

Class 15

Alternative Dispute Resolution

Arbitration Case Studies – Case 1

- ***LaSalla v. Doctor's Association***
- **Facts:** There was a dispute between a Subway franchisor and franchisee in terms of how to split profits. In 2002, an arbitration award settling the matter was sought, received and confirmed in court. Three years later, the same issues arose in a subsequent proceeding (presumably the parties were still disputing the division of profits made subsequent to the original action).
- **Issue:** Should the doctrine of res judicata (in this case, it was the “issue preclusion” aspect that applied) be used to bar the second proceeding because the issue was already arbitrated.
- **Ruling:** The court ruled that although a confirmed arbitration proceeding would have res judicata effects in a subsequent court proceeding, it DOES NOT apply to a subsequent arbitration proceeding.
- **Key Quote:** "In negotiating the agreement, the parties are free to bargain for whatever terms they choose, including a provision establishing a system or arbitral precedent. If, however, the parties elect not to include such a provision, or if one party's attempts to negotiate for the inclusion of such a provision are unsuccessful, arbitrators are free to attach to prior awards whatever precedential value they deem appropriate."

Arbitration Case Studies – Case 2

- ***Gordon v. Amica National Insurance Company***
- **Facts:** A “party arbitrator” (a third “umpire” chosen by the arbitrators chosen by each party) was hired to settle a dispute between homeowner and insurance company regarding damage to homeowner’s home. The umpire held *ex parte* communications about the case with the insurance company’s representative and didn’t disclose these conversations. The umpire later found in favor of the insurance company.
- **Issue:** Does the fact that there were improper *ex parte* communications inherently mean that the award must be reversed based on the bias of the umpire?
- **Ruling:** Yes. This type of impropriety, or even the appearance of impropriety that is inherent in *ex parte* conversations undermines the integrity of the arbitration process. The award must be reversed.
- **Key Quote:** "Examples of "misconduct" which, if found, may vitiate an arbitration award include participation in *ex parte* communications with a party or a witness, without the knowledge or consent of the other party and rendering an award without consulting a panel member. The presumptive validity of consensual arbitration awards depends upon the underlying integrity of the arbitration process. When that integrity is tainted either by actual impropriety or the appearance of impropriety, the arbitration award cannot be permitted to stand."

Arbitration Case Studies – Case 3

- ***Schoneberger v. Oelze***
- **Facts:** Beneficiaries of a trust agreement sued the Trustees, demanding an accounting for trust assets. The Trust agreement had an arbitration clause but, as beneficiaries, the plaintiffs had not been required to sign the trust agreement. The arbitrator found for the Trustees.
- **Issue:** Should the arbitrator's decision be upheld even though the plaintiffs had never actually signed the trust agreement?
- **Ruling:** No. Under state law (UAA), there must be a written agreement to arbitrate signed by all relevant parties before a court will uphold an arbitration clause. The fact that the plaintiffs were third party beneficiaries of the trust agreement and the fact that the Trustees may have detrimentally relied on the arbitration clause does not matter. Since the plaintiffs did not sign the agreement, it cannot be enforced against them.
- **Key Quote:** "the fundamental prerequisite to arbitration is the existence of an actual agreement or contract to arbitrate... A trustee's fiduciary duties result from the trust relation, are not based upon an agreement or contract, and are enforceable even though the trustee received no consideration. A trustee who fails to perform his duties is not liable to the beneficiary for breach of contract. The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract. Further, the trustee, by accepting the trust and agreeing to perform his duties, does not make a contract to perform the trust enforceable in an action at law."

QUIZ TIME!

Arbitration Case Studies – Case 4

- ***Ting v. AT&T***
- **Facts:** AT&T send a “Customer Service Agreement” to its customers saying that unless they object or go through some other procedural hurdle, they will be deemed to have accepted the agreement. The agreement provided that all potential disputes will be arbitrated and that there will be no class action arbitration proceedings (effectively meaning there will be no class action litigation by customers against AT&T).
- **Issue:** Were the clauses in the CSA enforceable in light of the fact that most customers never read them and that the terms favored AT&T and that the customers did not have much of a choice but to agree to those terms.
- **Ruling:** The clause is unenforceable! In the context of such an adhesion contract, a provision unfair to the customer will be considered unconscionable and will not be enforced.
- **Key Quote:** Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope . . . the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." In determining whether an arbitration agreement is sufficiently bilateral, courts assessing California law look beyond facial neutrality and examine the actual effects of the challenged provision.
- **Note:** There has been a split among the circuits on this very issue.

Arbitration Case Studies – Case 5

- ***Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC***
- **Facts:** Cingular customers were “forced” to sign an agreement to use their service, which stated “You agree that instead of suing in court, you will arbitrate any and all disputes and claims.”
- **Issue:** Is this clause enforceable or should it be nullified based on the unconscionability doctrine?
- **Ruling:** Where there is a one-sided adhesion contract between parties of unequal bargaining position, it can be set aside based on unconscionability. Here, the fact that only the customer was giving up his or her right to a day in court meant that the contract was unfair and should be set aside.
- **Key Quote:** In the context of arbitration clauses, "Adhesion contracts are not *per se* unenforceable, but rather lend themselves to an inquiry as to whether the weaker party consented to the fine print, and if so whether the adhesionary clause is unduly burdensome or extremely harsh."

Arbitration Case Studies – Case 6

- ***Sultar v. Merrill Lynch***
- **Facts:** Plaintiff sued defendant, a brokerage firm. The case went to arbitration before the NASD. The NASD dismissed the case because the plaintiffs did not comply with discovery rules. Under Connecticut law, you must move to vacate an arbitration award within 30 days. Under the GAA, you have 3 months to move to reverse an arbitration award. The plaintiffs (who wanted to go back to the NASD first) missed the 30 day state rule.
- **Issue:** Should the 30 day state deadline apply or should the plaintiff get the 3 month deadline under the FAA?
- **Ruling:** The Connecticut rule may be applied. Even though the FAA is a federal rule, in state court, the state subject matter jurisdiction rules apply. Therefore, the 30 day time limit is upheld and the court will not review the dismissal of the case in arbitration.
- **Key Quote:** "The Federal Arbitration Act covers both substantive law and a procedure for federal courts to follow where a party to arbitration seeks to enforce or vacate an arbitration award in federal court. The procedural aspects are confined to federal cases... The Connecticut 30-day deadline under Conn.Gen. Stat. § 52-120(b) applies to motions to vacate arbitration awards in state cases, and not the longer period set forth in the Federal Arbitration Act (FAA). Requiring the movant to file within 30 days does not conflict with the primary purpose of the FAA, which is to encourage arbitration."