

Frivolous Arbitration: May Attorney Fees Be Awarded?

Judge Abraham J. Gafni (Ret.)

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Disputing parties often seek attorney fees and costs from opponents whom they claim are presenting frivolous arguments and not litigating in good faith. And, indeed, courts in most jurisdictions, including Pennsylvania, are empowered to make such awards under both statutes and procedural rules.

But what if the matter is being arbitrated rather than being litigated in court? Do arbitrators have the same right to award attorney fees and costs?

A recent case from the Supreme Judicial Court of Massachusetts, *Beacon Towers Condominium Trust v. Alex*, No. SJC-11880 (Jan. 7, 2016), discusses this question and highlights issues for attorneys considering arbitration.

The suit involved a claim by an owner of a condominium unit against the condominium trust on the ground that he had been subjected to an assessment imposed contrary to the trust's bylaws.

The trust's bylaws required that any disputes regarding actions by the trustees be submitted to arbitration. After a hearing, the arbitration panel ruled in favor of the unit owner and voided the special assessment against him. In addition, a majority of the panel awarded attorney fees to the unit owner.

The panel recognized that the arbitration agreement did not specifically provide for an award of such fees. Nonetheless, it concluded that the commercial arbitration rules of the American Arbitration Association (AAA) allowed such an award where "authorized by law"; and, indeed, a Massachusetts statute did authorize such an award where "substantially all of the defenses were wholly insubstantial, frivolous, and not advanced in good faith."

Ultimately, a trial court vacated the arbitrators' award of attorney fees, and the Supreme Judicial Court affirmed that ruling.

The appellate court recognized that under Massachusetts law an attorney fee may not be awarded in arbitration proceedings "unless the parties have entered into an agreement authorizing the award of such fees." (Compare 42 Pa.C.S. Section 7312, which states that unless otherwise prescribed in the agreement to arbitrate, all expenses of the arbitration "but not including counsel fees," shall be paid as prescribed in the award.)

The unit owner contended, however, that the parties had, in fact, agreed to the arbitrators' award of attorney fees by incorporating the following commercial arbitration rules of the AAA into the arbitration agreement:

- Rule 47(a), which allows the arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties."
- Rule 47(d)(ii), which allows "an award of attorney's fees if all parties have requested such an award, or it is authorized by law or by their arbitration agreement."

The court rejected the argument that the arbitration panel might enter an award that was "just and equitable," including attorney fees by reason of frivolous claims, because Rule 47(a) also required that the "remedy or relief" be within the scope of the agreement. Accordingly, the arbitrator's authority to make such an award is limited by Rule 47(a) to the express terms of the arbitration agreement itself.

Moreover, if Rule 47(a) allowed arbitrators to award attorney fees whenever they deemed such to be just and equitable, Rule 47(d)(ii) would be superfluous. The court noted that Rule 47(d)(ii) is the more specific rule governing the award of attorney fees, and, accordingly, the general language in Rule 47 (a) must yield to it.

Rule 47(d)(ii), as noted above, does allow the award of attorney fees if "authorized by law." The unit owner contended, therefore, that the award of attorney fees by the arbitrators should be affirmed because such awards are "authorized by law" in Massachusetts.

The court was unwilling to accept this argument because the Massachusetts statute codifying the exception to the American Rule (which generally does not provide for the award of counsel fees to successful litigants) only allows a court to award attorney fees where "substantially all of the defenses ... were wholly insubstantial, frivolous and not advanced in good faith." (Pa.R.C.P. 1023.1(d) allows a "court" to impose an appropriate sanction for filing a frivolous or otherwise objectionable pleading.)

The court concluded that an arbitrator is not a court that may award such attorney fees. Legislative history as well as the definition of "court" in the statute itself reflected that all Massachusetts courts were not intended to be included within its provisions. Accordingly, "it would be absurd for us to interpret the term even more broadly to include arbitrators." The court was particularly concerned because arbitrators would be in a position to make such findings without restraint and not subject to judicial review, absent fraud.

Exceptions were noted. For example "an arbitrator may award attorney fees where a party prevails on a statutory claim in which the statute specifically mandates the recovery of attorney's fees by the prevailing party."

In addition, the court recognized the right of arbitrators to award monetary damages as a sanction for discovery violations, because AAA Rule 23 authorizes the arbitrator not only to direct production but also to "resolve any disputes concerning the exchange of information." It found the authority to impose such sanctions implicit in the right to control discovery, because without it the arbitrator's ability to adjudicate claims would be impeded.

But are arbitrators everywhere barred from ordering such sanctions absent the grant of authority in the arbitration agreement itself? Not necessarily.

For example, if the arbitration is being conducted under the Revised Uniform Arbitration Act (RUAA), adopted in New Jersey and many other states, the arbitrator may impose punitive damages as well as reasonable attorney fees and other reasonable expenses of arbitration. Specifically, awarding attorney fees and reasonable expenses is allowed "if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." (See N.J.S.A. 2A:23B-21 (d).) In short, that an arbitration panel is not a "court" does not bar an arbitrator in a state that has adopted the RUAA from entering any order that might be entered by a court.

Consequently, today, where arbitrations are conducted throughout the United States and internationally under arbitration agreements that are subject to or specifically incorporate the RUAA or comparable rules of a dispute resolution provider, an arbitrator may have authority beyond the usual understanding or expectations of the parties.

Yet another circumstance in which attorneys inadvertently empower arbitrators is when both attorneys, in their desire to intimidate the opposition, include claims for attorney fees and costs. In such circumstances, Rule 47(d)(ii) specifically allows arbitrators to make such an award; the opposing claims seeking such fees are deemed to reflect a tacit understanding and acceptance by the parties that the authority has been incorporated into the proceedings.

In summary, traditionally, arbitrators, unlike courts, have not been viewed as having the power to award attorneys fees and costs for frivolous actions. However, a party may subject itself to this authority by (1) providing for it in the arbitration agreement, (2) including in its claim for damages the award of attorney fees and costs, (3) adopting statutory provisions such as the RUA or (4) adopting the rules of a dispute resolution provider that specifically bestow that authority upon the arbitrator.

The lesson is clear: When agreeing to arbitration, consider carefully if you want the arbitrators to have the power of a court to impose sanctions for behavior found to be frivolous. If not, assure yourself that (1) your arbitration agreement expressly states this, (2) that you have not incorporated in your arbitration agreement a statute, court rule or a dispute resolution provider's rule that would allow an arbitrator to exercise this authority, and (3) that you have not filed pleadings or claims that may reflect an understanding that the arbitrator has the authority to award attorney's fees or costs. •

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