ATTORNEYS' FEES IN THE AFTERMATH OF ARBITRATION

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The issue of arbitrators' ability to award attorneys' fee has crystallized over the past three decades. There is little question today that arbitrators may award attorneys' fees, if the issue is properly presented to them.

Initially, the principal obstacle was the so-called "American Rule" which holds that parties should each bear their own attorneys' fees unless such are provided for by 1) statutory authorization 2) contractual agreement or 3) in circumstances of bad faith.

Some examples where attorneys' fees have been allowed are:

Contracts with specific provisions allowing an award of attorneys' fees have been enforced. Arbitration provisions broadly worded to include "any and all disputes" have been held to include consideration by arbitrators of awarding attorneys' fees.

Should the parties themselves request arbitrators to consider awarding attorneys' fees, such requests have been honored. (*Andorra Services, Inc. v. M/T EOS, et al*; U.S.D.C. Dist. of New Jersey, Civil Action No. 06-373 (November 19, 2008).

The Society of Maritime Arbitrators (SMA) amended its Rules in 1994 to allow arbitrators to consider awarding attorneys fees.

Generally speaking, today most final arbitration awards are dealt with between the parties without further ado; by compliance or settlement of the award. At the same time, there are instances (for varied reasons) where a winning party has sought to confirm the award pursuant to Section 9 of the Federal Arbitration Act (FAA). Seeking to obtain a judgment, a motion to confirm under Section 9 must be made within one year from the date of the award. A motion to

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vacate must be brought within 3 months pursuant to Section 10 of the FAA. It is a given that arbitration awards are usually given great deference and vacated only on limited grounds.

Neither Section 9 nor 10 of the FAA makes any mention of awarding attorneys' fees. Most arbitration provisions today will afford arbitrators the ability to award attorneys' fees; however, what happens with respect to attorneys' fees when the winner goes to Court to confirm an award, or opposes a motion to vacate that award?

In *Painewebber Inc. v. Bybyk*, 81 F.3rd 1193, 2nd Circuit (1996), the Circuit Court held that, when an arbitration agreement provided "for any and all controversies" to be submitted to arbitration, and contained no express limitation with respect to attorneys' fees, the arbitrators were empowered to consider applications for such fees.

Earlier this year (2015), Judge Englemayer of the Southern District of New York considered a petition to confirm an arbitration award. The panel majority had granted attorneys' fees referring to the Second Circuit's holding in *Painewebber* (supra). The Court also found the award indicated the panel majority found the losing party had acted in bad faith, thus constituting an exception to the American Rule.

In that case, the petitioner, in its initial papers, requested the Court to grant attorneys' fees and costs incurred in pursuing the action; however, the Court noted in a footnote petitioner did not pursue the application further in its brief, nor did it set out any legal basis for requesting such relief, nor did it provide any accounting of fees and costs incurred in the case. Accordingly, the Court declined to award such relief.

Earlier, in *Hess Corporation v. Dorado Tankers Pool, Inc.*, 2015 AMC 1432, Judge Buchwald of the Southern District confirmed an award of attorneys' fees. The matter involved the Asbatankvoy form which includes a provision that "any and all differences and disputes of

whatsoever nature arising out of this Charter party shall be put to arbitration." The provision went on to provide an award could include a "reasonable allowance for attorney's fees".

The Charter Agreement also contained a separate clause which provided that damages for a breach of the charter party should "include all provable damages, and all costs of suit and attorneys' fees incurred in any action hereunder".

The Court allowed attorneys' fees and costs expended by the Charterer in pursuing its petition to confirm and in opposing Owner's motion to vacate. The Court noted that both parties agreed that such attorneys' fees were proper under the provisions of the charter party.

In the first case, no follow-up was made by the Petitioner on its request for attorneys' fees incurred on the matter before the Court. In the second, there was no dispute as to entitlement to attorneys' fees based on the wording of the charter party.

In *Loeb v. Blue Star Jets LCC*, 2009 WL 4906538 (S.D.N.Y.) Judge Scheindlin considered a motion for confirmation of an arbitration award and for attorneys' fees associated with bringing the Petition.

The agreement included an arbitration clause calling for arbitration in New York City by a single arbitrator; however, made no provision as to the awarding of attorneys' fees, other than a provision providing that any action or breach of the agreement by the Petitioner ("Client") would make the "Client" liable for damages, including attorneys' and legal expenses. (a "fee shifting" clause).

The arbitrator found this provision was reciprocal pursuant to New York statute Section 5-327 of the General Obligation Law and awarded damages plus attorneys' fees. The Court confirmed the award made by the arbitrator and went on to award attorneys' fees and costs incurred as a result of the petition to confirm the award. The court based its finding on the "fee

shifting" clause as being reciprocal and allowing any action arising out of a breach of the contract. Therefore, Petitioner was entitled to attorneys' fees arising out of the breach of the agreement by Respondent.

Where the agreement specifically provides for attorneys' fees and expenses incurred in proceedings other than the arbitration itself, courts have had little difficulty in awarding attorneys' fees and expenses. See for example: *Sailfrog. v. Theonramp Group, Inc.*, 1998 U.S. LEXIS 23525 (Northern Dist. of Calif. 1998); *Elite, Inc. v. Texaco Panama Inc.*, 777 F.Supp. 289 (S.D.N.Y. 1991); *Trans-Asiatic Oil Ltd. S.A. v. UCO Marine International Ltd.*, 618 F.Supp. 132 (S.D.N.Y. 1985); In re *Arbitration Between Carina International Shipping Corp. and Adam Maritime Corp.*, 961 F.Supp. 559 (S.D.N.Y. 1997); *Universal Computer Servs. v. Dealer Servs.*, 2003 U.S. Dist. LEXIS 12237 (E.D.N.Y. 2003).

Where the agreement is not clear or says little or nothing as to attorneys' fees to be awarded outside of the arbitration proceeding, courts have had difficulty in dealing with their ability to award such fees.

In *Crossville Med. Oncology P.C. v. Glenwood Systems, LLC*, 2015 U.S.App. LEXIS 7313 (decision marked "NOT RECOMMENDED FOR FULL-TEXT PUBLICATION"), the Sixth Circuit found the clause in question did not "anticipate an award of post-arbitration attorneys' fees for subsequent proceedings and litigation." The Court referred to the Seventh Circuit decision of *Menke v. Monchecourt* 17 F 3d 1007 (1994): "Absent statutory authorization or contractual agreement between the parties, the prevailing American Rule is that each party in federal litigation pays his own attorneys' fees." *Menke* (supra, at 1009). The Circuit Court affirmed the District Court's denial of a motion for attorneys' fees.

Courts have acknowledged, as in *Crossville*, that while the Federal Arbitration Act does not specifically grant the ability to award attorneys' fees, neither does it prohibit attorneys' fees being awarded in legal proceedings subsequent to arbitration. It seems courts, in refusing to grant attorneys' fees for subsequent hearings, apparently just could not find a "jurisdictional peg" on which to hang that hat.

In O*wn Capital LLC v. Celebrity Suzuki of Rock Hill*, 2011 U.S. Dist. Lexis 84824, the U.S. District Court for the Eastern District of Michigan (Southern Div.) essentially said "Go back to arbitration" where the agreement referred to "all disputes" as being referred to arbitration.

It is questionable whether referring a matter back to arbitration is commercially or realistically sound. Clearly, a final award renders the arbitrator or panel *functus officio*. To go back to arbitration would mean the start of a completely new arbitration to consider attorneys' fees and expenses; and then what? Another motion to confirm? Back to arbitration again?

It would seem the more realistic solution to recover fees and expenses in post arbitration efforts should start with the agreement itself by way of proper provisions specifically speaking to awarding attorneys' fees and legal expenses, not only by arbitrators, but also in any other proceedings instituted subsequent to the arbitration award itself.

Obviously, such provisions in a charter party cuts both ways vis-à-vis the parties. At the same time, attorneys' fees and legal expenses incurred by way of efforts to enforce or confirm an award or, on the other hand, to vacate the award, can be significant.

Lastly, and obviously, attorneys' fees and legal expenses must be requested of arbitrators or the Court and substantiated if they are to be considered.