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News & Types: Commercial, Competition & Trade Update

Judges Clash in Overturning Arbitration Awards

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Practices: Commercial, Competition & Trade, Litigation

The debate about arbitration vs. litigation goes on, with partisans both for and against. One argument used by both sides is the finality of arbitration. For those favoring arbitration, finality avoids costs and delays of endless appeals. For those favoring litigation, finality means no ability to challenge the arbitration award.

There was an interesting juxtaposition of cases that we reported on in June, 2013. In one case, out of the 6th Circuit Court of Appeals, an arbitration award was successfully challenged due to the bias of the arbitrator, the misconduct of counsel for the winning side, and the overall conduct of the arbitration. We called it "The Arbitration from Hell" and it was a pretty glaring case of an arbitration award that should not have stood.

But a 7th Circuit Court of Appeals decision issued around the same time had a different result. The loser in the arbitration unsuccessfully challenged the award. The court was clearly annoyed at what it considered not even a close case. The court even went so far as to suggest it would have imposed sanctions on the loser for challenging the arbitration award except for the fact that the loser was required to pay attorneys' fees anyway by agreement.

These cases perhaps represent the extremes – one case where the arbitration was clearly improperly conducted and the other where the "sore loser" had no basis to challenge an award except for the fact the loser was not happy.

Now comes the 7th Circuit with a case between these two extremes. Judge Posner overturned the arbitration award, but in the face of a vigorous dissent from Judge Sykes. (*Bankers Life & Casualty Insurance Co. v. CBRE, Inc.*, 7th Circuit Court of Appeals No. 15-1471, decided July 29, 2016)

Bankers leased office space in Chicago's West Loop. Its lease was set to expire in 2018. But Bankers had the good fortune of sharing the building with Groupon, at the time a high-flying e-commerce company. Groupon was in expansion mode. As a result, CBRE approached Bankers about subleasing its space to Groupon and relocating elsewhere. CBRE and Bankers signed a Listing Agreement which contained the following provisions, which Judge Posner noted were required by Illinois law:

- CBRE would "accept delivery of and present [to Bankers] all offers and counteroffers to buy, sell, or lease . . . property" of Bankers;
- CBRE "would assist [Bankers] in developing, communicating, negotiating, and presenting offers, counteroffers, and notices"; and
- CBRE would "answer [Bankers'] questions relating to the offers, counteroffers, notices, and contingencies."

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But Bankers wanted more than the minimum legal requirements. Bankers told CBRE that it wanted to profit by at least $7 million, representing the additional amount it would receive from the Groupon sublease compared to what it would pay the lessor of its replacement space.

CBRE presented Bankers with several cost-benefit analyses (CBAs). One of these presented in May 2011 showed Bankers saving $6.9 million by relocating to another location in Chicago's Loop. Although just short of the $7 million target, it was close enough to Bankers, which then subleased its space to Groupon and leased the replacement space.

But CBRE made a major blunder in its CBA. It omitted Bankers' promise, as part of the deal with Groupon, to give Groupon a $3.1 million tenant improvement allowance. Bankers claimed, without dispute by CBRE, that it would not have done these deals if would only profit by $3.8 million, not the $6.9 million projected in CBRE's CBA. Judge Posner also noted that CBRE received $4.5 million in commissions in arranging these back-to-back deals.

The parties arbitrated their dispute in a proceeding conducted by Judicial Arbitration and Mediation Services (JAMS), a respected alternative dispute resolution organization. Bankers wanted the $3.1 million that was not included in the CBA. It also wanted to avoid paying the $4.5 million in commissions to CBRE. Bankers claimed that CBRE a) violated the Listing Agreement by failing to provide accurate information and b) committed the tort of negligent misrepresentation.

In February 2014, the arbitration panel issued its award in favor of CBRE. The panel acknowledged that CBRE had blundered in preparing its CBA. But, it concluded, CBRE did not violate the Listing Agreement because the Listing Agreement "did not explicitly require CBRE to furnish Bankers with a correct CBA, and CBRE had not violated its obligations to assist Bankers ‘in developing, communicating, negotiating and presenting offers, counteroffers, notices and contingencies.' " Judge Posner was stunned, noting, "It's hard to imagine what else the mistake might be."

Bankers filed a motion for reconsideration by the arbitration panel. In response, in June 2014, the arbitration panel pivoted slightly, but still found for CBRE. The panel acknowledged that the Listing Agreement obligated CBRE to answer questions accurately. CBRE covered itself by putting on the CBAs a disclaimer that provided that CBRE was not guaranteeing that there were no errors contained in the CBA. So CBRE was not responsible for errors in the CBA.

Then in July 2014, to add insult to Bankers' injury, the panel awarded costs to CBRE. Bankers' challenged the award but failed at the district court level. Bankers appealed to the 7th Circuit.

Judge Posner was scathing in his treatment of the arbitration panel. "The panel exceeded its authority. . .. . The panel's reliance on the disclaimer was . . . unjustified. The disclaimer is not part of the Listing Agreement. . . . [R]esponses to Bankers' questions . . . were inaccurate . . . not responsive, and thus violated the Listing Agreement."

Apparently, no other judge on the three judge panel of the 7th Circuit disagreed with Judge Posner on this point. But this was probably the easy part. Recall, this was a challenge to an arbitration award. There was no

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allegation of bias or improper conduct of the arbitrators. It just seemed that their award was not correct, to Judge Posner grossly so. Should it be overturned?

Judge Posner recited the familiar standards applied in reviewing an arbitration award. Judge Posner cited Illinois decisions holding that "errors in judgment or mistakes of law" are not sufficient to overturn an arbitration award unless "gross errors of judgment in law or a gross mistake of fact" are "apparent upon the face of the award."
To Judge Posner, this award counted as one containing "gross" errors and mistakes apparent on the face of the award. The arbitrators' authority is limited to the unambiguous contract language and arbitrators do not have the authority to ignore the plain language of the contract and to alter the agreement.

Judge Posner cited a case in which arbitrators made a miscalculation of figures. The arbitrators did not miscalculate in this case, but they endorsed a $3.1 million miscalculation.

Judge Posner then added an interesting historical side argument. It used to be that most arbitration awards contained no reasoning because judges hostile to arbitration would use the reasons to overturn the awards. More recently, judges and the law look more favorably on arbitration. Parties are asking for "reasoned awards." JAMS, the arbitration organization in this case, requires a concise statement of the reasons for the award, unless the parties choose otherwise. So, concluded Judge Posner, the reasoning should be part of the "face of the award" and should also be reviewed for "gross" errors and mistakes, which, in this case, the court found.

As noted, Judge Sykes dissented. Not surprisingly, she cited the same language and the same Illinois cases that Judge Posner cited in overturning the award. She quoted one Illinois case, also cited by Judge Posner:

> "The fact that arbitrators have made an erroneous decision will not vitiate their award. If they have acted in good faith, the award is conclusive upon the parties; and neither party is permitted to avoid it [ ] by showing that the arbitrators erred in their judgment, either respecting the law or the facts."

According to Judge Sykes, the parties chose to resolve their dispute in arbitration. Overturning the award deprives the parties of that choice. Judge Sykes also noted, as did Judge Posner, that calculation errors may lead to reversal of arbitration awards. But this case was <u>not</u> a calculation error <u>by the arbitrators</u>.

> "On plenary review I might agree with my colleagues that the arbitrators mistakenly read the disclaimer and the agreement together. But the limited judicial review that the [Illinois Uniform Arbitration Act] permits requires us to uphold an arbitration decision that 'draws its essence from the parties' contract,' as this one does."

Is Judge Posner creating a new standard of judicial review of arbitration awards? Clearly, he is not doing so explicitly. He cited favorably the standard of review of arbitration awards. But he may have deftly expanded the range of what would be considered "gross" errors and mistakes and the range of what could be reviewed by including the reasons in a "reasoned award" as part of the review.

It is also interesting to speculate whether Judge Posner or Judge Sykes are more partial to arbitration. Of course, it is possible, even likely, that their personal views on arbitration were not factors in their opinions. But it certainly would appear that Judge Sykes favors arbitration and wants courts to avoid interfering in the

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arbitration process. It would also appear Judge Posner is less favorable and more willing to review arbitration awards.

But maybe Judge Sykes is telling parties to an arbitration that they have to live with the result, no matter how egregious it may seem, while Judge Posner is reassuring these same parties that the courts will not let gross errors stand, so parties may feel more comfortable with arbitration.

Clearly this case did not, and probably no case could, put an end to challenges to arbitration awards.

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