

Contracts Tea no. 10 (December 2011-January 2012)

SOUTH CAROLINA

A Memorandum of Understanding may constitute a contract even though the parties omit material terms and manifest their intent to execute future agreements.

In *Stevens & Wilkinson, Inc. v. City of Columbia* (case no. 4914), the City of Columbia selected three developers to develop, build, and operate a 300-room, full service Hilton Hotel near the Convention Center. The City and development teams executed a Memorandum of Understanding ("MOU"), which stated, "[I]n consideration of the foregoing and the mutual promises contained herein, and other valuable consideration the sufficiency and receipt of which are hereby acknowledged, the parties agree as follows." The document provided the City would purchase and prepare land for the hotel site, form a non-profit corporation to own the land, and issue "approximately \$60 million" in hotel revenue bonds. Meanwhile, the development team was to complete certain work that would enable the construction company to calculate a guaranteed maximum price for the hotel construction. Notably, the MOU required the parties to negotiate future agreements.

The City and development team performed in accordance with the MOU for over a year. However, in March 2004, the City voted to issue a second request for proposals because another developer, Windsor/Aughtry, expressed its desire to build a privately funded hotel instead of a publicly funded hotel. By this time, the cost of the development team's plan had risen to over \$72 million.

In response to the City's new request for proposals, the development team submitted two proposals for Hilton Hotels: a resubmission of its original publicly financed proposal and a new proposal for the hotel to be privately and publicly financed. Instead, the City accepted Windsor/Aughtry's \$26 million proposal and agreed to contribute \$3 million to build the privately funded hotel.

The development team filed suit against the City alleging breach of contract, *quantum meruit*, and promissory estoppel. The trial court granted the City's motion for summary judgment and dismissed each claim. The trial court determined the MOU was not a contract because it stated the parties' intent to execute a future definitive agreement in good faith.

The South Carolina Court of Appeals reversed the trial court's grant of summary judgment concerning the breach of contract claim because there was still a genuine issue of material fact concerning whether the MOU was a contract. The court also reversed the trial court's grant of summary judgment concerning the *quantum meruit* claim because the development team may have conferred a valuable benefit to the City. Finally, the court affirmed the lower court's grant of summary judgment for the promissory estoppel claim because the MOU did not contain an unambiguous promise to compensate the development team.

After the US Supreme Court remanded to the SC Supreme Court a decision for reconsideration in light of *AT&T Mobility, LLC v. Concepcion*¹ the SC Supreme Court affirmed its decision because the preemption issue was not raised in trial court or on appeal.

In *Herron v. Century BMW* (case no. 26805), the South Carolina Supreme Court affirmed a trial court's denial of BMW's motion to compel arbitration. Following that decision, BMW petitioned the US Supreme Court for a writ of certiorari. The United States Supreme Court vacated the South Carolina Supreme Court's decision and remanded for reconsideration in light of its decision in *AT&T Mobility, LLC v. Concepcion*.² In that case, the court held that the Federal Arbitration Act preempts state laws that prohibit contracts from disallowing class action lawsuits. Here, the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act prohibits a contractual provision from banning class action lawsuits.

As such, the United States Supreme Court certified the question of whether the Federal Arbitration Act preempts South Carolina law invalidating a prohibition on class arbitration contained in an arbitration agreement. On reconsideration, the Supreme Court denied BMW's motion to compel arbitration again. The Court determined that the preemption issue was untimely and improper because the issue was not raised in trial court or on appeal to the South Carolina Supreme Court. Therefore, the Court held that the issue of preemption is procedurally barred and further consideration in light of *AT&T Mobility, LLC v. Concepcion* is unwarranted. The Court reinstated its original opinion.

¹ 131 S.Ct. 1740 (2011).

² 563 U.S. ___ (2011) issued April 27, 2011. We commented it on Contracts Tea no. 3. July 13, 2011.

NEW YORK

A job security provision in a Collective Bargaining Agreement must be explicit, unambiguous, and comprehensive for the dispute to be submitted to arbitration.

In *Matter of Johnson City Professional Firefighters Local 921 v. Village of Johnson City*, 18 N.Y.3d 32 (N.Y. 2011), the Village of Johnson City ("Village") and Johnson City Professional Fire Fighters ("Union"), executed a collective bargaining agreement ("CBA"). The CBA contained a no-layoff clause which stated: "A. The Village shall not lay-off any member of the bargaining unit during the term of this contract." The term 'layoff' was undefined by the CBA. The CBA contained an arbitration clause.³

One year later, the Village voted to abolish six firefighter positions due to budget restraints.

The Union served the Village with a notice of intent to arbitrate. The Union sought injunctive relief to enjoin the Village from terminating the six firefighters pending a determination through arbitration. Simultaneously, the Village brought a proceeding to stay arbitration. The Supreme Court granted the Union's motion to compel arbitration and the appellate court affirmed by reasoning that the no-layoff clause was not subject to any prohibition against arbitration and the issue was resolvable given the CBA's broad grievance and arbitration provision.

The New York Court of Appeals reversed the Supreme Court's. The Court of Appeals held that a collective bargaining dispute over a job security provision would be subject to arbitration only if the clause was explicit, unambiguous and comprehensive. Because the clause at issue was not, the termination of the six fire fighters did not fall within the no-layoff provision and was not arbitrable.⁴ Under the majority holding, the Appellate Division's decision is reversed and the arbitration stayed.

There are also some public policy considerations behind the Court of Appeals'

³ The CBA prescribes a grievance procedure, culminating in arbitration before the Public Employment Relations Board (PERB).

⁴ The Court noted for example the term 'layoff' was undefined by the CBA and, consequently, was subject to competing interpretations. This "underscore(d)" the ambiguity of the clause.

decision. The Court reasoned that if the parties ambiguously agreed about the right to eliminate positions, then employees would regularly challenge a municipality's budgetary decisions.⁵

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⁵ The decision was not unanimous. While both the majority and the minority agree on the standard (i.e. an arbitration clause on a job security clause in a CBA must be explicit, unambiguous, and comprehensive), the minority thought that this particular clauses passes the test and would have enforced arbitration.