Who Decides Arbitral Venue – an Arbitrator or the Court?

Judge Abraham J. Gafni (Ret.)
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Perhaps no arbitration issue has been litigated more frequently in recent years than determining "arbitrability." Repeatedly, courts have been called upon to decide whether they or the arbitrators have the authority to resolve particular aspects of a dispute.

A recent opinion, *Bamberger Rosenheim, (Israel)*(Profimex) *v. OA Development, (United States)*(OAD), 862 F. 3d. 1284 (11th Cir., 2017), arising out of an international business dispute, considers that question when there is a disagreement as to the appropriate arbitral venue; and, incidentally, it provides guidance to counsel seeking to assure that the intent of parties will be realized generally.

Profimex was an Israeli company that raised money for real estate investments. OAD was a corporation incorporated in the state of Georgia that developed real estate. The two companies entered into a Solicitation Agreement which provided for the submission of disputes to binding arbitration, to be conducted in accordance with the Rules of the International Chamber of Commerce. With respect to venue, the agreement provided that: *"*Any such proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex. "

Eventually, Profimex commenced an arbitration proceeding in Atlanta, Georgia, against OAD for breach of contract. In the same arbitration in Atlanta, Georgia, OAD submitted a counterclaim alleging that Profimex had defamed OAD in statements to Israeli investors.

Profimex objected to the OAD defamation counterclaim being arbitrated in Georgia as the arbitration agreement called for proceedings involving any disputes submitted by OAD to be arbitrated in Tel Aviv, Israel.

This objection was presented to the arbitrator who decided that venue for the defamation counterclaim was, in fact, proper in Georgia "in part, because the 'dispute' was submitted by Profimex." Ultimately, he found Profimex liable on OAD's defamation counterclaim.

Profimex filed a petition to vacate the defamation award on several grounds, including improper venue. OAD filed a petition to confirm the award. The federal district court confirmed the award and denied the petition for vacatur. The appellate court deferred to the venue ruling of the arbitrator and affirmed the district court.

Profimex contended that the district court had erred in confirming the arbitral award under the New York Convention (convention) as codified under Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. sec. 201-208. The Convention applies to non-domestic arbitral awards "when one of the parties is domiciled or has its principal place of business outside of the United States". Awards under the Convention must be confirmed, unless "the arbitral procedure was not in accordance with the agreement of the parties."

Profimex also contended that the award should have been vacated under Chapter 1 of the FAA relating to domestic arbitrations which allows for vacatur of an arbitrator's award if the arbitrator exceeded his powers.

The federal appellate court's analysis of vacatur under both the convention and the domestic provisions of the FAA reflected its understanding that the factors to be considered were essentially similar.

The court recognized that, ordinarily, parties have the authority to decide which matters should be decided by the courts and which by arbitrators. Only if the arbitration agreement is silent on who is to decide "threshold" questions about the arbitration do courts determine the parties' intent. This they do with by relying on certain presumptions.

Among these presumptions is "that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability.'" Such disputes include "whether the parties are bound by a given arbitration clause" or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy."

Different presumptions, however, apply to the authority of arbitrators. Thus, it is presumed that “the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration”.

Here, Profimex agreed that the arbitration agreement was binding and applied to OAD’s defamation counterclaim. However, it contended that setting the counterclaim’s venue in Atlanta, Georgia was contrary to the parties’ intent reflected in specific provisions which required that any arbitration submissions by OAD must be heard in Tel Aviv, Israel.

The appellate court, in rejecting Profimex’s argument and relying on authority from at least four other circuits, found that “disputes over the interpretation of forum selection clauses raise presumptively arbitrable procedural questions”. In other words, “such clauses determine where an arbitration is conducted, not whether there is a contractual duty to arbitrate at all”. Rulings on such procedural preconditions, as noted above, would be for the arbitrator.

Moreover, a court, in reviewing the arbitrator’s venue determination, was not to determine whether she got the contract’s meaning right or wrong, but “whether the arbitrator (even arguably) interpreted the parties’ contract”.

The court concluded that here, in deciding that the venue for the counterclaim was proper in Atlanta, Georgia, the arbitrator had interpreted the arbitration provision. He had apparently decided that in initially bringing its claim for breach of contract in Atlanta, Profimex should be deemed to be the party that had “submitted” all of the disputes with OAD arising under the agreement to arbitrate. Thus, “the arbitrator’s construction holds, however, good, bad or ugly.”

It is also apparent from the opinion that had the arbitrator fixed the arbitral venue for the defamation counterclaim in Tel Aviv, the court would have similarly deferred to that interpretation as to the intent of the parties.

The court did recognize, however, that there is a circumstance when the court will not defer to an arbitrator’s decision regarding arbitral venue but will review such a decision independently. This will occur when it is apparent that the forum selection clause has been ignored by the arbitrator. If it could not be stated “even arguably” that that the arbitrator had interpreted the parties’ contract, the courts would be permitted to review de novo the arbitral provisions, including those relating to arbitral venue. Thus, if an arbitration provision was clear, without a hint of ambiguity, the court might overturn a ruling by the arbitrator that would reflect that the relevant provision had been totally ignored and never interpreted. The court, in effect, characterized such a circumstance as a manifest disregard of the contract.

Moreover, the court makes clear that the international nature of this dispute would not change its opinion in this regard. It recognized that whether a dispute must be resolved in

arbitration or in court is a significant issue in international business transactions. Once it is clear that there is a valid agreement to arbitrate, however, “we see no reason why arbitral venue must be a question presumptively reserved to the courts.”

The holdings in this case should alert counsel to take special care in preparing arbitration agreements. As the court indicated, “arbitrable” issues are of limited scope. Parties, therefore, may and should carefully designate those issues they wish to have arbitrated and specifically identify those issues that are not for the arbitrators but for the courts. In the absence of such specific direction in the instant case, the suggested ambiguity in the arbitral venue provisions allowed for an interpretation by the arbitrator to which the court felt constrained to defer.

As the court stated, “if parties do not want an arbitrator to resolve arbitral-venue disputes, ‘they may agree to limit the issues they choose to arbitrate’ as in *Stolt-Nielsen v. Animal Feeds International,* 559 U.S. 662, 683 (2010).”

In short, in preparing arbitration agreements, counsel should set out not only those substantive issues that are to be resolved by the arbitrator but also specify which procedural issues are to be resolved by the arbitrator and which are reserved for the courts. •

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