ADR UPDATE

AUTHOR*

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PARTIES CANNOT CONTRACT FOR REVIEW OF AWARD ON THE MERITS BY APPELLATE COURT

***Housing Authority of the City of Calexico v. Multi-Housing Tax Credit Partners XXIX, L.P.*, 94 Cal. App. 5th 1103 (2023)**

The parties' arbitration agreement in this case provided that the arbitrator "shall endeavor to decide the controversy as though the arbitrator were a judge in a California court of law." It further provided that the parties would maintain their appeal rights and that the arbitrator's decision and "findings of fact and conclusions of law shall be reviewable on appeal upon the same grounds and standards of review as if said decision and supporting findings of fact and conclusions of law were entered by a court with subject matter and present jurisdiction."

After the arbitrator issued a final award denying all claims and counterclaims and declined to award attorneys' fees or costs, the plaintiffs sought review in the trial court. That court declined to review the award on the merits for errors of fact or law and declined to grant the plaintiffs' petition to partially reverse or vacate the award. It reasoned that the arbitration agreement provided for such a review only by the appellate court. The plaintiffs appealed.

The court of appeal reversed, holding that the trial court should have undertaken the review. It noted that "courts are not parties to arbitration agreements and are not bound by their terms." It reasoned that just as parties cannot agree that a legal dispute arising from their arbitration agreements will be resolved by the California Supreme Court, they have no ability to leapfrog over the superior court's original jurisdiction to undertake such a review by placing this authority in the hands of the court of appeal.

NO AUTHORITY TO ISSUE 3RD-PARTY SUBPOENAS FOR DISCOVERY DOCUMENTS

***McConnell v. Advantest America, Inc.*, 92 Cal. App. 5th 596 (2023)**

A few years ago, in *Aixtron, Inc. v. Veeco Instruments, Inc.*,[1] the court of appeal held that the California Arbitration Act (CAA)[2] does not provide for prehearing discovery subpoenas to third parties. Thus, with the exceptions of wrongful death and personal injury cases, third-party discovery subpoenas are not available in most arbitrated cases unless the parties explicitly contract to allow for them.

Some arbitrators have attempted a workaround: issuing subpoenas to third parties to appear and produce documents at a hearing set specifically "for the limited purpose of receiving documents," with the actual arbitration hearing on the merits—where testimony from the same nonparties could be sought—adjourned until a future date.

This case makes clear that such a workaround fails—and that where a "hearing" is merely a tactic to provide for discovery of information and documents from third parties, such subpoenas are invalid under the CAA.

That was the reality in this case, where the arbitrator issued broad third-party subpoenas for producing documents at a hearing limited to collecting them, did so with the intention of adjourning the hearing for nearly a year—when the same third parties would be summoned to testify, and allowed for the documents to be uploaded to a portal controlled solely by the subpoenaing party's counsel.

JURY WAIVER IN ARBITRATION AGREEMENT DOESN'T RENDER DELEGATION CLAUSE UNCONSCIONABLE

***Holley-Gallegly v. TA Operating, LLC*, 74 F.4th 997 (9th Cir. 2023)**

Kenneth Holley-Gallegly filed a putative class action lawsuit against his former employer, TA Operating, LLC. TA removed the case to federal court and moved to compel arbitration. Holley-Gallegly had signed an arbitration agreement with a delegation clause that provided: "All challenges to the interpretation or enforceability of any provision of this Agreement shall be brought before the arbitrator, and the arbitrator shall rule on all questions regarding the interpretation and enforceability of this Agreement."

TA argued this clause placed the determination of whether the case was arbitrable in the arbitrator's hands. The district court held the clause was procedurally unconscionable because the arbitration agreement was a contract of adhesion presented as a condition of continued employment. It then found that the delegation clause was also substantively unconscionable because the agreement contained a jury waiver provision that stated: "IF THIS AGREEMENT IS DETERMINED TO BE UNENFORCEABLE, ANY CLAIMS BETWEEN YOU AND THE COMPANY RELATED TO YOUR EMPLOYMENT SHALL BE SUBJECT TO A NON-JURY TRIAL IN THE FEDERAL OR STATE COURT THAT HAS JURISDICTION OVER THE MATTER."

It then denied the motion to compel arbitration. TA appealed.

The Ninth Circuit held that the district court had erred in holding the delegation clause unenforceable. It vacated the order with instructions that the district court order the arbitrator to decide the issue of arbitrability. The Ninth Circuit explained that, under *Rent-A-Center, West, Inc. v. Jackson*,[3] delegation clauses are essentially severable mini-agreements within agreements to arbitrate. As such, the court is not to look at the arguments about the unconscionability of the arbitration agreement *as a whole*, but only at those that apply to the delegation clause specifically.

The court emphasized that the jury waiver provision did not render the delegation clause substantively unconscionable because it would only apply if the agreement were determined to be unenforceable. Under that circumstance, the plaintiff would be able to argue against the jury waiver provision in court. If the agreement *were* deemed enforceable, then pursuing the case in arbitration would serve to waive a jury trial, anyway. Thus, the court noted that the provision had no bearing on whether the delegation of arbitrability was unconscionable.

SEPARATE ORDER DENYING MOTION TO COMPEL ARBITRATION NOT SUBJECT TO INTERLOCUTORY APPEAL

***Boshears v. PeopleConnect, Inc.*, 76 F.4th 858 (9th Cir. 2023)**

In this non-employment case, John Boshears sued PeopleConnect, a digital identity company, for violating his right to publicity by using his photo on a website, Classmates.com. PeopleConnect sought to compel arbitration under section 4 of the Federal Arbitration Act (FAA). It also sought to dismiss Boshear's complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that it had immunity under the Communications Decency Act.[4]

The district court denied both requests for relief in a single 26-page document titled "order." PeopleConnect filed an interlocutory appeal challenging both of these denials, citing to section 16(a) of the FAA. That section provides: "An appeal may be taken from . . . an order . . . denying a petition under section 4 of this title to order arbitration to proceed."

In a concurrently filed memorandum disposition, the Ninth Circuit vacated the district court's order denying the motion to compel arbitration and remanded for further proceedings. It issued this published opinion to explain the "obvious principle" that "two orders do not become one 'order' for the purposes of section 16(a) solely by virtue of the fact that they appear in the same document."

Despite the fact that the denial of the rule 12(b)(6) motion was made in the same document that denied the motion to compel arbitration, each constituted a separate order, so the denial of the arbitration motion was not subject to review under section 16(a) of the FAA.

PRACTICE TIP: MEDIATION BRIEFS

Mediation briefs are usually your mediator's first exposure to your case. In addition to providing the basics—a statement of facts, analysis of the legal claims and defenses, and discussion of damages—you should give your mediator background and context to help understand the dynamics of the case.

- What discussions led to mediation?
- How have the interactions between the parties/counsel been so far?
- Is there any history of which the mediator should be aware?
- What is your client like and what are that client's needs?
- What barriers to resolution do you anticipate?

Sometimes, some of this information may be better conveyed through a phone call. Don't hesitate to ask for one.

Given the option to exchange briefs, most attorneys choose to keep them confidential. This is often a missed opportunity to give the other side's decisionmaker an unfiltered view of your case and to demonstrate the quality of your work—particularly when you have written a strong brief that lays out your client's positions and anticipates and addresses the opposing side's best arguments.

There may be arguments or evidence you wish to hold back from sharing with the other side, particularly when the other side has not yet been "pinned down." Make this explicit for the mediator—and make the brief easier to share if you choose to do so—by placing all facts, evidence, and arguments that should not be shared or discussed with the other side in a separate section explicitly titled as confidential.

ESTOPPEL APPLIED WHERE DEFENDANT REPRESENTED PLAINTIFF COULD OPT OUT OF ARBITRATION AGREEMENT

***Perez v. Discover Bank*, 74 F.4th 1003 (9th Cir. 2023)**

This non-employment case involves a claim of discrimination based on citizenship and immigration status after an application for consolidation on student loans was denied. The lead plaintiff in this case signed two arbitration agreements: one during the original loan application process years prior, and one during the loan consolidation application process. She took the position that her claims were outside of the scope of the first arbitration agreement and that both agreements were unconscionable. At a hearing on these issues, the defendant bank argued that the consolidation agreement was not unconscionable because the plaintiff would not be bound by it if she sent an opt-out notice that day.

On that basis, the district court granted the motion to compel arbitration based on the second agreement.

Shortly after the hearing, the plaintiff sent in an opt-out notice. She moved for leave to file a motion for partial reconsideration, seeking to have the court reverse its decision compelling arbitration. The defendant responded by arguing that the opt out did not apply to her discrimination claim because it had accrued before her opt out and that, in the alternative, the first arbitration agreement also applied. The court granted the plaintiff's motion and rescinded the portion of the order compelling her to submit her discrimination claims to arbitration. It determined that her opt out was valid, and that her claims were outside of the scope of the first arbitration agreement. The defendant appealed.

The Ninth Circuit affirmed. It held that the defendant was judicially estopped from now arguing that the plaintiff could not opt out of the second arbitration agreement. Its position clearly contradicted the one it previously took, upon which the court relied. Absent estoppel, the defendant would derive an unfair advantage.

ENDNOTES

* Ramit Mizrahi is an employment law mediator. She is chair of the Pasadena Bar Association Labor & Employment Law Section, former chair of the CLA Labor & Employment Law Section, and former editor-in-chief of this publication. She has been recognized as one of the Top 100 Super Lawyers (2023) and Top 50 Women Super Lawyers in Southern California (2022, 2023). She can be reached at ramit@mizrahilaw.com.

1. *Aixtron, Inc. v. Veeco Instruments, Inc.*, 52 Cal. App. 5th 360 (2020).
2. California Arb. Act, Cal. Code Civ. Proc. §§ 1280-1294.4.
3. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).
4. Communications Decency Act, 47 U.S.C. § 230.