the party’s agreement. In this case, there was no contractual basis to conclude that the parties implicitly authorized class arbitration. The agreements were not inconsistent with individual arbitration and did not support the conclusion that the parties intended class arbitration.

- **ADMINISTRATIVELY CLOSING A CASE NOT AN APPEALABLE ORDER UNDER FAA**

Psara Energy, Limited v. Advantage Arrow Shipping, LLC et al.
2020 WL 104348
United States Court of Appeals, Fifth Circuit
January 9, 2020

Psara had a bareboat charter agreement with Space Shipping, LLC; Geden Holdings was the performance guarantor. After the vessel was detained and extensively damaged, Psara initiated a maritime arbitration claim against Space Shipping and Geden. Geden transferred its fleet of vessels to other entities, including Advantage, and Psara sought and obtained maritime attachments against Advantage. Advantage moved for referral to arbitration in London on the basis that Psara’s claims all arose from the charter party between Psara and Space Shipping, which contained a valid and enforceable arbitration clause. The court granted the motion and administratively closed the case, denying pending motions as moot and retaining jurisdiction to

enforce any arbitration award. Months later, the court denied Psara's motion to stay the referral to arbitration pending appeal and this Court denied its identical motion. Psara appealed.

The United States Court of Appeals for the Fifth Circuit held that it lacked appellate jurisdiction and dismissed the appeal, finding that the district court's order, which administratively closed the case, was not a final, appealable order under the FAA. A final decision with respect to arbitration means a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment. An arbitration order entering a stay, as opposed to a dismissal, is not an appealable final order. Administratively closing a case is the "functional equivalent of a stay" and thus not an appealable order under the FAA. The court rejected Psara's contention that the collateral order doctrine authorized appellate jurisdiction because the collateral order doctrine does not apply to orders concerning arbitration governed by the FAA. The Court also held that 28 USC §1292(a)(3) (conferring jurisdiction over interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed) was inapplicable to referrals to arbitration in admiralty cases that do not determine a party's substantive rights or liabilities.

- **FEDERAL APPEALS COURT CORRECTS DISTRICT COURT'S FLAWED ARBITRATION ANALYSIS**

Iraq Middle Market Development Foundation v. Harmoosh

2020 WL 130281

United States Court of Appeals, Fourth Circuit

January 13, 2020

The Iraq Middle Market Development Foundation loaned \$2 million to Al-Harmoosh. When the Foundation sued managing partner Harmoosh for failure to repay the loan, the court dismissed the action after Harmoosh asserted his right to arbitrate pursuant to an arbitration clause in the loan agreement. Harmoosh did not move to compel arbitration, as he was entitled to do under the FAA. Three years later, the Foundation sued Harmoosh in an Iraqi trial court, which granted judgment to the Foundation. Under Iraqi law, if a party fails to assert the right to arbitration in the trial court, the party waives that right. The minutes from the five trial court hearings contained no reference to any assertion by Harmoosh of a right to arbitrate. The Foundation returned to the District of Maryland, seeking recognition under the Maryland Foreign Money Judgments Recognition Act. Harmoosh moved to compel arbitration and dismiss the suit, arguing that the Iraqi proceeding was contrary to the parties' agreement to arbitrate. The court, construing the motion as one for summary judgment, granted judgment to Harmoosh and the Foundation appealed. This Court vacated the judgment, finding that a party defaults his right to arbitrate if he fails to raise arbitration before so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the arbitration, and remanded the case for development of the record on this point. The district court held that it was immaterial whether Harmoosh raised the arbitration defense in the Iraqi court because he could not substantially utilize the litigation machinery since the Iraqi trial court employs relatively summary procedures and does not provide pretrial discovery. The Foundation appealed.

The United States Court of Appeals for the Fourth Circuit vacated and remanded. The lower court did not give weight to the evidence before it – that Harmoosh waited until after the entry of final judgment to assert an arbitration defense – and engaged in a flawed analysis by exporting our judicial norms to the Iraqi system. The court should have asked whether the final judgment resulted from Harmoosh's substantial utilization of the litigation machinery offered by the Iraqi trial court. To hold otherwise undermined principles of international comity. Harmoosh must be held to have defaulted his right to arbitrate if he failed to assert that right before the Iraqi trial court that issued its final judgment against him. Given the dueling testimonies on that point, the case was remanded.

- **COURT FINDS PANEL PROPERLY CONSTITUTED AND INJUNCTIVE RELIEF PROPER**

Soaring Wind Energy, LLC, et al., v. Catic USA Incorporated, et al.

2020 WL 63296

United States Court of Appeals, Fifth Circuit

January 7, 2020

Soaring Wind Energy LLC was created by agreement in 2007 by Tang Energy, Catic USA and others to market wind energy equipment and service. Members of Soaring Wind agreed to conduct activities constituting the business in and through Soaring Wind and its subsidiaries - and agreed that this prohibition would extend to its affiliates. The Agreement also provided that disputes arising under or related to the Agreement would proceed to binding arbitration, with each disputing member having the opportunity to name its own arbitrator. The panel had the authority to grant injunctive relief but not special, exemplary, punitive, or consequential damages. Claiming that Catic and others breached the agreement through the actions of its Chinese affiliates, Tang demanded arbitration. Tang selected its arbitrators, as did the four remaining Class A members who joined Tang in the dispute. Catic and Thompson, the CEO of one affiliate, answered the demand and named their arbitrators; Catic's non-signatory Chinese affiliates refused to participate in the arbitration. The seven selected arbitrators then appointed two more. Catic and Thompson preemptively sued Tang, et al., in federal court, seeking a declaratory judgment that the panel was improperly constituted. The court dismissed those claims. Catic and Thompson raised the same claim with the arbitration panel, which determined it was constituted according to the Agreement's terms. The panel issued an award in favor of the claimants, ordering Catic and its non-signatory Chinese affiliates to be jointly and severally liable for \$62.9 million in lost profits and ordered that Catic and Thompson's equity interest in Soaring Wind should be divested. The claimants sought to confirm the award. The court bifurcated the proceedings, staying the case against the Chinese entities, and confirmed the award. Catic and its Chinese affiliates appealed.

The United States Court of Appeals for the Fifth Circuit affirmed. The agreement forming the LLC bore a relation to China sufficient for federal jurisdiction under the NY Convention. Catic argued that the court erred by confirming the award without first reviewing the arbitrators' powers over Catic's Chinese affiliates. The Court found this point irrelevant because Catic assumed the obligation of its affiliates' performance. The arbitration panel reasonably found that a breach had occurred. The Court also held that the arbitration panel was properly constituted, contrary to Catic's argument that it was not because the plaintiffs appointed five arbitrators while the other side only appointed two. The Agreement contemplated the number of parties, not the number of sides. The case featured seven members, each of whom had the opportunity to name an arbitrator under the Agreement. The agreed-upon selection process was followed to the letter; Catic USA and Thompson received the process they were due. Catic also contested that the award was improper, attacking the assumption of the panel that the affiliate's investment would generate profits. Because Catic refused to provide relevant information, however, it was within the arbitration panel's authority to infer that the affiliate's investment was profitable. The award was proper. The Court also held that the panel's order that Catic and Thompson divest of equity interest in the LLC constituted permissible injunctive relief. Catic asserted that this essentially doubled the damages, and was indistinguishable from punitive relief; however, given the broad scope of equitable relief, combined with deference to the arbitration panel, the Court declined to set aside the divestment as punitive and not equitable.

- **MULTIPLE ATTACKS ON THE MERITS OF ARBITRAL AWARD ALL FAIL**

Hoolahan v. IBC Advanced Alloys Corp
2020 WL 255759
United States Court of Appeals, First Circuit
January 17, 2020

When IBC purchased Beralcast from Gerald Hoolahan and Gary Mattheson in exchange for cash and shares, the parties executed a Purchase and Sales Agreement providing that Delaware law governed and including an arbitration clause. After Hoolahan was blocked in selling his shares, his attorney, Schoenberger, contacted IBC's CFO, Anderson. Anderson informed Schoenberger that IBC blocked the sale because Hoolahan failed to disclose an outstanding claim related to the IBC-Beralcast deal; Schoenberger conveyed that he thought the restriction violated the Agreement. At that point, Schoenberger learned that Anderson was represented by counsel. Anderson introduced Schoenberger to the IBC corporate counsel via email and Schoenberger emailed both to memorialize the phone call. When Hoolahan found out that Mattheson had not been blocked when he placed his shares on the market, he initiated arbitration, claiming that IBC breached the Agreement and the implied covenant of good faith and fair dealing by deliberately blocking his sale. During the arbitration hearing, Schoenberger testified about the call and the

email; however, Anderson was unavailable due to a death in the family. It came to light at the hearing that IBC harbored ill will against Hoolahan. The arbitrator awarded Hoolahan damages in the amount he would have received if he sold his shares at the same time as Mattheson, as well as attorneys' fees and costs. IBC filed a petition to vacate the award. The court confirmed the award and IBC appealed.

The United States Court of Appeals for the First Circuit affirmed. IBC asserted that the award should be vacated because it was procured by undue means due to reliance on the testimony of Hoolahan's attorney for the sale of the shares. Undue means encompasses underhanded conduct that amounts to intentional malfeasance, which IBC was unable to show. The arbitrator found Schoenberger's testimony credible that he did not know IBC was represented by counsel until the end of his phone call with Anderson and determined that the testimony did not violate the OH Rules of Professional Conduct. Even if the arbitrator's reliance on Schoenberger's testimony did constitute reliance on undue means, IBC failed to show that the testimony procured the award. IBC also asserted that the arbitrator was guilty of misconduct in refusing to postpone the hearing; however, IBC cited no authority to mandate a sua sponte continuance of the hearing without which there was no clear or obvious error. The arbitrator's refusal to permit the submittal of an affidavit from Anderson did not warrant vacatur. IBC never asked for a continuance even though it knew Anderson would not be available to testify. And Schoenberger was available to cross, such that the arbitrator could hear from him, make a credibility determination, and render a decision. IBC also alleged that the arbitrator exceeded his authority by awarding Hoolahan attorneys' fees in contravention of the rules and laws governing the Agreement. DE law provides that while the winning party is generally expected to pay its own attorney's fees, there are exceptions, including bad faith. In this case, the arbitrator took the evidence that amounted to existence of ill will to impute bad faith onto IBC and, as a result, awarded attorneys' fees. The arbitrator did not exceed his authority by concluding that IBC breached the Agreement. The Award cited to articles from the Agreement and these articles were raised multiple times during the hearing, which was enough to conclude that the arbitrator construed the Agreement. IBC offered no case law or inapposite case law to support its argument that the arbitrator acted with manifest disregard of the law when he failed to offset Hoolahan's award with the proceeds from Hoolahan's sale of shares previously and the value of the shares he retained at the time of the award.

Missouri

- **DENIAL OF MOTION TO COMPEL ARBITRATION AFFIRMED**

Theroff v. Dollar Tree
2020 WL 203121
Supreme Court of Missouri
January 14, 2020

Theroff brought a disability discrimination action against her former employer, Dollar Tree, asserting that she is legally blind and that Dollar Tree constructively discharged her by refusing her request to allow her service dog to accompany her to work. Dollar Tree moved to compel arbitration pursuant to an agreement to arbitrate. The circuit court held an evidentiary hearing on the motion, during which Theroff asserted that another employee helped her to complete her employment paperwork since she could not read it on the computer and that she did not assent to an arbitration agreement because it was never mentioned and she did not know that she had signed it. The circuit court overruled the motion without making any findings. Dollar Tree appealed.

The Supreme Court of Missouri affirmed. There was nothing to suggest that the lower court's finding that Theroff did not assent to an arbitration agreement in her employment paperwork was not supported by substantial evidence, was against the weight of the evidence, or was the result of the erroneous application of the law. With no clear and unmistakable evidence of the existence of assent to a delegation provision, the lower court could not delegate the matter to an arbitrator whose very existence depended on the agreement.

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

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