

Happy Holidays and Best Wishes For a Healthy 2021!

Unintentionally Granting Arbitrators the Power to Award Attorney Fees



In this pandemic period, as courts are limited in their ability to conduct civil trials, parties increasingly consider whether and how to settle their disputes through arbitration.

In his article last month in the Legal Intelligencer, “How Pre-Lawsuit Demand Letters Can Undermine Arbitration” (Nov. 16, 2020), Charles Forer, through his erstwhile attorney foil Bob, explained how a party who had entered into an agreement providing for mandatory arbitration almost suffered the unintended consequence of forfeiting that right by threatening litigation in court.

Yet another area in which this “law of unintended consequences” appears to be regularly occurring these days is when a party unintentionally extends authority to the arbitrator

to award attorney fees.

The general “American Rule,” of course, is that, in the absence of a contractual agreement or statutory provision, each party is responsible for its own attorney fees. Similarly, arbitrators generally lack the authority to award attorney fees. Nonetheless, parties often determine that it is within their interests to include a provision in the arbitration agreement allowing the arbitrators to award them.

Even when the parties have not included such authority in the arbitration agreement, however, they may unexpectedly find that through their arbitration pleadings or other actions during the arbitration proceeding, they have granted such authority and become responsible for the payment of their successful adversaries’ attorney fees.

A recent opinion of the Massachusetts Superior Court, business litigation session, reflected how a party’s own actions authorized an arbitration panel to award attorney’s fees even though the contract did not provide that authority. See *Credit Suisse Securities (USA), (Credit Suisse) v. Galli*, No. 2020-0709-BLS 2 (Aug. 31, 2020).

The case involved employees who were formerly employed by Credit Suisse. They filed an arbitration demand against Credit Suisse alleging a violation of the Massachusetts Wage Act (Wage Act) and related contract claims, asserting that Credit Suisse had failed to pay them earned deferred compensation. [READ MORE..](#)

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