Do Arbitration Panels Have the Authority to Order Remote Arbitrations?

By

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I. Introduction

With the advent of the Covid-19 virus, arbitration hearings have been delayed or done remotely. Both counsel and panelists have varying degrees of enthusiasm for remote hearings citing the need to learn new (to them) technology and having less ability to read the physical reactions of certain participants in the arbitration. While most make the best out of the pandemic situation, the issue arises of the authority of an arbitration panel to order a remote hearing over the objections of party. The purpose of this article is to examine selected caselaw on the authority of an arbitration panel to order a remote arbitration.

II. Recent Case on Point

Legaspy v. Financial Indus. Regulatory Auth., 2020 U.S. Dist. LEXIS 145735 (N.D. Ill.) was a claim by investors against their investment advisors under FINRA arbitration rules which caused the hearing to take place at a time and location determined by the Director of FINRA. The arbitration panel decided that the hearing would take place remotely, however the investment advisor objected on the bases that this would cause the arbitration to be overly cumbersome and too expensive.

Citing *Howsam v. Dean Witter Reynolds, Inc,* 537 U.S. 79 (2002), the court ruled: "Once the case has been submitted to arbitration, federal courts leave it to arbitrators to sort out their own procedures. . . . . Whether FINRA can or should conduct a hearing remotely is a question of procedure that FINRA, not this court must decide."[1] Thus the panel had the authority to order a remote hearing as a matter of procedure.

III. Supporting Caselaw

. The issue in *Howsam,* supra, was the interpretation of a six-year time limit for [2]bringing a NASD arbitration. The Supreme Court found that the validity of the arbitration clause, and its application to the dispute in question, was for a court to decide while the interpretation of the arbitration clause was for the arbitration panel. The Howsam court observed:

> Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises "a question of Arbitrability" for a court to decide.
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> . . .
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> At the same time the Court has found the phrase "question of Arbitrability" *not* applicable to other kinds of general circumstances where parties would likely expect that an arbitrator would decide the gateway matter. Thus "procedural questions which grow out of the dispute and bear on its final disposition" are presumptively *not* for the judge, but for an arbitrator to decide."

Thus, the Howsam court found that the NASD arbitrators should interpret and apply the time limit on initiating a NASD arbitration.

Stolt-Nielsen S.A AnimalFeeds Int'l Corp., 559 U.S. 622 (2009) is a case in which the Supreme Court found that the arbitration panel had exceeded its authority in ordering a class action arbitration. But the course of its opinion, the court observed:

> In certain contexts, it is appropriate to presume that parties who enter into an arbitration agree implicitly authorize the arbitrator to

> adopt such procedures as are necessary to give effect to the parties' agreement. Thus, we have said that '"procedural questions which grown out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator to decide."[3]

Consolidation of disputes under two reinsurance treaties into one arbitration was the issue in *Employers Insurance Co. v. Century Indemnity Co.,* 443 F.3d 573 (7th Cir. 2006). The court found that consolidation was a procedural question:

> We find based on *Howsam* that the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve. It does not involve whether [the reinsurer] and [cedent] are bound by an arbitration clause or whether the arbitration clause covers the [policies at issue]. Instead, the consolidation question concerns grievance procedure – *i.e.* whether [the cedent] can be required to participate in one arbitration covering both the Agreements, or in an arbitration with other reinsurers.[4]

On consolidation, *see also Shaw Supermarkets, Inc, v. United Food and Commercial Workers Union 791,* 321 F.3d 251 (1st Cir. 2003).

A purchase price dispute was involved in *Lumbermens Mutual Cas. Co. v. Broadspire Mgmt. Services,* 623 F.3d 476 (2010). The issue was whether one party had fulfilled a condition precedent to arbitration that it detail its position on the price of the business sold. The court found that this was a procedural issue for the arbitration panel, especially since it involved the same issues as the arbitrators would have to consider in order to resolve the dispute.

Zurich American Ins. Co. v. Watts Industries, 466 F.3d 577 (7th Cir. 2006) involved the preclusive effect of a prior state court decision on two of the six deductible agreements at issue. The court ruled that this was a procedural issue for the arbitrator to decide.

IV. Commentary

It is clear from this caselaw that *Legaspy, supra,* is not likely to be an isolated case in finding that ordering a remote arbitration is a procedural matter, is within the authority of the arbitration panel. In fact, it appears that the courts are reserving for themselves the issues of a valid arbitration clause and its application to the dispute in question. It is at least arguable that any issue beyond that is a procedural issue for panel determination.

ENDNOTES

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[1] 2020 U.S. Dist. LEXIS 145735*6

[2] 537 U.S. 79 at 84.

[3] 559 U.S. 662 at 684 – 5, citing *Howsam* and *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964) (emphasis in the original).

[4] 443 F.3d 573 at 577.