NOW + NEXT

ARBITRATION ALERT | NIXON PEABODY LLP

July 21, 2020

Amazon's arbitration clause for delivery workers does not survive interstate commerce and choice of law review in the First Circuit

By Christopher M. Mason, Jessica S. Jewell, and Carolyn G. Nussbaum

Late last week, the United States Court of Appeals for the First Circuit upheld a decision refusing to compel a Massachusetts employee of Amazon Logistics, Inc. ("Amazon") to arbitrate claims that the company had underpaid him and others by misclassifying them as independent contractors instead of employees. *See Waithaka v. Amazon.com, Inc.*, No.19-1848, 2020 U.S. App. LEXIS 22313, *6–7, 53 (1st Cir. July 17, 2020). Although the plaintiff, as a "last mile" driver, made deliveries only locally in Massachusetts, the Court held that he nonetheless fit the definition of a transportation worker "engaged in interstate commerce" in Section 1 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1. The FAA provisions favoring arbitration therefore did not apply to his contract with Amazon. *Waithaka*, 2020 U.S. App. LEXIS 22313 at *32.

Because the FAA did not apply, the First Circuit also looked to state law to determine whether arbitration was required. It concluded that a choice of Washington law in the plaintiff's contract would not survive comparison with Massachusetts law and that, under Massachusetts law, the entire arbitration clause in the contract was unenforceable because it included a class action waiver. *Id.* at *53.

The FAA Section 1 analysis

When the plaintiff in *Waithaka* first sued Amazon, the company responded by pointing to a section of the plaintiff's independent contractor agreement that required arbitration and waived class proceedings. *Id.* at *4-5. It then moved under Section 4 of the FAA, 9 U.S.C. § 4, to compel the plaintiff to arbitrate his underlying misclassification and wage and hour claims on an individual basis. *Waithaka*, 2020 U.S. App. LEXIS 22313 at *7-8.

The plaintiff, however, countered by asserting that the FAA did not apply to his contract at all. Section 1 of that statute excludes from its scope "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In the plaintiff's view, he was such a transportation worker, engaged in interstate commerce.

Waithaka, 2020 U.S. App. LEXIS 22313 at *11-13. The District Court agreed with the plaintiff, *see id.* at *13, and Amazon appealed.

On appeal, Senior Circuit Judge Kermit Lipez's opinion for a three-judge panel of the First Circuit expressly rejected "Amazon's cramped construction of Section 1's exemption for transportation workers." *Id.* at *32. While Amazon had argued that what the plaintiff actually did and where he actually did it was the key to the exemption, the Court disagreed: "The original meaning of the phrase 'engaged in interstate commerce,' revealed by the [Federal Employers' Liability Act] precedents, and the text, structure, and purpose of the FAA all point to the same conclusion: . . . last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers 'engaged in interstate commerce,' regardless of whether the workers themselves physically cross state lines." *Id.* Put another way, because such workers "work transporting goods or people 'within the flow of interstate commerce,'" they are "engaged in interstate commerce." *Id.*

To reach this conclusion, the Court of Appeals looked at what "engaged in interstate commerce" would have meant when the FAA was first enacted in 1925. After examining cases going back a century in the railroad context, the panel concluded that even if such workers "were responsible only for an intrastate leg of that interstate journey[,] [they] were understood to be 'engaged in interstate commerce' in 1925." *Id.* at *22.

The choice of law analysis

While the analysis of "engaged in interstate commerce" may not have been entirely surprising, the First Circuit addressed more than the FAA itself in its decision. And it did so in a way that could have important consequences. Amazon had argued that even if the FAA did not apply, the express choice of Washington state law in the plaintiff's written independent contractor agreement would nevertheless require individual arbitration. The Court of Appeals rejected this argument.

First, the panel analyzed the language on the face of the contract to determine whether the parties had actually chosen a governing law. The Court concluded that the contract provided for Washington law. *Id.* at *37-38.

Second, however, this did not necessarily mean that the choice of law was valid when applied to the arbitration clause in the contract. To that point, the Court concluded that if the class waiver provisions in the arbitration clause were to violate a fundamental public policy of Massachusetts, then the choice of Washington law might be unenforceable. *Id.* at *37-38.

Third, without actually deciding whether there was a true conflict between Massachusetts and Washington law (or what the public policy of Washington might be), the panel then assumed that applying Washington law to permit a class action waiver would be "contrary to the [C]ommonwealth [of Massachusetts's] fundamental public policy." *Id.* at *53. In Judge Lipez's view, there was "significant evidence" that the Supreme Judicial Court of Massachusetts would conclude that "the right to pursue class relief in the employment context represents the fundamental public policy of the Commonwealth, such that this right cannot be contractually waived in an agreement not covered by the FAA" and that "the statutory right to pursue class relief reflects the Commonwealth's 'desire to allow one or more courageous employees the ability to bring claims on behalf of other employees who are too intimidated by the threat of retaliation and termination to exercise their rights.'" *Id.* at *48 (quoting *Machado v. System4 LLC*, 989 N.E.2d 464, 470 n.12. (Mass. 2013)). While the Supreme Judicial Court of Massachusetts had not actually *decided* this question

in the context presented by the *Waithaka* case, the Court of Appeals did not seek to certify the issue to that state tribunal.

Fourth, instead, the panel then addressed whether this "fundamental public policy" meant that Massachusetts law would "oust" the contractual selection of Washington law. Applying the rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)—that a federal court exercising diversity jurisdiction uses the choice of law principles of the forum state to decide what law to apply—the First Circuit held that it would apply Massachusetts choice of law principles, and particularly the Restatement (Second) of Conflicts of Laws, to that problem. *Waithaka*, 2020 U.S. App. LEXIS at *50-53 & n.23.

Fifth, under those choice of law principles, the panel asked whether the parties' contractual choice of Washington law bore a "substantial relationship" to the state of Washington. *Id.* at *51-52. Given that Amazon is headquartered in Washington, there was no question of this. *Id.*

Sixth, however, the panel concluded that but for the contractual choice of Washington law, Massachusetts would have a "materially greater interest" than Washington in the question of whether a class action waiver—an essential part of the arbitration clause at issue—could be enforced against a Massachusetts citizen. *Id.* at *52.

Finally, because "[u]nder Massachusetts law, the class waiver provisions would be invalid" (given that avoiding class action waivers in employment contracts is apparently a fundamental public policy of Massachusetts), because this would therefore preclude the application of any conflicting law from another state having a lesser interest in that issue, and because "the [a]greement stipulates that the class waiver provisions cannot be severed from the rest of the dispute resolution section", the Court of Appeals held that "the arbitration provision would be . . . unenforceable." *Id.* at *53.

Conclusion

The expansive choice of law analysis in *Waithaka* promises to create problems in some states for multi-state enterprises with arbitration clauses covering transportation workers. However, not *all* states (or all courts interpreting the sometimes-elusive "fundamental public policies" of a state) will deem a procedural issue of dispute resolution on a class versus non-class basis to be a "fundamental public policy." (It is notable that the First Circuit did not examine, in any detail, what makes a public policy "fundamental.") Furthermore, the differences in state laws will be a limitation on the certification of national or multi-state classes. Businesses should, therefore, not abandon arbitration and class waivers as alternative dispute resolution techniques, even for transportation workers in interstate commerce. They should, however, review existing arbitration clauses applicable to such workers anew.

For more information on the content of this alert, please contact your regular Nixon Peabody attorney or:

- Christopher M. Mason, 212-940-3017, cmason@nixonpeabody.com
- Jessica S. Jewell, 401-454-1046, jsjewell@nixonpeabody.com
- Carolyn G. Nussbaum, 585-263-1558, cnussbaum@nixonpeabody.com