# Neutral Notes

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## THE LONG REACH OF THE FIGHTING IRISH

In The University of Notre Dame (USA) In England v. TJAC Waterloo, LLC; ZVI Construction Co., LLC, an interesting opinion by Retired Justice David H. Souter, sitting in the First Circuit, the Court affirmed the arbitration agreement and award.

The facts are relatively unusual. This case was an appeal from the District Court's recognition of an English arbitrator's determination of joint contract liability against the seller and renovator of a building. Litigation was bifurcated regarding liability and damage issues and the District Court treated the arbitrator's liability judgment as final and thus entitled to judicial recognition.

Notre Dame in England had agreed to buy an English building from TJAC Waterloo, LLC for $58,833,700 once the structure had been renovated and converted into a student dormitory by TJAC's associated corporation, ZVI Construction Co., LLC. If there was a dispute, either buyer or seller could refer the disagreement for adjudication by an "expert" whom we would refer to as an arbitrator. Notre Dame eventually identified and made a claim for $8,500,000 in necessary remedial work. Notre Dame's claims were submitted to an arbitrator as provided in the agreement. The three parties to the P&S Agreement agreed to try the liability elements of the claims first and separately litigate the issues of damages following.

The arbitrator issued a determination or judgment that TJAC and ZVI were jointly liable to Notre Dame.

Notre Dame asked for "assurances" that the two corporations would be in a position to satisfy the award of damages. Failing to receive adequate assurances, Notre Dame filed suit in a Massachusetts state court for an order enjoining TJAC and ZVI from dissipating, encumbering, or otherwise transferring assets. The case was removed to the federal district court under the statute implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention. The District Court confirmed the award and authorized attachment of property in the amount of just over $7 million as security for the anticipated award.

TJAC and ZVI appealed, arguing that the arbitrator's judgment of liability lacked finality under Section 9 regarding confirmation of a foreign arbitral award.

Justice Souter relied upon the law of the circuit which he states as follows: "Hart Surgical holds that a bifurcated liability judgment may qualify as final when the arbitrating parties have formally agreed to litigate liability and damages in separate, independent stages." He noted that this opinion was also supported by the Supreme Court's position regarding the Federal Arbitration Act.

Further, he said that no convention, meaning the New York Convention, case has "been brought to our attention addressing the significance of bifurcation in addressing finality…." In a footnote, he also noted that counsel for TJAC and ZVI "have agreed" to bifurcation.

The Court held that a final determination of liability but not damages could satisfy the finality requirement of Article V(1)(e) of the Convention. In this case, the Court ruled that "the parties have agreed to submit the issue of liability to the arbitrator for a distinct determination prior to a separate proceeding to assess damages." The only remaining issue was whether the arbitrator's liability judgment was "final."

Given his wry New Hampshire humor, Justice Souter characterized the argument as "grasping for a straw that the record shows is not there to be grasped." The Court also noted that there had been a subsequent filing by ZVI

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# SEVENTH CIRCUIT IMPOSES SANCTIONS ON LAWYER WHO DOES NOT FOLLOW ARBITRATION CLAUSE

In James Hunt v. Moore Brothers, Inc., et al., the Seventh Circuit affirmed sanctions of $7,500 imposed by the U.S. District Court against attorney Jana Yocum Rine who had failed to heed the applicable arbitration agreement.

James Hunt had signed an independent contractor operating agreement with Moore Brothers, a small company located in Norfolk, Nebraska. Relations between the parties soured and Hunt hired attorney Rine to sue Moore on his behalf. She did so in federal court "paying little heed to the fact that the Agreements contained arbitration clauses." The Appellate Court said the imposition of sanctions was due to the District Court being "[t]ired of what it regarded as a flood of frivolous arguments and motions."

The Agreement between the parties had an arbitration provision which is relatively straightforward. It provided as follows:

> This Agreement and any properly adopted Addendum shall constitute the entire Agreement and understanding between us and it shall be interpreted under the laws of the State of Nebraska…. To the extent any disputes arise under this Agreement or its interpretation, we both agree to submit such disputes to final and binding arbitration before any arbitrator mutually agreed upon by both parties.

Instead of following this provision, Rine "ignored that language" and filed a multi-count complaint. The Court said the only thing notable about the complaint was its "breadth." For example, Rine accused Moore of holding Hunt "in peonage" in violation of 18 U.S.C. §1581, RICO violations, and various other claims.

Moore responded simply under the Federal Arbitration Act, filing a motion to compel and to stay the litigation and seeking the appointment of an arbitrator.

Apparently, Rine was still not satisfied and the Court said:

> This was the backdrop to Rine's ill-fated return to the district court. Less than two months after the judge told the parties to agree on an arbitrator, Rine filed a motion reporting that their efforts had failed. This revealed, she said, that the arbitration clause was nothing more than "an agreement to agree," unenforceable under Nebraska law. The district court rejected this reasoning. It noted that Rine should have raised this argument earlier and that in any event it was wholly without merit. The FAA preempts conflicting state law, and a delay in the selection of an arbitrator does not affect the enforceability of an arbitration clause. *Green v. U.S. Cash Advance Ill,* LLC, 724 F.3d 787, 791-92 (7th Cir. 2013). This was the point at which the court imposed the sanctions that are subject of Rine's appeal.

Rine continued to resist, arguing that the clause was non-enforceable as a matter of Nebraska law and, therefore, her behavior was justified. The Court rejected all of her arguments and said:

> We are unpersuaded by Rine's arguments. The fundamental flaw underlying her entire course of conduct is her disregard of the long line of Supreme Court decisions upholding the enforceability of arbitration clauses exactly like the one in the Hunt-Moore Agreements. As we noted earlier, Rine's theory in the district court was that the arbitration clause was only an agreement to agree in the future and thus was unenforceable under Nebraska law. For support, she pointed to *Nebraska Nutrients, Inc. v. Shepherd*, 626 N.W.2d 472 (Neb. 2001) and *T.V. Transmission, Inc. v. City of Lincoln*, 374 N.W.2d 49 (Neb. 1985). Yet neither of those cases has anything to do with arbitration, and so neither is of any use to Rine, which perhaps is why she has not cited them on appeal.

As a matter of fact, regarding vagueness, the Court rejected Rine's argument that the failure to name a particular arbitrator invalidated the provision.

> **PRACTICE NOTE:** Unless there is a permanent panel or arbitrator, nearly every agreement leaves open the appointment of the specific arbitrator or panel.

The Court rejected this argument as well and stated:

> The fact that an agreement to arbitrate leaves for later negotiations the selection of the particular arbitrator does not render that agreement so vague as to be unenforceable. If that were the case, then section 5 of the FAA, which provides for the court to appoint an arbitrator in some circumstances, would be pointless. Provisions in which the parties must agree on one or more arbitrators are common. … *Green* established that the absence of an obligatory process for designating an arbitrator is not the kind of lacuna that prevents the enforcement of the arbitration agreement.
>
> That is enough to show that Rine's effort to avoid

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# IN CASES OF SECURITY MATTERS, FINRA USUALLY PREVAILS

In BOSC, Inc., et al. v. Board of County Commissioners of the County of Bernalillo, a New Mexico County Board filed a lawsuit in state court against its securities broker and registered agent. The Board refrained from serving process while it determined whether arbitration was available.

Interestingly, the broker and agent removed the case to federal court and moved to dismiss. Four days after briefing was complete, and about three months later, the Board voluntarily dismissed and filed for arbitration. The broker and agent filed an action to enjoin arbitration, arguing that waiver applied and the matter should be dismissed.

The case involved an allegation of unsuitability, which is routinely handled at FINRA. The allegation was that the investments conflicted with Bernalillo County's liquidity needs and violated FINRA Rule 2111. The parties did not dispute that the FINRA Rules applied but there was a fundamental question of waiver.

The Court stated that it has recognized two forms of waiver, although only one has ever applied: when a party intentionally relinquishes or abandons its right to arbitration or when a party's conduct in litigation forecloses its right to arbitrate.

BOSC and Hayes argued that the Board intentionally waived its right to demand arbitration when it filed a state court lawsuit and urged the Court to adopt a bright-line rule that "plaintiffs who later seek arbitration on the same issue have necessarily waived their right to arbitrate."

Alternatively, they argued that the *Peterson* factors support a finding that the Board waived its right to arbitration by its conduct. Those factors are:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.

The Court of Appeals rejected the bright-line for waiver just because a party has filed a lawsuit "primarily because the circumstances of this case demonstrate how such a rule would not be wise."

The Court said that the Board merely took a step towards choosing litigation over arbitration by filing the original complaint but "it stopped short of voluntarily submitting the issues to a court for decision by refraining from serving process…. If the Board had done nothing else after filing, it would not have been entitled to default judgment but would have instead risked dismissal for failure to prosecute."

More importantly, "the Board dismissed the action before a court could rule on the motion to dismiss, a motion that BOSC and Hayes took it upon themselves to file even when they had not yet been served."

Based upon the facts and its reluctance to adopt a bright-line, the Tenth Circuit held that the Board did not waive its right to arbitrate. While it acknowledged that the Board took "some actions inconsistent with its right to demand arbitration," it did not go so far as to voluntarily submit its claims to a court for relief.

Contrary to claimants, the Court found that "what got the ball rolling was BOSC and Hayes' removal to federal court and their filing of a motion to dismiss even though they had not been served."

No trial date was nearing and a mere three months had passed from the day the Board filed a case until voluntary dismissal. Thus, the delay was insufficient to establish waiver or even prejudice.

Basically, the Court said that "not much had happened in the case before the Board dismissed it and sought arbitration."

Significantly, the expense that BOSC and Hayes expended were "primarily self-induced. Had they done nothing, the Board would have had to eventually decide whether to serve process and kick off the litigation or risk dismissal for failure to prosecute.

The Court made clear that it was not finding fault with the Board for BOSC and Hayes' decision to move forward despite having not been served.

Quite simply, the Court of Appeals rejected this effort to deny the FINRA arbitration and found that the same FINRA rules would apply without any negative impact upon the parties. It also concluded that the Board was "not improperly manipulating the judicial process."

The Court affirmed the judgment of the district court and concluded that the Board did not waive its right to demand arbitration and the court properly entered judgment in the Board's favor on the counterclaim to compel arbitration.

Working backwards in the decision, the Court of Appeals found that

> The *Peterson* factors analyze a party's conduct - that is, that party's external actions showing that it waived its right to demand arbitration even if it did not subjectively intend to do so. Whether it was in the form of discovery or a summary trial, the questions BOSC and Hayes wanted to ask would not change the *Peterson* analysis. We need not delve into whether a summary trial may be available to

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## The Long Reach Of The Fighting Irish (*Cont'd from pg. 1)*

and that the arbitrator emphasized the finality of his award stating that "[l]iability was decided via the 81-page Award . . . . the binding Decision . . . cannot be changed."

Interestingly, the Court said that the "disagreement came only after Notre Dame went to court seeking security for anticipated damages."

The Court of Appeals ruled that the district court was correct and that federal jurisdiction was properly exercised in confirming the award as written.

ZVI also raised a question that it could not be subjected to arbitration because ZVI individually never agreed to arbitrate as a party to the arbitration clause. The Court said that the evidence "adds up convincingly to defeat the claim."

The Court ruled that ZVI executed the agreement, fully participated in the arbitration, agreed on the selection of the arbitrator, and never raised any prior objections. In sum, the Court concluded that:

> ZVI's actions confirm what the language of the P&S Agreement provides in so many words, that ZVI along with the other signatories and the arbitrator understood that it was a party whose obligations were subject to the arbitration. ZVI's conduct thus provides the conclusive premise for applying the rule that a party who does "not deserve [an] issue" or contest the arbitrator's authority to decide it, but rather submits the issue to arbitration, "cannot complain that the arbitrator[] reached it." See JCI Commc'ns, Inc. v. Int'l Bhd. Of Elec. Workers, 324 F.3d 42, 49 (1st Cir. 2003).

The Court rejected the balance of ZVI's claims including that the agreement had only applied to the buyer and seller and it was not a direct party. The Court of Appeals stated that the English court, in reviewing an action filed by ZVI in the Technology and Construction Court, rejected its claims and did not attempt to parse the relationship of the terms of the two agreements on the jurisdictional question. Instead, it relied on ZVI's "active and unconditional participation in the arbitration."

The English court concluded that ZVI impliedly agreed to the arbitral jurisdiction and was stopped from claiming otherwise.

In sum, the Court of Appeals stated that "where a party submits an issue to arbitration, it 'cannot complain that the arbitrator[] reached it.'"

**PRACTICE TIP:** Arbitration awards can, of course, be reviewed under certain circumstances under the New York Convention in U.S. courts. The Notre Dame decision illustrates that premise as well as efforts to escape from the arbitration clause.

## Seventh Circuit Imposes Sanctions On Lawyer Who Does Not Follow Arbitration Clause (*Cont'd from pg. 2)*

> arbitration was doomed. But if we had any doubts about the district court's imposition of sanctions, the remainder of Rine's conduct in the litigation would resolve them. Section 1927 permits sanctions against a lawyer who "so multiplies the proceedings in any case unreasonably and vexatiously" that the lawyer should be responsible for the excess costs, expenses, and attorney's fees borne by the other side. 28 U.S.C. §1927.

The Court of Appeals summarized that this was "a simple commercial dispute between Hunt and Moore, but one would never know that from reading Rine's complaint. She blew it up beyond all rational proportion."

Her RICO and antitrust claims were "beyond the pale."

Similarly, her claims of Sherman antitrust violation were frivolous. Coming back to the central theme that the arbitration agreement was relatively straightforward and called for the application of Nebraska law, the Court said "[s]o Rine was off to a bad start, even before she filed the motion that prompted the district court's sanctions: her complaint was a disaster, and her efforts to avoid arbitration were meritless." Emphasis added.

The Court of Appeals noted that Rine's theory "missed the forest for the trees" and that the imposition of sanctions was not inappropriate because the district court found her approach "so objectively unreasonable."

Even in reviewing the sanction, attorney Rine argued that it was too high; offered no support for that position "other than a convoluted argument…."

The Court also noted that it was "unfathomable why she would invent an algorithm" instead of simply relying upon the information provided.

**PRACTICE TIP:** Some arbitration agreements are vague, imprecise, and susceptible of challenge. However, where the provision is agreed to by the parties, in writing, and states the applicable law and that disputes will be submitted to "final and binding arbitration before any arbitrator mutually agreed upon by both parties," it is unlikely that a challenge will be upheld. Similarly, sometimes an attorney needs to know when to quit. Otherwise, as the Court of Appeals upheld in Hunt v. Moore, sanctions may be imposed.

# ANOTHER ATTEMPT TO UTILIZE U.S. COURTS ON A FOREIGN DISPUTE

In Getma International v. Republic of Guinea, Getma International, a French company, attempted to raise issues it had with the award of an arbitral tribunal in Guinea in the United States. The district court held that Getma failed to satisfy the stringent standard needed for jurisdiction and the Court of Appeals agreed.

The case involved two foreign entities with no connection to the United States:

> After Guinea terminated a concession agreement between the two parties, an arbitral tribunal issued a €39 million award plus interest in favor of Getma. Guinea appealed the award to the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa (CCJA), a court of supranational jurisdiction for Western and Central African States. The CCJA set aside Getma's award. Getma nonetheless seeks to enforce the annulled award in the United States.

The U.S. Court noted that intervention in "this quintessentially foreign dispute" would require a finding that the award of the CCJA was "repugnant" to the fundamental notions of morality and justice in the United States.

The case was mired in African politics and other things.

In 2008, Guinea sought bids to expand and operate a port in Conakry, the country's capital. Getma submitted the winning bid and entered into a 25 year concession agreement. However, in December 2010, Guinea elected a new president who terminated the agreement. Getma, in protest, demanded a termination fee. Once the dispute arose the parties were required to settle the matter through arbitration subject to the arbitration rules of the CCJA. The parties selected a tribunal of three arbitrators, all of whom were based in France. The CCJA fixed the arbitrators' fees at approximately €61,000. Interestingly, after 14 months of arbitration, the arbitrators requested to increase their fee to €450,000 which was denied by written order. The arbitrators threatened to withhold their award unless their fee was increased.

The arbitrators issued a decision in favor of Getma for €39 million plus interest. Although the award contained no mention of arbitral fees, Getma paid the arbitrators €225,000. The arbitrators later filed suit in the Paris Court of Appeals to collect the remaining €225,000. That court ordered Getma to pay the balance on a theory of joint and several liability.

Guinea filed an annulment petition with the CCJA asking the court to set aside the arbitral award. The CCJA annulled the award and concluded that the arbitrators had breached their duty, ignoring mandatory governing fees and that the total arbitration may be reopened.

In a feint, Getma pursued relief in the United States, seeking enforcement of its now annulled award under the Federal Arbitration Act, and the provisions implementing those awards under the New York Convention. Under the New York Convention, "a district court may refuse to enforce a foreign award if 'a competent authority' has set it aside under the law of the country in which the award was made." The district court refused to enforce the annulled award on that ground.

Getma appealed the district court decision.

The Court of Appeals found an initial dispute over the applicable standard of review since Getma argued that the matter should be renewed de novo and Guinea contended it should only be a review for abuse of discretion. The D.C. Court of Appeals had not previously opined on this issue.

The anecdotal arguments by themselves are quite interesting.

Getma claimed that a Guinean judge on the 12-member panel tainted the annulment decision because after Guinea prevailed the Minister of Justice

> boasted in a televised interview that the Guinean judge, Fode Kante, had alerted Guinea to the "flaws" in its case. J.A. 1638. Before the district court, however, the Minister filed a declaration recanting his interview statement, characterizing it as baseless self-promotion. The district court credited the declaration, largely because the Minister's interview statement made no sense chronologically: Judge Kante was appointed two months *after* Guinea's last submission in the annulment proceeding, so he could have done nothing to shape Guinea's presentation. Nor could he have tipped the outcome against Getma, as the full 12-member court issued a unanimous decision. *Getma Int'l*, 191 F.Supp.3d at 54. Getma points to no evidence corroborating the Minister's initial interview statement and thus gives us no reason to disturb the district court's credibility finding.

They also argued that the attempt to escape from the fee provision was abhorrent. The Court rejected that argument and said that even against the parties' wishes regarding arbitral fees, such a notion "does not violate the United States's most basic norms of morality and justice."

Lastly, Getma used a cumulative error argument. The Court of Appeals rejected all of those claims, particularly since the CCJA had made clear that increased fees would be unacceptable. The Court of Appeals refused to enforce the annulled award, finding that Getma's claims did not constitute a violation of public policy under the New York Convention.

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## In Cases Of Security Matters, FINRA Usually Prevails (*Cont'd from pg. 3)*

> demonstrate that a party intentionally waived its right to arbitrate, because BOSC and Hayes have not asked us for that relief. [fn5 For a district court to grant a summary trial, the party opposing arbitration must show that a material factual dispute exists. We are not saying one way or the other, whether BOSC and Hayes met that threshold showing here as to whether the Board intentionally waived its right to arbitrate. We likewise do not comment on what questions regarding motivation a party opposing arbitration may ask at a summary trial to determine whether the opposing party has intentionally waived its right to demand arbitration.]

The Court also noted the proper procedure under the FAA. The Board filed a counterclaim for judgment compelling FINRA arbitration under 9 U.S.C. §4. BOSC and Hayes treated this counterclaim as a motion for summary judgment but they "misunderstood the correct procedure." The Court opined that while certain procedures under §4 can look like a summary judgment, the motion to compel arbitration sets in motion a summary trial procedure rather than the usual discovery procedures.

**PRACTICE TIP AND ANALYSIS:** BOSC, Inc., et al. v. Bernalillo County Board is quite interesting since no real movement in the litigation ensued after the case was filed. While diligent defense is always a good tactic, perhaps some measure of restraint would have prevented a case being brought in the federal courts at all. Waiver of arbitration is complex and securities matters usually belong at FINRA.

## Another Attempt To Utilize U.S. Courts On A Foreign Dispute (*Cont'd from pg. 5)*

**PRACTICE NOTE:** Even far reaching claims from Africa, with no connection whatsoever to the United States, can find their way into U.S. courts under the Convention. In Getma, we saw a very inventive approach to arbitration fees seeking an eightfold increase and then attempting to enforce that increase in France even though the arbitration was convened in the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business law in Africa, a supranational jurisdiction for Western and Central African States.


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## EIGHTH CIRCUIT UPHOLDS APPLICATION OF ARBITRATION AGREEMENT FOR STADIUM VOLUNTEER - GET YOUR HOT DOGS HERE!

In Matthew Leonard v. Delaware North Companies Sport Service, Inc., the Court of Appeals upheld the arbitration provision in the one-page Volunteer Release, Waiver and Indemnification Agreement signed by Matthew Leonard. He had worked at Busch Stadium in St. Louis as a volunteer concession worker to raise funds for Washington University. He was not paid but DNCS made a contribution of $1,096.57 to the University. He had signed a volunteer release form which included the language stating that the participant agrees "to submit any dispute arising from the Activity to binding arbitration."

Leonard sued in state court claiming violations of minimum wage laws; fraud; that the agreement was unconscionable; and, in part, due to the fact that it was on a pre-printed form. The Court noted that even so Leonard ignored the fact that after signing it he had three weeks to withdraw. He also argued a lack of consideration. The Court found that he gave up his right to sue in return for his opportunity to volunteer and have a contribution made to Washington University.

The Court simply affirmed that even though he was not paid he had signed an agreement for arbitration and the "underlying factual allegations touch matters covered by the arbitration provision."

**PRACTICE COMMENT:** Do we know if Mr. Leonard even got a free hot dog or beer at Busch Stadium?