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When May an Arbitrator's Award be Vacated?

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mark field. The case of *Carpenter v. Erie R. Co.*[45] was an action by an employee against an employer to recover damages for personal injury on the theory of the employer's misrepresentation concerning medical care requirements. The court held Section 43(a) to be inapplicable to such an action.

CONCLUSION

The foregoing are the pertinent decisions to date interpreting or commenting upon Section 43(a) of the Lanham Act. What will the future decisions hold? Perhaps the section was drawn with an intention that it be only a codification of the *Grand Rapids* case;[46] nevertheless, there is no doubt but that the language of Section 43(a) is broad enough to allow a court to regard it as a direct source of federal law with respect to false designations of origin (an indication of origin being the basic function of a trademark) or false advertising.

Will judicial decision lag behind highly developed and quickly changing business practices so that it might be possible for an individual to trade with impunity upon the goodwill that another has created (even though that practice would be considered to be a form of unfair competition in the present-day connotation of the word), since such a practice is not of a nature that is remedied by state law? The possibilities are many. Perhaps more courts will base federal jurisdiction on Section 44 of the Lanham Act and find an indirect source of federal common law regarding unfair competition based on the international treaties and conventions. It would seem that the better way would be to use the direct and concise wording found in Section 43(a). It seems that the only conclusion that can be drawn is that from a legislative viewpoint there ought to be a federal law of unfair competition in order to arrive at some degree of uniformity.

From a judicial standpoint there is a variety of thinking, with the trend perhaps slightly more toward the view that the federal district court does have jurisdiction over matters of common law unfair competition. Certainly in any common law trademark litigation one might attempt to base jurisdiction on Section 43(a). Outside the trademark field it is doubtful if such an attempt would be availing.

[45] 178 F. 2d 921 (C.A. 2d, 1949), cert. den., 339 U.S. 912 (1949).

[46] 127 F. 2d 245 (C.A. 7th, 1942), cert. den., 321 U.S. 771 (1943). See discussion in footnote 25 supra.

WHEN MAY AN ARBITRATOR'S AWARD BE VACATED?

Arbitration, the submission of some disputed matter to selected persons and the substitution of their decision for the judgments of the courts,[1] has proved to be both an economical and efficient means for the settlement of

[1] In re Curtis, 64 Conn. 501, 30 Atl. 769 (1894).

controversies. To insure this effectiveness the courts have been reluctant to set aside the awards of arbitration tribunals.[2] But both statutes and case law agree that an award, otherwise binding may be set aside where it can be shown that the arbitrators were guilty of misconduct, where a material mistake appears on the face of the award, or where evidence of fraud is present.[3] Following is a closer examination of the above principles.

MISCONDUCT OF ARBITRATORS

The arbitrator is placed in the position of judge and jury, and as such he must conduct himself discreetly and in a manner mindful of the considerations of each party. Conduct which will impeach the decision of a court will also suffice to vitiate the award of an arbitrator. Such behavior can be divided into two areas. First, excessive use of the powers granted the arbitrator by virtue of the submission, and second, actions which tend to create an air of partiality.

Excess of authority.—"[T]he power of the arbitrator or referee extends to just what the parties have agreed to submit and no more; and if he undertakes to try other matters not submitted, the award is invalid."[4] The rationale of this rule lies in the fact that by deciding issues not submitted, the referee actually "usurps" the authority given him and such a judgment is without legal force.[5]

An example of this "usurpation" of authority can be seen in *Palmer v. Van Wyck*,[6] which concerned a dispute as to a breach of warranty. There it was agreed that all matters of law be submitted to the court and the matter of the amount of damages should be determined by three arbitrators. The court found that a breach of warranty had been made resulting in a great deal of damage to the plaintiff. However, the arbitrators determined that only nominal damages be awarded. The award was vacated on grounds that the arbitrators had exceeded their authority in not granting an amount commensurate with the legal finding of the court as required by the arbitration agreement.

In *Leslie v. Leslie*,[7] two partners desirous of dissolution, submitted for arbitration the question of which one would sell his interest to the other.

[2] Roberts Bros. v. Consumers' Can Co., 102 Md. 362, 62 Atl. 585 (1894).

[3] Hudson Lumber Co. v. U.S. Plywood Corp., 124 Cal. App. 2d 527, 269 P. 2d 93 (1954); Gervant v. New England Fire Ins. Co., 306 N.Y. 393, 118 N.E. 2d 574 (1954); Draft State Arbitration Act, § 10; Uniform Arbitration Act, § 16.

[4] Cook v. Carpenter and Cook, 34 Vt. 121, 126 (1861); cf. Friedland v. Friedland, 1 App. Div. 2d 129, 148 N.Y.S. 2d 328 (1956); Doyle v. Hunt Construction Co., 123 Cal. 2d 51, 266 P. 2d 152 (1954).

[5] Leslie v. Leslie, 50 N.J. Eq. 103, 24 Atl. 319 (1892). Accord: Harnick v. Buffalo Brake Beam, 204 Misc. 308, 127 N.Y.S. 2d 308 (1953); Screen Cartoonists Guild Local 852 v. Walt Disney Productions, 74 Cal. App. 2d 414, 168 P. 2d 983 (1946); Bierlein v. Johnson, 73 Cal. App. 2d 414, 166 P. 2d 644 (1946).

[6] 92 Tenn. 397, 21 S.W. 761 (1893).

[7] 50 N.J. Eq. 103, 24 Atl. 319 (1892).

The arbitrators not only decided this question, but also determined that the defendant was indebted to the firm, and provided terms of payment of the debt. The court set aside this award on grounds that the arbitrators had no authority to delve into past dealings of the firm and determine issues not specifically submitted to them.

Hence, if the arbitrators merely find the facts requested, the award will stand. But if they go beyond that which is submitted to them, the award must fall.

Acts of the arbitrator amounting to partiality.—Generally, any act of an arbitrator which might in some way prejudice the rights of one of the parties is sufficient to impeach an award; this is true where only one of the referees has been guilty of misbehavior. Thus awards have been vacated where an arbitrator had a personal interest in the outcome of the dispute,[8] where an arbitrator visited the home of one of the parties during the dispute,[9] where the arbitrator had discussed the dispute freely with another who had served as referee in a prior proceeding concerning that dispute,[10] and where two of the three arbitrators rendered an award without contacting the third.[11]

Nor will the law tolerate the refusal of arbitrators to entertain evidence material to the dispute, for such refusal strikes at the very heart of the purpose of arbitration in providing a fair and impartial hearing to the parties.[12]

> Parties are entitled to be heard and present evidence before the arbitrators, and depriving a party of such substantial right is misconduct that will render the award invalid.[13]

These situations most frequently arise in ex parte hearings, where the adverse party has no opportunity to rebut facts prejudicial to his cause. Awards granted where such hearings have taken place are held to be void.[14]

In *Spitzer Electric Co. v. Girardi Construction Corp.*,[15] the arbitrator held ex parte consultations with his nominator concerning material facts,

[8] In re Miller, 260 App. Div. 444, 23 N.Y.S. 2d 120 (1940); Schwartzman v. London and Lancashire Fire Ins. Co., 318 Mo. 1089, 2 S.W. 2d 593 (1927).

[9] Robinson v. Shanks, 118 Ind. 125, 20 N.E. 713 (1889).

[10] Moshier v. Shear, 102 Ill. 169 (1882).

[11] Jones v. Bishop, 218 Ill. App. 318 (1920); Doherty v. Doherty, 148 Mass. 367, 19 N.E. 352 (1889).

[12] Gregory v. Pawtucket Mutual Fire Ins. Co., 58 R.I. 434, 193 Atl. 508 (1937); Giannopulos v. Pappas, 80 Utah 442, 15 P. 2d 353 (1932).

[13] Agricultural Ins. Co. of Watertown v. Blitz, 57 Nev. 370, 64 P. 2d 1042, 1046 (1937).

[14] Dukraft Mfg. Co. v. Bear Mill Mfg. Co., 151 N.Y.S. 2d 318 (1956); Whitehair v. Kansas Flour Mills Corp., 127 Kan. 877, 275 Pac. 190 (1929); Curran v. City of Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919); Hewitt v. Village of Reed City, 124 Mich. 6, 82 N.W. 616 (1900); Wilkins v. Van Winkle, 78 Ga. 557, 3 S.E. 761 (1887).

[15] 147 N.Y.S. 2d 40, 286 App. Div. 40 (1955).

all to the exclusion of the other party and without his knowledge. The Supreme Court of New York held such an award invalid because the adverse party could not controvert matters prejudicial to his cause.

Private investigations on the part of the arbitrator are other instances which foster partiality, and such behavior is fatal to the award.[16] *Stefano Berizzi Co. v. Krausz*,[17] is a case which best illustrates this principle. There, a dispute arose concerning the quality of imported bamboo skewers. After termination of the proceedings but prior to the decision, the arbitrator conducted his own personal investigation without the knowledge of either party. He obtained the opinions of several dealers in this type of commodity and also solicited the criticisms of prospective purchasers. On the strength of these findings the arbitrator rendered his award. This was set aside on grounds that the personal investigations prejudiced the adverse party in not affording him an opportunity to present any mitigating facts.

Jessup and Moore Paper Co. v. Reed and Bros. is a case containing similar facts. There, the arbitrator obtained the opinion of an undisclosed person subsequent to the termination of the hearings, and conveyed this opinion to the other referees. In vacating the award because of misconduct, the court said:

> A referee or arbitrator acting in a judicial capacity to hear and determine a dispute is both judge and jury, and cannot without the knowledge or consent of the parties receive testimony after having concluded a hearing of the parties.[18]

Thus, in cases where the conduct of the arbitrator has been found to be unjustified, the award will be set aside, and it is immaterial that the complaining party has not been damaged, or that the arbitrator has acted in good faith; the misconduct per se is sufficient.[19]

> It is not his [the arbitrator's] own consciousness of rigid justice that can support his determination of the controversy, nor his conviction in his own mind that he is so that can suffice. It is his *external actions* that will be subjected to scrutiny; and if these do not satisfactorily bear the test, the award will fall.[20]

MISTAKE

As a general rule, arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside for mistake in either.[21] The exception to this rule arises when a palpable error of fact

[16] Brotherton, Inc. v. Kreielsheimer, 8 N.J. 66, 83 A. 2d 707 (1951).

[17] 239 N.Y. 315, 146 N.E. 436 (1925).

[18] 10 Del. Ch. 146, 87 Atl. 1011, 1012 (1913).

[19] Jackson v. Roane, 90 Ga. 669, 16 S.E. 650 (1893).

[20] Morse, Arbitration and Award, c. 19 (1892) (emphasis added).

[21] Patriotic Order Sons of America Hall Ass'n v. Hartford Fire Ins. Co., 305 Pa. 107, 157 Atl. 259 (1931); cf. Pennsylvania Electric Co. v. Shannon, 377 Pa. 352, 105 A. 2d 55 (1955).

appears on the face of the award, or where it appears from the award that the arbitrators intended to decide questions of law and have erred. Mistakes of fact generally occur through the miscalculations of figures, omissions of words or the like. In such situations the award will be modified or vacated as befits the facts.[22]

To set aside an award on grounds of mistake of law, the submission agreement or the award itself must show that the arbitrators intended to decide questions according to the law and erred in so doing.[23] The reasoning in such cases is that because of the mistake, the arbitrator did not intend to reach the decision he has.

> The party alleging error of law must be able to point to the award and say that the arbitrator, as appears from the award itself, intended to decide the case according to law, and has mistaken it, and that except for this mistake his award would have been different.[24]

In *Roberts Bros. v. Consumers' Can Co.*,[25] the submission agreement provided that the arbitrators determine all questions of law and fact, and that the parties be given the opportunity of producing evidence from time to time. A deposition taken for the complainant intended to be used as evidence was sent to the arbitrators addressed to the complainant rather than the referees as directed. The arbitrators refused to entertain this deposition on grounds that it was inadmissible evidence having been addressed to the complainant rather than to them. The award given in favor of the adverse party was vacated on grounds of mistake of law. The court ruled that the rules of evidence cannot be construed strictly by arbitrators since they are usually mere laymen, and a strict construction would defeat the very purpose of arbitration. Here, the delivery of the depositions substantially met the terms of the submission agreement, and the refusal of the arbitrators to allow this evidence was mistake of law on the face of the award sufficient to render it ineffective.

FRAUD AND CORRUPTION

"Fraud or corruption . . . whenever discovered will furnish a sufficient cause for vacating the award."[26] This is the universal rule.[27] Therefore,

[22] First National Oil Corp. v. Arrieta, 151 N.Y.S. 2d 309 (1956); Arcol Fabrics Corp. v. Brenda Modes, 72 N.Y.S. 2d 700 (1947); Kutsukian v. Bossom, 270 App. Div. 396, 60 N.Y.S. 2d 27 (1946); Taylor v. Sayre, 24 N.J.L. 647 (1855).

[23] Putterman v. Schmidt, 209 Wis. 442, 245 N.W. 78 (1932); Utah Construction Co. v. Western Pac. Ry., 174 Cal. 156, 162 Pac. 631 (1917).

[24] Fudickar v. The Guardian Mutual Life Ins. Co., 62 N.Y. 392, 401 (1875).

[25] 102 Md. 362, 62 Atl. 585 (1905).

[26] Morse, Arbitration and Award 539, c. 19 (1892).

[27] Carlisle v. McCleskey, 264 Ala. 436, 87 So. 2d 831 (1956); Hudson Lumber Co. v. United States Plywood Corp., 124 Cal. App. 2d 527, 269 P. 2d 93 (1954); Commercial Union Assurance Co. v. Parker, 119 Ill. App. 126 (1905).

when bribery of an arbitrator is shown,[28] or he is otherwise influenced,[29] or if a party elects one interested in his behalf as a referee,[30] the award will be set aside. And it is of no consequence that the party seeking to perpetrate the fraud failed in his attempt.

> A party attempting by overt acts to corrupt or improperly influence such a tribunal to make an award in his favor is not to be heard to say that he was impotent to accomplish what he sought. . . .[31]

Perjury.—There is a conflict as to whether perjury is grounds for setting aside an award. Many courts will not disturb an award in such cases, reasoning that false testimony is intrinsic fraud, not appearing on the face of the award, and thus is insufficient to have it impeached.[32]

Other holdings have allowed proof of perjury to impeach an award.[33] Thus in *Fire Ass'n of Phil. v. Allesina,*[34] an award was set aside where the defendant had sworn that the amount of merchandise damaged in a fire was much greater than was true. In *Johnson v. Wells,*[35] two partners agreed to submit their dispute concerning a division of profits for arbitration. The defendant had so manipulated the firm's records that it appeared his partner was indebted to him when the opposite was true. These records were introduced in evidence at the hearings, and an award made in favor of the defendant. On appeal, the award was set aside on grounds of perjury, the false records being the subject of the perjured testimony.

Constructive fraud.—A line of cases can be found which holds that where there has been gross error or misbehavior on the part of the arbitrator, the award will be set aside on grounds of constructive fraud.[36] An example of this can be seen in *Baldinger v. Camden Fire Ins. Ass'n.*[37] There a fire loss amounted to $1855.00. The amount granted in the award

[28] Holt v. Williams, 210 Mo. App. 470, 240 S.W. 864 (1922).

[29] Spurck v. Crook, 19 Ill. 415 (1858).

[30] Ins. Co. of North America of Philadelphia v. Hegewald, 161 Ind. 631, 66 N.E. 902 (1903); Bradshaw v. Agricultural Ins. Co. of Watertown, 137 N.Y. 137, 32 N.E. 1055 (1893).

[31] Catlett v. Dougherty, 114 Ill. 568, 573, 2 N.E. 669, 671 (1885).

[32] Jacobowitz v. Metselaar, 268 N.Y. 130, 197 N.E. 169 (1935); French v. Raymond, 82 Vt. 156, 72 Atl. 324 (1909).

[33] Johnson v. Wells, 72 Fla. 290, 73 So. 188 (1916); Fire Ass'n of Philadelphia v. Allesina, 49 Ore. 316, 89 Pac. 960 (1907); Craft v. Thompson, 51 N.H. 536 (1872).

[34] 49 Ore. 316, 89 Pac. 960 (1907).

[35] 72 Fla. 290, 73 So. 188 (1916).

[36] Smith v. Hillerich & Bradsby Co., 253 S.W. 2d 629 (1952); Anco Products Corp. v. T.V. Products Corp., 23 N.J. Super. 116, 92 A. 2d 625 (1952); Noffsinger v. Thompson, 98 Colo. 154, 54 P. 2d 683 (1936); Kaufman Jewelry Co. v. Ins. Co. of Pa., 172 Minn. 314, 215 N.W. 65 (1927); Rottman v. Toft, 187 Wis. 558, 204 N.W. 585 (1925).

[37] 121 Minn. 160, 141 N.W. 104 (1913).

was $470.00. This was set aside by the court which ruled that where an award is grossly inadequate, constructive fraud will lie.

In *Woods v. Roberts,*[38] an arbitrator granted an award which was quite favorable to a widow, and later divorced his wife and married the widow. Such behavior was held to amount to constructive fraud sufficient to impeach the award.

In all of cases of constructive fraud, it must be remembered that there was no proof of actual fraud, but merely proof of the actions of the arbitrator or the parties which raised the presumption.

CONCLUSION

While the general rule is that every intendment will be given in favor of an award, yet the courts will set aside an award in cases of misbehavior of the arbitrator, gross error of fact or law appearing on the face of the award, or where fraud is present.

An examination of the various decisions indicates that not all courts adhere to the above principles in so far as misconduct and error are concerned, but subscribe to the doctrine of constructive fraud. The reason lies, perhaps, in the fact that mistake and misconduct per se are not accepted as grounds for the impeachment of the award. However, to meet the ends of justice, the court, instead of using gross error or misconduct alone to vacate an award, will say that the gross error or misconduct indicates the presence of fraud.

[38] 185 Ill. 489, 57 N.E. 426 (1900).