New Developments in Arbitration

IFTA ANNUAL ARBITRATOR MEETING

Loews Santa Monica Beach Hotel

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Outline

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2. Legislation: Senate Bill 766

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The ***Birbrower*** Saga

- *Birbrower, Montalbano, Condo & Frank v. Superior Court of Santa Clara County* (1998)
- representation by New York law firm of a California corporation, AAA Arbitration proceeding in California
- *Out of state* attorneys not admitted to appear for parties in arbitrations with seat in California

2. Legislation: Senate Bill 766

The ***Birbrower*** Saga Con't

- Extensive cricism
- Amendment to the California Code of Civil Procedure
- attorney admitted to the bar of *any other state* may represent the parties in the course of, or in connection with, an arbitration proceeding in California
- Requirements: payment of fee, certificate on arbitrator
- Problem: interpretation of *out of state*: foreign States excluded
- Section 1297.351 of the CCP: allows foreign attorneys to appear for parties (only?) in conciliations

2. Legislation: Senate Bill 766

The ***Birbrower*** Saga Con't

- Senate Bill 766
- permits an out of state, foreign attorney to provide legal services in an international commercial arbitration or related proceeding
- requirements: member in good standing of a recognized legal profession, subject to regulation and discipline by professional body
- Finally a solution
- In force as of January 1, 2019

2. Legislation: Senate Bill 766

California International Arbitration Council (**CIAC**)

- Initiative thanks to SB 766
- promote and build confidence globally in California as a venue for international arbitration
- enhance consciousness within California among businesses, counsel, arbitral institutions and arbitrators
- 45 Board of members, currently fundraising
- Educational work, amicus briefs etc.

3. Rockefeller Technology v. Changzouh SinoType (Service of Process)

3. Rockefeller Technology v. Changzouh SinoType

- Service of process and enforcement
  - Case study

- Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The “Hague Convention”)
  - Understanding until today: not mandatory, parties may “contract out”

- *Rockefeller Technology v. Changzouh Sinotype*
  - Cal. App., review granted on 26 September, 2018
  - Parties
  - Dispute
  - Default arbitral award, $414 million

3. Rockefeller Technology v. Changzouh SinoType

- First trial court: award confirmed
  - Rockefeller Asia had not properly served SinoType under the Hague Service Convention
  - **But**: the parties were permitted to contract around the Convention's service requirements
  - »*To allow parties to enter into a contract with one another and then proceed to unilaterally disregard provisions out of convenience [...]* ***would essentially result in anarchy and turn the entire international arbitration law on its head***«
  - Private agreement v. Hague Convention

3. Rockefeller Technology v. Changzouh SinoType

- Second trial court, 15 months later
  - motion to set aside judgment denied
  - holding: private agreement as to service of process

- CA Court of Appeal (2 step approach)

  1. Service of the summons not effective under the Hague Service Convention
  2. Parties may not contract around the convention's service requirements (language is "**mandatory"**)

  Plus: Void *ab initio*, judgment can be set aside anytime

3. Service of Process

- IFTA Model International Licensing Agreement, 5th Edition (released in 2010): "*The Parties agree to accept service of process in accordance with the IFTA® Rules and agree that such service satisfies all requirements to establish personal jurisdiction over the Parties. Both Parties* ***waive application of the Hague Convention for Service Abroad*** *of Judicial and Extrajudicial Documents in Civil or Commercial Matters.*"

3. Rockefeller Technology v. Changzouh SinoType

Questions:

- Can you contract your way out of the Hague Service Convention?
- What does Rockefeller mean for IFTA?

Review of appeal granted. Stay tuned.

3. Rockefeller Technology v. Changzouh SinoType

Many, many criticism:

- **CIAC**: Amicus brief?
- **IFTA**: Amicus brief?
- Compare **Foreign Sovereign Immunities Act**: When contracting with a foreign government to provide goods or services, it is permissible for US corporations to contract away the need for formal service of process. *Why are not private entities able to do so?*

3. Rockefeller Technology v. Changzouh SinoType

- Country-by-country overview as to Article 10 Hague Service Convention:
  - **China** has filed a “reservation” to Article 10, which states that it “oppose[s] the service of documents in the territory of the People's Republic of China by the methods provided by Article 10 of the Convention”
  - **Egypt** has objected to Article 10 in its entirety
  - **Bulgaria, Hungary, Kuwait**, and **Turkey** have objected to all of the channels of transmission listed in Article 10, referring to them collectively with the term “service.”

3. Rockefeller Technology v. Changzouh SinoType

- **Czech Republic** has adopted the position that "judicial documents may not be served ... through postal channels."
- **Russia** objected to certified international mail or Federal Express International Priority mail on individuals
- **Germany** has objected to service by postal channels
- **Switzerland** has objected to Article 10, including service by postal channels

- **Canada** did **not** object to service by postal channels

3. Rockefeller Technology v. Changzouh SinoType

Compare: ***Water Splash, Inc. v. Menon*** (2017, S. Ct.)

- federal and state appellate courts split whether Hague Convention permits service of process by mail for 30 years
- Argument of Menon: Article 10(a) does not apply to service of process, but applies as to "post-answer judicial documents"
- S. Ct.: Article 10 Hague Convention: "*Provided the state of destination does not object, the present Convention shall not interfere with – a) the freedom to send judicial documents, by postal channels, directly to persons abroad*"
- S. Ct.: meaning of 'send' in Article 10(a) includes 'serve'
- S. Ct.: French version is as authentic as the English version; in French, counterpart to "send" is "adresser," which consistently has been interpreted as meaning service or notice

3. Rockefeller Technology v. Changzouh SinoType

Water Splash, Inc. v. Menon Con't

- S.Ct: Convention does **not** prohibit such service, but also **does not authorize it automatically**
- S.Ct.: service by mail is **only** permissible if two conditions are met
  (1) the receiving state has **not objected** to service by mail; and
  (2) service by mail is **authorized** under otherwise-applicable law
- Difference
  - Water Splash: respondent in Canada
  - Rockefeller: respondent in China
- No statement as to mandatory character of the Hague Convention
- Is there room for *Rockefeller*?

4. Non-Signatories

4. Non-Signatories

- The Law
  - IFTA Rule 8.3: "*The **Arbitrator shall rule on his/her own jurisdiction**, including ruling on any objections with respect to the existence or validity of the agreement of the parties to arbitrate*"
  - JAMS Rule 11[b]: "*The Arbitrator has the authority to determine jurisdiction […] issues as a preliminary matter.*"
  - Current practice of IFTA as to non-signatories: IFTA may only open cases between parties who are signatories to an agreement which contains an IFTA Arbitration clause

4. Non-Signatories

Californian/U.S. Case Law

- *Benaroya v. Willis* (Cal. App. 2018):
  - Bruce Willis claimed outstanding payments by Benaroya
  - JAMS arbitrator added Michael Benaroya as an alter ego defendant to arbitration, even though MB had not signed individually the underlying agreement / arbitration clause
  - trial court confirmed award
  - CA Court of Appeals: only a court has jurisdiction to bind a non-signatory. Loan-out entity was bound, non-signatory actor not
  - Reference to *Sanquist v. Lebo Automotive* (Cal. App. 2014): "*To presume **arbitrability** without first establishing, independently, consent to arbitration is to **place the proverbial cart before the horse***"
  - "*six theories by which a non-signatory may be bound to arbitrate: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary*"

- IFTA's practice:
  - Determination of facts as to alter ego? Yes
  - Procedural ruling? No

4. Non-Signatories

- *Cortes-Ramos v. Martin-Morales* (1st Cir. 2018): non-signatory **Ricky Martin** could not compel arbitration based on arbitration agreement in song contest to which he was not a party. He was neither a contestant nor a co-sponsor

- *A.D. v. Credit One Bank* (7th Cir. 2018): child of cardholder not bound by clause in cardholder agreement; claim under federal TCPA

- *Matthau v. Superior Court* (Cal. App. 2007): Walter Matthau's loan-out entity was not bound

4. Non-Signatories

- *Outokumpu Stainless USA, LLC v. Converteam SAS* (11th Cir. 2018)
  - there was no agreement to arbitrate between buyer and supplier upon which buyer could be compelled to arbitrate
  - although contract between buyer and seller defined seller to include subcontractors, **supplier had not entered into a subcontract prior to signing of contract between buyer and seller**, and thus supplier could not have been considered a signatory of the contract

4. Non-Signatories

- *Jensen v. U-Haul of California* (Cal. App. 2018): Employee not third-party beneficiary of truck rental contract; insufficient agency relationship between lessee and employee and claims not dependent on rental contract (hence no equitable estoppel)

- Nursing home cases – *Hutcheson v. Eskaton* (Cal. App. 2017) and *Avila v. Southern California Specialty Care* (Cal. App. 2018) – neither relative bound by agreement signed by deceased resident of facility. "*Generally, a person who is not a party to an arbitration agreement is not bound by it, but there are* ***exceptions****; for example, a patient who signs an arbitration agreement at a health care facility can bind relatives who present claims arising from the patient's treatment*."

4. Non-Signatories

Difference between Swiss – Californian/US Approach:

- **California/US (invasive, formalistic, anti-arbitration):** 1. trial court establishes consent to arbitration by analyzing state law (e.g. assignment, alter ego, piercing the corporate veil), 2. trial court concludes there is "arbitrability" and sends parties to arbitrator to deal with substantive issues

- **Switzerland (arbitration-friendly, public-policy compliant):** 1. arbitrator establishes personal scope of AC by analyzing state law (e.g. assignment, third party involvement) and renders award on jurisdiction which can be appealed at Federal Court, 2. arbitrator analyzes the substantive issues (alter ego, piercing the corporate veil)

4. Non-Signatories

- Swiss Federal Supreme Court, BGE 129 III 727 (October 16, 2003)
  - arbitration clause extended to an individual who had not signed it but was **actively involved in the performance** of the contract (still exceptional)
  - Other theories to bind third parties to arbitration agreement:
    - assignment of a claim, simple or joint assumption of an obligation, transfer of a contractual relationship
    - by a mere procedural step, a party may be adhered to an arbitration clause

4. Non-Signatories

- Swiss Federal Supreme Court, BGE 129 III 727 (October 16, 2003)
  - on **enforcement** under Swiss *lex arbitri* and Article V(2)(b) NYC: no public policy concern
  - no reason to impose too strict requirements as to the **formal validity** of the extension of an arbitration clause to a third party
  - Swiss PIL Article 178:
    - *(1) The arbitration agreement must be **made in writing, by telegram, telex, telecopier or any other means**.*
    - *(2) Furthermore, an arbitration agreement is valid if it conforms **either** to the law chosen by the parties, **or** to the law governing the subject-matter of the dispute, in particular the main contract, **or** to Swiss law.* (**in favorem validitatis**)

5. Confidentiality

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- IFTA Rule 16.5: "*Notwithstanding anything in these Rules, in accordance with applicable law and the agreement of the parties, the* ***Arbitrator may engage in mediation or conciliation*** *of the dispute at any time during the arbitral proceedings for the purpose of encouraging settlement. However, if the Arbitrator acts as a mediator, such Arbitrator will be* ***disqualified*** *from serving as Arbitrator on that matter.*"

5. Confidentiality

- **Senate Bill 954**
  - General rule: All communication during mediation has to stay confidential
  - New Bill 954 requires the attorney to comply with the printed disclosure and acknowledgment requirements as soon as reasonably possible after being retained
  - If you are asked to draft an award based on a mediation under IFTA Rule 16.5, double-check the disclosure agreements

5. Confidentiality

- **Conciliation**
  - Derives from civil *state* court litigation
  - Is typically *not* used as a method in international arbitration when seat in Switzerland, Germany or Austria
  - Same concerns as with med-arb (bias, impartiality)

7. Updates on Domestic Arbitration

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Agreement to arbitrate

- FAA § 2. Revocation of contract to arbitrate
  - Language of CCP §1281.2: “the court shall order the […] respondent to arbitrate […] if [….] an agreement to arbitrate […] exists, unless […] grounds exist for revocation”.
  - Change of “**revocation**” to “**rescission**”
  - *Armendariz v. Foundation Health Psychcare Services, Inc.* (Cal. 4th 2000): revocation of a contract is a **misnomer** because only offers to create a contract can be revoked (footnote)
  - If an offer is revoked, there is by definition no contract or agreement
  - Once a contract has been formed, it is only undone by rescission

7. Updates on Domestic Arbitration

Arbitrability (Switzerland: personal and objective scope of the arbitration agreement)

- *Douglass v. Serenivision, Inc*. (Cal. App. 2018): Arbitrability properly determined by arbitrator as to guarantor. Conduct of guarantor during arbitration (filing an answer and so on) bound him to the AC

- *BG Group v. Argentina* (S.Ct. 2014) arbitrators decide compliance with conditions precedent to arbitration

7. Updates on Domestic Arbitration

Arbitrability Con't

- *Uber* Terms of Service cases – Circuit split
  - 1st Cir, 2018: users were not reasonably notified of terms of service and therefore Uber's motion to compel arbitration was denied and arbitration clause was unenforceable (*Cullinane v. Uber Techs., Inc.*)
  - 2nd Cir, 2017: user bound by terms of use which were clearly presented on website (antitrust claim against company and officers; *Meyer v. Uber Technologies, Inc*.).
  - Consider also *Long v. Provide Commerce*, Inc.,(Cal. App., 2016): "*Unlike a clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly ... party instead gives his assent simply by using the Web site.*"

7. Updates on Domestic Arbitration

Arbitrability Con't

- Non-compliance of parties
  - *Roldan v. Callahan & Blaine* (Cal. App. 2013) – Reprise: clients alleged being indigent and could not afford to pay required "up front" arbitration costs as stated in retainer agreements. Court of Appeal held clients could be excused from paying arbitration fees. Long standing public policy in California of ensuring that all litigants have access to justice system
  - *Weiler v. Marcus & Millichap Real Estate Inv. Servs., Inc.* (Cal. App. 2018) follows Roldan: if a party in an arbitration demonstrates that they have no ability to pay the arbitrator, two possible consequences: either letting the party go to court, or make the other party pay

7. Updates on Domestic Arbitration

Preemption: Disagreement between CA Supreme Court and the 9th Cir. as to a **claim for public injunctive relief**

- *Broughton v. CIGNA HealthPlans of California* (Cal. 4th 1999): FAA applied to parties' arbitration agreement, assuming that their contract involved interstate commerce; claim for public injunctive relief under Consumers Legal Remedies Act is **not** arbitrable, but damage claim under same act **is** arbitrable

- *Cruz v. PacifiCare* (Cal. 4th 2003): claims for injunction were **not** subject to arbitration, but claims for unjust enrichment and for restitution and disgorgement under the Unfair Competition Law **are** subject to arbitration

7. Updates on Domestic Arbitration

Preemption Con't: Disagreement between CA Supreme Court and the 9th Cir. as to a **claim for public injunctive relief**

- *McGill v. CitiBank N.A*. (Cal. 5th 2015): FAA **did not preempt** California public policy prohibiting credit card account agreements from waiving the right to seek public injunctive relief in any forum

- *Ferguson v. Corinthian College* (9th Cir. 2014): FAA **preempted** California's Broughton–Cruz rule that claims for public injunctive relief could not be arbitrated, and students' claims fell within the scope of their arbitration agreements
- IFTA has to follow McGill (CA Supreme Court)

7. Updates on Domestic Arbitration

Preemption Con't

- *Epic Systems Corp. v. Lewis* (S.Ct. 2018): Fair labor standards; FAA saving clause is no basis for refusing to enforce arbitration agreements waiving collective action procedures for claims under the FLSA

- *DIRECTV, Inc. v. Imburgia* (S. Ct. 2015): preemption by FAA, court must enforce arbitration agreement even if it contains a class arbitration waiver

7. Updates on Domestic Arbitration

Other statutory changes

- 2013: According to FRCP Rule 45 (b) (2), a subpoena may be served at any place within the United States (applies to FAA § 7)

Dispositive Motions

- *Schlessinger v. Rosenfeld Meyer & Sussman* (Cal. App. 1995) – Reprise: arbitrator could entertain summary adjudication motions in arbitration proceeding, and live hearing was not required; claimant's ability to present material evidence was not prejudiced by summary adjudication

7. Updates on Domestic Arbitration

Discovery (Switzerland: Production of Documents)

- Restricting pre-hearing discovery: *CVS Health Corp. v. Vividus* (9th Cir. 2017)
  - Circuit split: arbitrators' authority to compel prehearing document production from third parties. Does an arbitrator possess the authority under FAA to compel production of documents from a third party prior to a hearing?
  - 9th Cir. follows 2nd and 3rd Cir.: **an arbitrator's power to compel production of documents from a third party is limited to production at an arbitration hearing**
  - Compare 8th Cir: has allowed arbitrators to order production of documents prior to the hearing, and the 6th Circuit has indicated agreement with this position. The 4th Circuit has stated that it may allow prehearing document production only under unusual circumstances

7. Updates on Domestic Arbitration

Challenges to the Award

- *Baker Marquart LLP v. Kantor* (Cal. App. 2018)
  - ex parte communications with arbitrators
  - award clearly referenced, as basis for award, issues and claims which client raised in confidential brief to arbitration panel
  - Issues and claims were not raised in client's demand for fee arbitration, and law firm had no knowledge of confidential brief until arbitration hearing was underway and did not see copy of brief until much later
  - successive judgments confirming award and later cost award not error
- *EHM Prod., Inc. v. Starline Tours of Hollywood, Inc.* (Cal. App. 2018)
  - Tour bus driver brought claim against tour bus company, tour bus company was required to defend production company in lawsuit
  - award of costs after initial arbitration award
  - No violation of “one final judgment rule“

Q & A

Contact

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ARBITRATION 2018 – CURRENT ISSUES
Arbitration Decisions Of Note

United States Supreme Court

BG Group. PLC v. Republic of Argentina, 134 S.Ct. 1198 (2014)
DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015)
Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)

Ninth Circuit Court of Appeals

CVS Health Corp. v. Vividus, LLC, 878 F.3d 703 (9th Cir. 2017)
Ferguson v. Corinthian College, 733 F.3d 928 (9th Cir. 2014)

Other Federal Circuits

A.D. v. Credit One Bank., 885 F.3d 1054 (7th Cir. 2018)
Cortes-Ramos v. Martin-Morales, 894 F.3d 55 (1st Cir. 2018)
Cullinane v. Uber Techs., Inc., 893 F.3d 53 (1st Cir. 2018)
Meyer v. Uber Technologies, Inc., 868 F.3d 66 (2d Cir. 2017)
Outokumpu Stainless USA, LLC v. Converteam SAS, 902 F.3d 1316 (11th Cir. 2018)

California Supreme Court

Armendariz v. Foundation Health Psychcare Services, Inc., Cal. 4th 83 (2000)
Birbrower, Montalbano, Condo & Frank v. Superior Court of Santa Clara County, 17 Cal. 4th 119 (1998)
Broughton v. CIGNA HealthPlans of California, 21 Cal. 4th 1066 (1999)
Cruz v. PacifiCare, 30 Cal. 4th 303 (2003)
McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017)

California Courts of Appeal

Avila v. S. California Specialty Care, Inc., 20 Cal. App. 5th 835 (2018), review denied (June 13, 2018)
Baker Marquart LLP v. Kantor, 22 Cal. App. 5th 729 (2018), reh'g denied
Benaroya v. Willis., 23 Cal. App. 5th 462 (2018)

Douglass v. Serenivision, Inc., 20 Cal. App. 5th 376 (2018)
EHM Prods., Inc. v. Starline Tours of Hollywood, Inc., 21 Cal. App. 5th 1058 (2018), review denied (June 13, 2018)
Hutcheson v. Eskaton Fountainwood Lodge, 17 Cal. App. 5th 937 (2017)
Jensen v. U-Haul of California, Inc., 18 Cal. App. 5th 295 (2018)
Long v. Provide Commerce, Inc., 245 Cal. App. 4th 855 (2016)
Matthau v. Superior Court, 151 Cal. App. 4th 593, 60 Cal. Rptr. 3d 93 (2007)
Rockefeller Tech. Investments (Asia) VII v. Changzhou Sinotype Tech. Co., 24 Cal. App. 5th 115 (2018, petition for review granted)
Roldan v. Callahan & Blaine, 219 Cal. App. 4th 87 (2014)
Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal. App. 4th 1096 (1995)

Treatises

W. Knight, R. Chernick, S. Haldeman & W. Bettinelli, *California Practice Guide – Alternative Dispute Resolution* (The Rutter Group 2018)

I. Macneil, R. Speidel, T. Stipanowich & G. Shell, *Federal Arbitration Law* (1995)