A Timely Analysis of Legal Developments

ASAP®

In This Issue:

August 2009

In an unpublished opinion, the U.S. Court of Appeals for the Ninth Circuit recently denied a multi-national employer's request to compel arbitration and have its employees' claims heard by an arbitrator in Mumbai, India pursuant to the United Nations Convention on the Recognition and Enforcement of International Arbitral Awards.

Blocks in the Road to Enforcing Foreign Arbitration Clauses in the United States

By John C. Kloosterman and Sarah R. Nichols

In an unpublished opinion, the U.S. Court of Appeals for the Ninth Circuit in *Vedachalam v. Tata America International Corp.*, No. 08-15521 (9th Cir. July 31, 2009), recently denied a multi-national employer's request to compel arbitration and have its employees' claims heard by an arbitrator in Mumbai, India pursuant to the United Nations Convention on the Recognition and Enforcement of International Arbitral Awards.

Factual Summary

The two named plaintiffs in the case are Indian nationals who were hired by Tata's parent entity, Tata Sons Ltd., in India and then seconded to work for Tata America in the United States. While still in India, each plaintiff signed various agreements to arbitrate any claims against Tata in India. Other documents, however, indicated that Tata retained the right to bring any claims against the employees in the U.S. court system.

In 2006, the plaintiffs filed a class action against Tata in the U.S. District Court for Northern District of California, alleging claims for breach of contract and various violations of the California Labor Code, including overtime and vacation pay requirements. The proposed class consists of thousands of current non-U.S. citizen employees of Tata working in the United States, plus former Tata employees dating back to 2000.

Tata filed two motions to compel arbitration under the United Nations Convention on the Recognition and Enforcement of International Arbitral Awards, which has been adopted as part of the Federal Arbitration Act. The district court denied both motions, finding that neither plaintiff had a valid arbitration agreement. In its unpublished decision, the Ninth Circuit squarely affirmed the lower court.

The Court's Analysis

The United Nations Convention on the Recognition and Enforcement of International Arbitral Awards requires signatories to recognize written agreements in which the parties have agreed to arbitrate their disputes. The Convention defines a *written agreement* as

one that includes "an arbitral clause ... signed by the parties or contained in an exchange of letters." If an agreement meets this criteria, a court is required to refer the parties to arbitration unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

U.S. courts often interpret arbitration agreements broadly. Here, however, the court found there was no mutual agreement between the employees and the employer to arbitrate disputes in India.

The court found there were a number of agreements between the Tata employees and the company mentioning different dispute mechanisms for different issues. The numerous agreements at issue can be grouped into two types: (1) service agreements; and (2) secondment agreements.

The service agreements were entered into at the beginning of the individual's employment in India. Those agreements offered training by the company in exchange for a promise to stay with the company for a certain length of time. The service agreements referred to a training period and limited the employee's ability to work elsewhere for a number of years in exchange for that training. The arbitration clause in this agreement was found to cover only claims arising out of a breach of the service agreement, not all employment-related claims.

The secondment agreements were a number of agreements between the company and the employee, some entered into at the time of secondment and some afterwards. The secondment agreements reaffirmed the service agreement's arbitration provision and sought to incorporate the service agreement by reference. But some of the secondment agreements provided that the company reserved the right to sue its employees in the U.S. courts and collect liquidated damages for any disputes arising from employee breaches of the agreement. In another secondment agreement, the dispute resolution clause stated that any disputes could be resolved overseas, either in the jurisdiction where the employee worked or in India, *at the option of the employer*. The court held that the various secondment agreements were inconsistent and provided different remedies for different breaches. Specifically, the court held that the company's explicit reservation of its right to litigate meant that a reciprocal agreement to arbitrate all disputes arising in the context of the employees' employment in California could not be inferred.

The message here is twofold: (1) the different dispute mechanism in the various secondment agreements made it impossible to interpret the arbitration clause in the service agreement to cover *all* disputes arising out of the employees' employment; and (2) the company's reservation of its unilateral right to sue its employees or choose the jurisdiction also made it impossible for the court to infer a *reciprocal* agreement to arbitrate all disputes in India.

Another document, referred to as a letter to employees, named specific arbitrators in India who would hear the disputes. The court found that this letter was not an enforceable arbitration agreement because it lacked consideration by requiring only employees, and not the employer, to arbitrate.

Finally, to the extent that the letter also included a promise of continued employment, the court found it to be inadequate consideration because the employees were not at-will employees – a promise of continued employment constitutes consideration only if the employee is employed at will.

What Does This Mean to Multi-National Employers

This decision strongly suggests that employers cannot quietly assume that an agreement to arbitrate any dispute in a foreign jurisdiction will be enforceable just because the U.S. is a signatory to the United Nations Convention. The agreement must: (1) provide consideration; (2) cover the type of dispute in question; and (3) not be inconsistent with other agreements.

Employers need to be aware that they may not be able to enforce an arbitration agreement entered into *outside* the U.S., if it is not enforceable in the U.S. Employers may want to review any arbitration agreements providing for arbitration outside the U.S. to make sure that these agreements are consistent, and that the arbitration clause covers all employment-related issues that arise under U.S. law.

Employers also may want to consider agreeing to arbitrate in the U.S. rather than first having a U.S. court find it can hear the dispute.

John C. Kloosterman is a Shareholder and Sarah R. Nichols is an Associate in Littler Mendelson's San Francisco Office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr Kloosterman at jkloosterman @littler.com, or Ms. Nichols at snichols@littler.com.