Unintentionally Granting Arbitrators the Power to Award Attorney Fees

Judge Abraham J. Gafni (Ret.)
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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.

Credit Suisse denied these allegations and filed a counterclaim claiming that the employees had breached their contracts with Credit Suisse. Consequently, in addition to asserting a claim of millions of dollars in compensatory damages it sought "transaction costs, interest and fees."

In closing arguments, the employees' counsel specifically sought attorney fees, asserting that the arbitrators could award them pursuant to the Wage Act, and "because we believe that Credit Suisse, in filing their counterclaims … are requesting" not only millions of dollars in compensatory damages but also "related transaction costs and fees." Employees' position was that since both parties were requesting attorney fees and costs, the arbitrators had the authority to award such fees to the successful party.

In response, in its closing arguments, Credit Suisse's counsel stated that "we do not think there is any legal basis for an award of fees and expense in this case," but added that if the arbitration panel were to award fees to the employees, the fee application was insufficiently itemized. However, they did not directly contest the assertion that Credit Suisse had itself requested attorneys' fees or that by so doing it had given the arbitrators the authority to award such fees even without a finding of a Wage Act violation. Moreover, at no time in the proceedings, did they make clear to the arbitrators that they were withdrawing any claim for attorneys' fees should they prevail.

The arbitration panel awarded the employees compensatory damages as well as over $100,000 in attorney fees. Credit Suisse appealed, arguing that the panel had exceeded its powers in awarding such fees.

In considering this contention, the court noted that judicial review of an arbitral decision "is extremely narrow and exceedingly deferential." Among the limited bases for vacating an award under both the Federal Arbitration Act, 9 U.S.C. Section 10(a)(4) and the Wage Act, however, is where the arbitrators have exceeded the scope of their arbitral authority.

Had the arbitration panel found violations of the Wage Act, the employees would have been entitled to attorney fees pursuant to that statute. The court noted, however, that it was unclear whether the findings of the panel had been based upon violations of the Wage Act.

Critically, however, the arbitration panel did not cite the Wage Act as the basis for its award of attorney fees. Rather, according to the Massachusetts Superior Court, "the panel stated that it had the authority to award fees because each side had requested its fees. Where the parties mutually request attorney's fees in an arbitration, courts have concluded that this mutual request can provide the requisite legal basis for an award of fees, even though the general rule is that each party pays its own attorney fees. This is precisely what happened here."

In citing other cases containing a similar holding, the court noted that Rule 43(d) of the Commercial Arbitration Rules of the American Arbitration Association at Rule 43(d) also authorizes the award of attorney fees where all parties have requested it.

In short, "by expressly demanding attorney's fees and then submitting that demand (through its counterclaim) to arbitration, Credit Suisse effectively gave the arbitrators the authority they would not have otherwise had to award such fees to the prevailing party."

The court distinguished this situation from *Matter of Stewart Abori & Chang,* 282 A.D. 2d 385, 723 N.Y.S. 2d 492 (App. Div. 2001), in which the court vacated the arbitrator's award of attorney fees to the prevailing party because prior to the rendering of the award, the opposing party withdrew its claim to recover its own attorney fees and objected to the opponent's claim for such relief. It was not deemed, therefore, to have acquiesced in the arbitrator's consideration of that claim.

Finally, Credit Suisse sought to escape this conclusion by arguing that its counterclaim only asked for "fees," not "attorney fees." This contention was also rejected by the court. It noted that it was clear from the employees' closing argument that the employees understood the Credit Suisse counterclaim to be seeking attorney fees and the employees' own counsel were also seeking attorney fees, regardless of whether an award in its favor was based on a Wage Act violation. In the face of these contentions by the employees, however, Credit Suisse was silent, neither correcting the supposed mischaracterization of its counterclaim nor making clear that Credit Suisse was not seeking attorney fees. In addition, its only expressed opposition to the award of attorney fees was based solely on the sufficiency of the fee application submitted by the employees.

Otherwise stated, while Credit Suisse did not actively litigate the issue of its own fees, it never expressly withdrew that claim. In addition, Credit Suisse did not dispute the employees' assertion in closing arguments that the parties had agreed to submit the question of attorney fees for resolution by the panel.

In summary, whether arbitrators should be granted the authority to award attorney fees is an issue that must always be considered when drafting an arbitration agreement; and, of course, as the nature of any future dispute is not yet known and the incorporation of such a provision will be adopted without any knowledge of the potential financial burden that may result , counsel must always evaluate the likelihood of success in the arbitration, the relative financial situations of the parties, and the ability to bear such further expense in the event of an adverse result.

What has been further demonstrated here is that parties must remain wary of the possibility of becoming responsible for attorney fees, even when the arbitration agreement does not provide for such by making or joining in such a demand or, perhaps, by simply remaining silent and not objecting in the face of the other side's request for attorney fees. Unfortunately, this often occurs merely because parties wish to demonstrate that their aggressiveness and confidence match that of their adversaries. Ignoring the potential risk of this unintended consequence, however, may result in a significant award well beyond what was contemplated by the parties when they agreed to arbitration. •

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