

Ruling Shows Difficulty Establishing Arbitrator Partiality

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September 16, 2014

ADR

Unlike judges, arbitrators are generally selected either by the disputants themselves or through a party-approved process. In such circumstances, it might be imagined that both partiality and correctness of decision would be subject to close judicial scrutiny. In fact, reviewing courts will rarely vacate arbitrators' awards on these bases.

Two interesting situations illustrating this reluctance presented themselves recently in the U.S. District Court for the Southern District of New York in the case of *Cellu-Beep v. TeleCorp Communications*, No. 13 Civ. 7236 (NRB) (July 18, 2014).

Evident Partiality

• May an arbitrator independently request the parties to brief an issue that neither of them had raised?

The parties had entered into a contract that authorized Cellu-Beep Inc. to sell products and services of TeleCorp Communications Inc. The agreement further provided for good-faith negotiation, mandatory mediation and, ultimately, arbitration pursuant to the Federal Arbitration Act to resolve disputes. After negotiation and mediation had failed, Cellu-Beep commenced arbitration against TeleCorp. TeleCorp filed an answering statement, which included a statute of limitations defense. Cellu-Beep then filed a revised arbitration demand to which TeleCorp did not file an answer; rather, it filed a motion to dismiss that did not contain the statute of limitations defense.

Before Cellu-Beep had filed its papers in opposition to the motion to dismiss, however, the arbitrator, "unprompted by anything the parties said," asked if [TeleCorp] would also request dismissal of the matter on statute of limitations grounds. ... Later, in its reply brief, [TeleCorp] included a statute of limitations defense, and [Cellu-Beep] was given an opportunity to counter the

argument in a supplemental submission."

Ultimately, the arbitrator decided that the claim was time-barred. Cellu-Beep opposed confirmation of the award and sought vacatur based upon Section 10(a) of the Federal Arbitration Act, which provides that a court may vacate an award "where there was evident partiality or corruption in the arbitrators."

Cellu-Beep contended that the arbitrator "abandoned all pretense of neutrality" by soliciting briefs on the issue of the statute of limitations even though TeleCorp had not mentioned this defense in its motion to dismiss. In short, it was arguing that the arbitrator had taken up the cudgels of TeleCorp by independently proposing the very argument upon which the final award in TeleCorp's favor was based.

The court rejected this argument. It noted that although the requisite standard for disqualifying a judge was that "his impartiality might reasonably be questioned," the standard for disqualifying an arbitrator required more. It would be triggered only "when a reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one side." This showing must be direct and not speculative, and the party requesting vacatur on this basis "has the burden of demonstrating partiality by 'clear and convincing evidence.'"

The court added that evident partiality is not established simply because the arbitrator engaged in "legitimate efforts to move the case along." Here, the solicitation of briefing on a potentially dispositive issue was deemed legitimate, particularly where both parties were afforded an opportunity to address the matter.

The court, however, did not end its discussion at this point. It added that the arbitrator had the authority, as do federal judges in certain cases, to dismiss the case sua sponte on the statute of limitations grounds even if he had not granted Cellu-Beep the opportunity to brief the statute of limitations issue.

One may question whether the court was prepared to reach this conclusion because TeleCorp had earlier raised the statute of limitations defense in its initial answer to the arbitration demand. In such circumstances, perhaps the arbitrator reasonably expected that eventually this issue would be raised again; and, accordingly, adjudicative efficiency warranted his independent inquiry as to whether the statute of limitations issue should not be raised as soon as possible.

Whether courts would be equally approving of suggestions by an arbitrator as to potential avenues of legal inquiry never hinted at by any of the parties would appear to be more problematic. In such circumstances, one can envision a court finding that an arbitrator who introduces unexplored legal theories into the litigation in favor of one of the parties has overstepped proper bounds and has demonstrated evident partiality.

Nonetheless, the court in this case found that in the absence of any "personal interest, pecuniary or otherwise" in the outcome of the case or any special relationship with TeleCorp, no such bias could be inferred. Accordingly, Cellu-Beep's speculation and conjecture did not provide the requisite clear and convincing evidence warranting a finding of evident partiality.¹

Manifest Disregard of the Law

• Should the arbitrator have found that mandatory mediation tolled the running of the statute of limitations?

In the past, there was an assumed basis for vacating an award when it was in "manifest disregard" of applicable law. Here, the court recognized that the viability of this doctrine remains unclear in light of recent decisions of the Supreme Court. Nonetheless, it addressed the issue, as several jurisdictions (including its own U.S. Court of Appeals for the Second Circuit) have concluded that the doctrine has survived.

Generally, under the manifest disregard doctrine, an arbitrator's award could be vacated where (1) the law allegedly ignored was clear and explicitly applicable to the matter; (2) the law was improperly applied, leading to an erroneous outcome; and (3) the arbitrator was subjectively aware of the applicable law and chose to disregard it. A court would not vacate, however, merely because it disagreed with the merits of the award, so long as there was a "colorable justification for the outcome reached."

Here, Cellu-Beep contended that there should have been a tolling of the period of limitations, at least insofar as the mediation period was concerned, as the dispute resolution agreement between the parties mandated both good-faith negotiation followed by the parties submitting to "non-binding mediation before a mutually agreed certified mediator."

The arbitrator disagreed, stating, "The running of the limitations period [was] not affected by either the negotiation or the mediation phase provided in [the agreement]."

The court rejected Cellu-Beep's contention that the arbitrator's conclusion constituted a manifest disregard of the law. It pointed out that Cellu-Beep could cite to no case reflecting that this issue was either clear or well defined and, indeed, Cellu-Beep conceded that there may be a split in the authorities. In light of the unclear state of the law and the extreme deference granted to arbitrators' decisions, it was apparent that the "manifest disregard argument must fail."

Notice, however, that had the arbitrator issued a contrary ruling, i.e., that the mediation period did in fact toll the statute of limitations, the court would similarly have refused to interfere with that decision, because, as noted, this issue has not been clearly resolved, and there would have been colorable justification for such a result as well.

These two rulings reflect once again the reluctance of courts to vacate actions taken by arbitrators in managing the process or making decisions. Counsel, therefore, must take special care to clarify issues as to which they might later seek support, such as whether there will be a tolling of the statute or a stay on any requirement for discovery or production of expert reports, or whether material witnesses must appear and testify live at the arbitration hearing; these understandings should also be made explicit in the arbitration agreement.

In short, arbitration offers parties a unique opportunity to create an adjudicative forum, structured in a manner best suited to meet their needs and confront the specific issues presented. Care must be taken, however, to ensure that in either drafting the agreement or accepting established procedures of an ADR provider, they have not subjected themselves to bonds from which they may be unable to extricate themselves.