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Insurance company's bid to replace arbitrator fails

FAA doesn't permit pre-award challenge

By: Pat Murphy July 7, 2016

An insurance company was not entitled to the pre-award removal of an arbitrator — who had been appointed by the opposing party in a business dispute — based on the argument that he failed to meet the qualifications specified in the parties' arbitration agreement, a federal judge has found.

The plaintiff, John Hancock Life Insurance Company U.S.A., argued that the arbitration agreement's express prohibition on the appointment of past or present John Hancock employees prevented the arbitrator selected by the defendant, Employers Reassurance Corp., from sitting on the panel hearing the parties' dispute.

But U.S. District Court Judge Denise J. Casper found no authority under the Federal Arbitration Act for a court's removal of a party-appointed arbitrator prior to the issuance of an award.

"In the end, because John Hancock has not alleged that its concerns regarding Employers' appointment of [Denis] Loring raise questions about 'the very validity' of the Agreement, John Hancock's attempt to cast its request for pre-award judicial intervention as a matter of contract enforcement is unconvincing," Casper wrote.

The 16-page decision is John Hancock Life Insurance Company (U.S.A.) v. Employers Reassurance Corporation, Lawyers Weekly No. 02-251-16. The full text of the ruling can be found here.

Amend the FAA?

John Hancock was represented by Ana M. Francisco of Boston. She declined to be interviewed, citing her client's policy against commenting on active cases.

Employers Reassurance Corp. was defended by Cambridge attorneys Scott P. Lewis and Melissa C. Allison, who did not respond to a request for comment prior to deadline.

But Boston civil litigator Thomas M. Bond said neither the language of the FAA nor the case law interpreting the statute supported John Hancock's position that courts can make a pre-award inquiry into an arbitrator's qualifications.

"The only inquiry that can be made pre-arbitration is whether there is a valid and binding arbitration agreement," Bond said.

Bond also found no merit to the public policy argument that parties should be able to settle any dispute as to an arbitrator's qualifications before expending time and money on an arbitration. Instead, Bond saw allowing such challenges as taking away from the benefits of arbitration in the commercial setting.

"When you agree to arbitration, you want to avoid judicial intervention, you want to streamline the process, trading procedural safeguards for savings in time and expense," he said. "You don't want to open Pandora's box, getting the court involved in every single [disagreement] before the arbitration even takes place."

David A. Hoffman, a Boston-based arbitrator and mediator, said Casper's decision was a proper application of the FAA. However, he said the case highlights a flaw in the statute itself.

"The problem here is the FAA. It should allow pre-arbitration review of the selection of arbitrators, so that the parties and counsel don't waste their time on a lengthy arbitration, only to find that they have to repeat the process because one of the selected arbitrators was ineligible," he said in an email.

Boston business litigator Charles A. Cook has represented parties in numerous arbitrations both in the U.S. and internationally. Cook said he was not surprised by Casper's interpretation of the FAA.

"The agreement delegates to the arbitrators the resolution of 'any controversy or claim arising out of or relating to' the agreement," Cook said. "The qualifications and eligibility of the arbitrator appointed by the defendant is for the arbitration panel, not the court, to decide."

As a matter of public policy, Cook said, he opposes amending the FAA to provide a pre-award mechanism for removing arbitrators selected by the parties.

"If there were judicial procedures for resolving issues of arbitrator bias or appointment prior to the matter proceeding, I could see 25 percent or more of the cases that I handle go to court," Cook said. "That completely undoes the benefit of arbitration."

While agreeing that Casper got it right in rejecting the removal request, Boston civil litigator Seth J. Robbins said the case raises the more intriguing question of what John Hancock does now. The company is facing an arbitration it thinks is "tainted" from the start, one that may well have to be done over again once a court reviews the award, he said.

Robbins suggested that, depending on the language of the parties' arbitration agreement, John Hancock may have a right to commence a separate arbitration to resolve the parties' disagreement over who qualifies as an arbitrator under the terms of the agreement. The resolution of that issue could help John Hancock both in its current dispute and should Employers attempt to make similar appointments in the future, he said.

"Let's say an arbitration panel comes back and says here is what we believe this [arbitrator qualification] clause means," Robbins said. "Then Employers is on notice that there's an award in place essentially saying that your appointee is invalid."

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>
> — David A. Hoffman, Boston

Reinsurance dispute

The parties entered into a reinsurance agreement in 1999. Under the agreement, Employers accepted a percentage of John Hancock's retention of liability under certain insurance policies.

A dispute arose as to Employers' right to increase reinsurance premiums charged to John Hancock. Unable to resolve the dispute through negotiation, John Hancock demanded arbitration pursuant to a clause in the contract.

The contract's arbitration clause provided for each party to appoint one arbitrator. The two arbitrators named by the parties would select a third arbitrator to complete the panel hearing the dispute.

The agreement specified that "[a]ll three arbitrators must be officers of Life Insurance Companies or Life Reinsurance Companies, excluding however, officers of the two parties to this Agreement, their affiliates or subsidiaries or past employees of any of these entities."

After John Hancock initiated arbitration in August 2015, Employers selected Denis Loring as an arbitrator.

John Hancock demanded that Employers withdraw Loring, contending that his appointment violated the agreement's prohibition on the appointment of past or present employees. According to John Hancock, Loring was ineligible because he was a former employee of John Hancock Mutual Life Insurance.

Employers contended that Loring met the agreement's qualifications for arbitrators because he left John Hancock

Mutual Life Insurance before it became affiliated with John Hancock. Employers further asserted that John Hancock Mutual Life Insurance was no longer affiliated with John Hancock.

When Employers refused to withdraw Loring, John Hancock filed an action in federal court seeking his removal and an order directing Employers to "name a replacement arbitrator in compliance with the Agreement."

No removal exception

John Hancock acknowledged that the FAA generally prohibits a court from removing party-appointed arbitrators prior to the conclusion of the arbitration. However, John Hancock argued that the bar on judicial intervention was limited to pre-award challenges regarding the bias of arbitrators and did not extend to qualification-based challenges.

John Hancock urged the court to recognize an exception to the general rule that, it said, implicitly arose under

Sections 4 and 5 of the FAA.

Section 4 allows parties "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to seek a court order compelling that "arbitration proceed in the manner provided for in such agreement."

Section 5 directs parties to follow any method for appointing arbitrators provided in the arbitration agreement. Moreover, Section 5 grants courts the authority to appoint an arbitrator when the arbitration agreement does not provide a method for appointing arbitrators, when a party fails to "avail himself of such method," or "if for any other reason there shall be a lapse in the naming of an arbitrator."

In rejecting John Hancock's proposed exception, Casper first noted that neither Section 4 nor Section 5 included express language concerning the removal of an arbitrator. Instead, the judge wrote that the FAA specified the avenues for a District Court to review arbitration proceedings, notably Section 10's listing of grounds for vacating an award including "evident partiality or corruption in the arbitrators," arbitrator "misbehavior," and arbitrators exceeding their powers. Similarly, Section 11 allows parties to petition a District Court to modify an arbitration award.

Casper observed that under both Section 10 and Section 11 it was "essential for the district court's jurisdiction" that the arbitrator's decision was "final."

"Thus, based upon the express terms of the FAA, challenges to a party-appointed arbitrator, such as allegations of bias, are properly considered by courts only at the conclusion of the arbitration," she wrote.

Casper observed that the 2nd and 5th U.S. Circuit Court of Appeals had already rejected John Hancock's argument that an exception exists in the FAA that permits a District Court to remove an arbitrator before the conclusion of arbitration when removal is premised on contract-based qualifications.

John Hancock argued that a request for pre-award removal based on arbitrator qualifications is distinct from a court impermissibly intervening to remove an arbitrator because of bias.

But Casper found no basis in the language of the FAA for making such a distinction.

"The FAA provides no express authorization for pre-award judicial intervention regardless of the grounds for removal; whether an arbitrator satisfies a provision of the arbitration agreement is a question of the arbitrator's capacity to serve just as much as a challenge regarding the arbitrator's bias is a question of capacity to serve," the judge wrote. **MLW**

John Hancock Life Insurance Company (U.S.A.) v. Employers Reassurance Corporation

THE ISSUE: Does the Federal Arbitration Act authorize a court to remove a party-appointed arbitrator based on his lack of qualifications prior to the issuance of an award?

DECISION: No (U.S. District Court)

LAWYERS: Ana M. Francisco of Foley & Lardner, Boston (plaintiff)

Scott P. Lewis and Melissa C. Allison, of Anderson & Kreiger, Cambridge (defense)

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