Neutral Notes

The Jacobs Center for Justice and Alternative Dispute Resolution™

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NOT EVERY CLAIM FOR ARBITRATION HAS A SIMPLE ENDING

The Fifth Circuit Court of Appeals, in Rasheed Al Rushaid, et al. v. National Oilwell Varco, et al., held that various claims to consolidate and/or compel arbitration would not be granted. The Court noted it was being asked for a second time to reverse an order denying a motion to compel arbitration. The Court previously found that National Oilwell Varco had a contractual right to arbitration before the International Chamber of Commerce (ICC). The remaining defendants were nonsignatories to that agreement although they now argued that they were also entitled to arbitration.

In reciting some of the history, the Court noted that despite the arbitration clause the defendants did not seek to compel arbitration. Instead, they proceeded to discovery and set a trial date in federal court. National Oilwell Varco (NOV) Norway, however, promptly sought to compel arbitration when it was served based upon a price quotation issued by NOV Norway to Al Rushaid Parker Drilling (ARPD).

The District Court denied the motion, ruling that the NOV Norway arbitration clause was not a part of the parties' agreement and that, in any event, NOV Norway waived its right to arbitrate. One of the arguments that the Court considered was that consolidation to a single location might simplify and improve the process. The Court said "[t]o sum up, if left undisturbed, the proceedings have fragmented. Claims against NOV Norway will be arbitrated before the ICC. Claims against NOV LP will be arbitrated within the Southern District of Texas. And claims against the Nonsignatory Defendants will be litigated in Texas state court." The Court of Appeals noted the potential attraction

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ARBITRATION OF NURSING HOME DISPUTES

In an interesting and split decision in the Arkansas Supreme Court, Courtyard Gardens Health and Rehabilitation, LLC, et al. v. Malinda Arnold, a majority of the Court ruled that despite the provision in the arbitration agreement that the National Arbitration Forum (NAF) be utilized to arbitrate the claims, and the impossibility to do so because NAF had settled with the Attorney General of Minnesota and agreed to no longer conduct any arbitration pursuant to pre-dispute consumer agreements, the Court found that language sufficiently flexible to permit a different result.

The arbitration agreement provided as follows:

It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, ("NAF") which is hereby incorporated into this Agreement, and not by a lawsuit or resort to court process. This agreement shall be governed by and interpreted under the Federal Arbitra-

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The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

ARBITRATION AWARDS HARD TO OVERTURN

In a primer on review of arbitration awards, Judge Kearney, in Nowak v. Pennsylvania Professional Soccer, LLC, et al., in Philadelphia, reviewed the award of Arbitrator Margaret Brogan upholding the discharge of Piotr Nowak, formerly coach of the Philadelphia Union professional soccer team. The arbitrator held five days of hearings and issued an award finding Nowak's termination justified under the terms of the parties' agreement. She issued an interim award on April 21, 2015, in favor of Philadelphia Union and a final award on November 5, 2015 further directing Nowak to pay fees and costs.

Nowak sought to vacate the arbitrator's awards. The court went through the calculus to set aside an arbitrator's award. Interestingly, at the end, however, the court noted that perhaps parties of unequal bargaining power would do better not to agree to mandatory arbitration and to proceed in federal district court - where it is more efficient and more economical.

Nowak functioned under an employment agreement which provided for mandatory arbitration. The Philadelphia Union terminated Nowak based upon behavior allegedly in violation of the agreement and notified him on June 13, 2012. He initially filed an action in federal court in 2012 but the court ordered the parties to arbitrate their dispute in accordance with the agreement.

Judge Kearney stated that review would be "extremely deferential" and that mere disagreement with the arbitrator's decision or belief the arbitrator committed error is insufficient to vacate or modify the award. The court recited the four classic grounds to set aside an award under the Federal Arbitration Act as follows:

> Awards may be vacated where:
> (1) procured by corruption, fraud, or undue means;
> (2) the arbitrator demonstrated evident partiality or corruption;
> (3) the arbitrator was guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, in refusing to hear evidence pertinent and material to the controversy, or any other misbehavior by which the rights of any party have been prejudiced; or
> (4) the arbitrator exceeded her powers or so imperfectly executed then that a final and definite award upon the subject matter submitted was not made.

Nowak sought to vacate the arbitration awards claiming there were unjustified applications of law; the arbitrator relied upon unauthenticated hearsay statements; the arbitrator exceeded her powers; and she exhibited bias in favor of Philadelphia Union.

The federal court ruling noted that it cannot set aside an award merely because it disagreed with the arbitrator's findings or because the arbitrator made a factual or legal error.

Judge Kearney rejected the assertion of reliance upon unauthenticated hearsay statements and, instead, found that the arbitrator referenced independent testimony from players, Nowak himself, and the team's trainer. Based upon that evidence, the arbitrator concluded that Nowak exercised bad judgment "ignoring the advice of certified trainers."

The arbitrator found Philadelphia Union complied with its terms under the agreement and it was supported by record evidence. The arbitrator stated that it "would have been better if Philadelphia Union had allowed Nowak the opportunity to review the report [regarding termination] when he was terminated" but she ultimately found that he was provided a "fair opportunity to respond to" deficiencies and cross-examine his accusers.

Nowak further attempted to set aside the award as not justified by the facts and record. The court, however, found that the arbitrator had made careful reference to the facts including Nowak's disparaging comments about the Philadelphia Union and its management to a local sports broadcaster in 2012. The court also discussed Nowak's general assertion that the arbitrator was biased due to his position regarding health and safety of players. The arbitrator observed that "Nowak admitted he denied players access to water during a training run" and made disparaging remarks to the players. Nowak urged that the arbitrator was biased because she had a "distaste" for his hard-nosed approach to coaching. The court rejected this argument saying that evident impartiality would require him to show that "a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration." Rather, it found that "Nowak does not identify particular evidence showing Arbitrator Brogan's bias or partiality, but instead points to language in the arbitration criticizing Nowak's concussion policies as 'simply unacceptable….'"

The U.S. District Court upheld the arbitrator's award and did not set it aside. Perhaps of even more interest are the several pages in the conclusion of the Opinion criticizing the parties' utilization of arbitration. At the outset the Court declared:

> To our continuing surprise, intelligent and worldly parties often sign agreements to arbitrate future disputes and limit their fulsome due process citizen rights to a federal court and jury believing they will obtain a quicker answer with less costs. Like the estimable District Judge William G. Young, we find privately arbitrating issues between parties of disparate bargaining power particularly in the employment area "bestrides the legal landscape like a colossus" with the only possible remaining perceived benefit obtained in the secrecy of private arbitration without the benefit of the community's input on the development of the Law.

Judge Kearney basically suggested that federal courts handle these matters "more expeditiously than in many private arbitrations." He also noted that the fees and costs in private arbitration are often equal or exceed court costs. Despite the fact that arbitration proceedings

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Not Every Claim For Arbitration Has A Simple Ending (*Cont'd from pg. 1)*

of such an argument but ultimately rejected. Rather, the Court held that it had no jurisdiction to review interlocutory orders compelling arbitration. It also found it lacked jurisdiction under the "collateral order doctrine." The Court said that the collateral order doctrine is a narrow exception to section 16 of the Federal Arbitration Act and that "should stay that way and never be allowed to swallow the general rule."

The Court declared:

> Appellants warn that permitting the district court's decision to stand means plaintiffs' claims will "be split into three proceedings – two arbitrations and one state court proceeding, an outcome the NOV Parties have tried to avoid since the outset of the case." This is an inevitable and permissible consequence where one of the multiple defendants asserts a right to arbitrate. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 213, 220-21, 105 S.Ct. 1238, 1242-43 (1985) (noting that private arbitration agreements must be enforced even if the result is piecemeal or bifurcated litigation). If Appellants had truly prioritized their desire to try the case efficiently, they could have foregone arbitration.

PRACTICE TIP: Arbitration clauses and provisions may be strictly enforced. In addition, the absence of arbitration provisions does not necessarily impute to courts the right or inclination to compel non-parties to arbitrate. Precision in drafting is always critical. As the Court stated in Rasheed Al Rushaid, if the parties really wanted to try the case efficiently, they could have simply foregone arbitration in the first place.

Arbitration Awards Hard To Overturn (*Cont'd from pg. 2)*

are usually secret, once the parties seek judicial scrutiny or confirmation they may lose secrecy.

Judge Kearney presented his own thoughts regarding ADR as follows: "We favor alternative dispute resolution especially between parties of equal bargaining power motivated to finally resolve their dispute in private and with no appeal right." The court later said that "[w]hile we encourage private settlements, this case, and many like it, should remind parties and counsel of the risks in cavalierly agreeing to mandatory arbitration when they should know, from experience, of a need to often ask a judicial officer to vacate findings from a private forum and the judge's deference to the private forum."

PRACTICE COMMENT: Setting aside an arbitration award continues to be difficult and rarely occurs.

Most interesting about the Nowak opinion is the court's cautionary comments regarding the "value" of arbitration particularly where parties have unequal bargaining power. Let's consider those comments as food for thought when parties draft private arbitration agreements.

DOUBLE "JOINTED" IN COLORADO

The new Cannabis Dispute Resolution Institute (CDRI), in Denver, Colorado, provides a potential framework for resolution of claims regarding the cannabis industry in Colorado. Previously, many courts had refused to enforce cannabis-related agreements including partnerships, loans, and other contracts. The CDRI will provide a mechanism for the cannabis industry in Colorado to enforce rights with specific arbitration agreements and choice of law provisions. These provisions generally provide that Colorado law shall apply and secure the parties' agreement to waive defenses involving violation of federal law.

The CDRI also provides that arbitrators exceed their powers if they void or refuse to enforce any contracts or agreements that are cannabis-related. By utilizing the CDRI parties can try to ameliorate concerns regarding the illegality of the industry under federal law.

Additional concerns, however, have to do with the enforceability or ability to confirm an award in state court since it may be against federal law or public policy.

PRACTICE NOTE: I will be available to join the CDRI and perhaps mediate some of these disputes. I expect to be in Colorado in July!

Arbitration Of Nursing Home Disputes (*Cont'd from pg. 1)*

tion Act, 9 U.S.C. Sections 1-16. The Agreement specifically stated that arbitration will be in accordance with the NAF Code of Procedure.

Lawsuits were filed in state court alleging negligence, malpractice, statutory violations, and other claims against Courtyard Gardens and its administrator. Eventually, a motion to compel arbitration occurred and the dispute reached the Supreme Court of Arizona.

Malinda Arnold argued that the arbitration agreement was impossible to perform because the agreement selected the NAF to serve as arbitrator and NAF could no longer do so. The circuit court agreed with her position and found the arbitration agreement impossible to perform because it incorporated the NAF Code of Procedure. Under the Code of Procedure, the NAF was required to serve as arbitrator of any disputes between the parties.

The Arkansas Supreme Court stated simply that the "crux of the disagreement here is the unavailability of the NAF." Rather than end at that point, the majority went through a lengthy analysis to essentially say that the NAF's Code of Procedure remains available "even when the NAF is not serving as the arbitrator." Basically, the Court ruled that Arnold "failed to demonstrate that the agreement to arbitrate 'cannot be effected by any means.'" In other words, the Court held that even though the NAF was not able to arbitrate the dispute as the lower court had opined based upon the agreement to arbitrate, simply utilizing the Code of Procedure would be adequate. Thus, the majority held that the "NAF term [regarding arbitration at NAF] was merely an ancillary logistical concern and that section 5 of the FAA applies and provides a procedure for the appointment of a substitute arbitrator."

The Court found that the integral term of the agreement was arbitration and not the NAF itself as the arbitrator. In addition, since the arbitration agreement contained a severability clause, the Court was satisfied that arbitration could occur in accordance with the agreement and not at the NAF.

A strong dissent by Justice Paul E. Danielson, on behalf of himself and two colleagues, rejected this approach. He said that it is axiomatic that "arbitration agreements must be enforced according to their terms." He declared that the NAF Code, which was part of the arbitration agreement by virtue of incorporation, "clearly states that it shall be administered only by the NAF." His analysis went on at length but really started and ended at that point. Since the NAF Code of Procedure stated that it shall be administered only by the NAF or any entity or individual providing administrative services by agreement with the NAF, the arbitration agreement "effectively selects the NAF as arbitrator." The Court opinion in this case was thirty-two pages and the dissent took the bulk of it.

The dissent acknowledged the "liberal" policy favoring arbitration. However, it stated that that policy did not allow the Court to rewrite the agreement. Instead, it declared that "the law obligates us to enforce the plain terms of the contract into which the parties entered."

Justice Danielson also strongly dissented in Lamb v. GGNSC Holdings regarding public policy and unconscionability. Some of these comments follow:

> First, for the same reasons stated in my dissent in *Courtyard Gardens Health & Rehabilitation, LLC v. Arnold*, 2016 Ark. 62, I disagree with the majority's conclusion that the arbitration agreements at issue here were not impossible to perform. As I opined in that case, the designation of the National Arbitration Forum ("NAF") was an integral term of the parties' agreement; therefore, the unavailability of the NAF rendered the agreements impossible to perform and, consequently, unenforceable.
>
> Second, I cannot agree with the majority's conclusion on the issue of unconscionability, as its analysis is flawed. A careful reading of the majority opinion reveals only one basis for its holding that the circuit court erred in finding the arbitration agreements unconscionable, and that is our public policy favoring arbitration. This truncated analysis violates our mandate to treat arbitration agreements the same as any other contract.
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> . . .
>
> The majority's opinion today utterly fails to do that; instead, it relies solely on our public policy favoring arbitration. We have historically cited that policy as part of our analysis, but it has not been - and should not be - the extent of our analysis.
>
> . . .
>
> The majority's opinion in this case goes far beyond resolving any doubts in favor of arbitration. It rubber-stamps the arbitration agreements before it based simply on our policy favoring arbitration. This begs the question: Going forward, could there ever be an arbitration agreement the majority determines to be invalid or unenforceable? If today's decision is any indication, the answer to that question is no.

It is interesting that the agreement was obviously one-sided and drafted by the nursing home. Thus, in such a case rather than find against the drafter, the majority ruled that there was some flexibility in the meaning of the arbitration agreement even though it had been drafted on behalf of the nursing home and granted the motion to compel arbitration.

New York Court Of Appeals— Arbitration Update (*Cont'd from pg. 6)*

> should be determined by the arbitrators pursuant to the FAA and the parties' agreements to arbitrate arbitrability (see AT&T Technologies, Inc., 475 U.S. at 649).

The Court ruled that the question of arbitrability was one for the arbitrators and that there was no reverse preemption. Significantly, the Court did not express a view on whether National Union's failure to file the payment agreements rendered the arbitration clauses unenforceable. That question, it ruled, should be determined by arbitrators pursuant to the FAA.

A EUROPEAN FLAVOR TO CLAUSE DRAFTING

In the 2010 decision in Chalbury McCouat International Limited and PG Foils Limited (High Court of Justice, Queen's Bench Division, Technology and Construction Court) EWHC 2050, Justice Ramsey discussed an arbitration provision which was ambiguous with regard to location of the arbitration. The dispute arose in a contract interpretation between an English company, the claimant, which had its principal place of business in England, and the defendant, an Indian company operating in the province of Rajustan. The dispute arose over the manufacturing plant in the Netherlands and payment terms under the contract. When the matter could not be resolved Claimant invoked the arbitration clause and sought consent to the appointment of the arbitration tribunal. Instead, defendant did not give consent but referred the dispute to the arbitral tribunal in India.

Defendant stated that it will be applying for the appointment of an arbitrator under the provisions of the Indian Arbitration and Conciliation Act.

The arbitration clause provided as follows:

> In case if there is any dispute between the parties of this contract the same will be sorted out by mutual discussion, But in case if the issue is not resolved even after discussions the same will be referred to arbitration as per prevailing laws of European Union in the Europe. The decision of the Arbitrator is final and binding on both parties.

It should be noted that in the arbitration clause there is no precise venue. It simply says disputes will be referred to arbitration "as per prevailing laws of European Union in the Europe."

The Court needed to do much statutory interpretation and construction regarding a site for the arbitration since the arbitration clause was silent regarding the seat of the arbitration as well.

The Court stated that under § 2(1) of the 1996 Act it is stated that the provisions of part one of that Act "apply where the seat of the arbitration is in England and Wales." Much of the difficulty in this case is that the arbitration clause was silent as to the seat of the arbitration.

Under § 2(4), it provided that the Court may exercise power conferred if there is a connection with England and Wales, among other things.

The Court stated that "the wording of the arbitration clause leaves much to be desired and evidently did not have the benefit of proper legal advice." The Court, however, was able to opine that the parties desired arbitration. Since no seat of arbitration was designated, the Court went through a detailed analysis attempting to discern the location and justification for that determination.

The Court said there also was no expressed choice of law. The only indication regarding choice of law was a reference to arbitration as the prevailing law of European Union in the Europe.

To make sense of that reference, the Court looked to the rules of the European Union set out in the Rome convention. Under the Rome convention, the Court said that Article Four provided that the contract "shall be governed by the laws of the country with which it is most closely connected." The Court concluded that it involved an English company to perform the work of dismantling a plant in the Netherlands. "On this basis," the Court ruled the proper tribunal "is English."

The Court further noted that the arbitral tribunal should be in Europe possibly England "unlikely to be in India." The only connection with India was the fact that the defendant was an Indian company operating in India. The Court then concluded that there was a sufficient connection with England for the court to act under the 1996 Act in the United Kingdom.

The Court noted that the defendant may, "as its lawyer has stated, apply to the Indian courts for some relief which may include the appointment of an arbitrator." However, the English court concluded that English law would be likely to apply and that an English seat of arbitration was possible but an Indian seat was "unlikely."

PANEL APPOINTMENT

The Court said "[w]hat is apparent is that there is no difference between the parties as to the fact that there should be sole arbitrator and, in the absence of any agreement that there is to be a tribunal of two or more arbitrators the default mechanism for arbitration must be a sole arbitrator" citing the 1996 Act.

Justice Ramsey opined there were a number of institutions that could provide the arbitration panel but under the circumstances concluded that the London Court of International Arbitration (LCIA) should make the appointment and the tribunal should be constituted by that appointment.

PRACTICE TIP: This case involved very poorly drafted arbitration clauses with a failure to specify the location of the arbitration or how the panel should be constituted. Essentially, it was a dispute between application of English and Indian law and where the arbitration should be held. Obviously, the answer is to draft arbitration clauses carefully and precisely perhaps using the draft clause provisions provided by CPR or AAA, for example. See adr.org/aaa/ShowPDF?doc=ADRSTG_003898 and adr.org/aaa/ShowPDF?doc=ADRSTG_002540

NEW YORK COURT OF APPEALS—ARBITRATION UPDATE

In Monarch Consulting, Inc. v. National Union Fire Ins. Co. of Pittsburgh, New York's highest court opined whether certain workers' compensation insurance payment agreements – in California – should be submitted to arbitration.

The case focused on whether the McCarran-Ferguson Act precluded application of the Federal Arbitration Act (FAA) in relation to the California Insurance Code. The Court concluded that because application of the FAA did not invalidate, impair, or supersede the specific provision in question, the McCarran-Ferguson Act was not implicated and the FAA applied to the parties' payment agreements. In addition, the Court ruled that the arbitration clauses in the payment agreements should be submitted to arbitration themselves.

The Court went through a detailed discussion and analysis of each of the statutes. Significantly, it noted that in certain circumstances the McCarran-Ferguson Act exempts state laws from FAA preemption.

The California Insurance Code required most employers to maintain workers' compensation insurance. These policies had to be filed with the state. Many of the policy agreements contained arbitration clauses. The Court noted that "[t]he Department also expressed its view that arbitration provisions contained in unfiled agreements may be considered unenforceable absent proof that the insured expressly agreed to arbitration when it initially entered into the policy agreement."

It was conceded in the instant dispute that the policies were not filed.

National Union, an insurance company licensed in Pennsylvania, had its principal place of business in New York. It also issued workers' compensation policies to three different California-based employers, including Monarch Consulting, Priority Business Services, and Source One Staffing from 2003 to 2010. National Union conceded that payment agreements were never filed with the State of California but the parties operated under these agreements for several years.

The payment agreement arbitration clauses required that disputes arising out of the agreement be submitted to arbitration before a panel of three arbitrators and that the arbitrators would have "exclusive jurisdiction over the entire matter in dispute, including any question as to arbitrability."

By early 2011 disputes arose between National Union and each of the insureds under the payment agreements. Ultimately, three separate proceedings were initiated in New York Supreme Court involving a petition or cross petition by National Union to compel arbitration in each case, and a petition by Monarch Consulting to stay arbitration. The N.Y. Supreme Court granted National Union's petition to compel but denied Monarch's petition to stay. In the Source One matter, the Supreme Court denied National Union's petition to compel and held the payment agreements were unenforceable.

Wisely, the Appellate Division consolidated the appeals.

New York's high court concluded that the McCarran-Ferguson Act did not reverse preempt the FAA with respect to California insurance Code § 11658. The Court stated that the California law did not "and still does not" prohibit arbitration in the insurance context. The Court acknowledged that the California Insurance Code "may have required the filing of the Payment Agreements" but stated that the "purpose of the filing rule is to ensure that the insurance documents comply with the Insurance Code and accompanying regulations – none of which pertain to the use or form of arbitration provisions." Based upon that analysis, the Court found that "neither the goal of the statute nor its administrative scheme is undermined by applying the FAA." The Court also disagreed with the insured's assertion that application of the FAA would undermine the Department's authority to review insurance agreements and incentivize violations of the filing requirement.

Since the N.Y. Court of Appeals concluded that the McCarran-Ferguson Act does not reverse preempt the FAA to the payment agreements at issue, it addressed the question of whether, under the FAA, the enforceability of the payment agreements and their arbitration clauses was a question to be resolved by the arbitrators or by the Court. Relying upon Rent-A-Center (U.S.S.C.), the New York high court found that the arbitration agreements vested decision making to the arbitrators because of the severability of the delegation provisions.

The Court stated that "[t]his rule of severability extends to delegation clauses, which are severable from larger arbitration provisions," citing the Supreme Court in Rent-A-Center as well as other precedent. Thus, the Court stated that "where a contract contains a valid delegation to the arbitrator of the power to determine arbitrability, such a clause will be enforced absent a specific challenge to the delegation clause by the party resisting arbitration."

The main challenge by National Union, the Court noted, was failure to file the payment agreements in accordance with California Insurance Code. Since the Court of Appeals already found such a failing to not be dispositive, it rejected that argument.

The Court stated that:

> In sum, we hold the FAA applies to the Payment Agreements because it does not "invalidate, impair, or supersede" the California Insurance Code or any insurance regulations and, consequently, the McCarran-Ferguson Act is not triggered (15 U.S.C. § 1012[b]). Further, because the parties clearly and unmistakably delegated the question of arbitrability and enforceability of the arbitration clauses to the arbitrators – in provisions that were not specifically challenged by the insureds – the FAA mandates that the arbitration provisions be enforced as written. We, therefore, express no view on whether National Union's failure to file the Payment Agreements rendered the arbitration clauses unenforceable, because that question

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ARBITRATION WITH A SONG

The Third Circuit Court of Appeals dealt with an interesting arbitration question in Whitehead v. The Pullman Group. This dispute had to do with John Whitehead and Gene McFadden, who were part of the Philadelphia music scene in the 1970's. In 2002, David Pullman approached Whitehead and McFadden about purchasing their song catalog. The parties signed a contract but never finalized the sale. Both Whitehead and McFadden had passed away by 2006. Pullman then became embroiled in a series of disputes with their estates over ownership of the song catalog. The parties eventually agreed to arbitration. However, Pullman was unhappy with the arbitral panel's ruling and moved to vacate the arbitration award on the ground that the panel had committed legal errors that made it impossible for him to present a winning case.

The Third Circuit rejected all of his claims.

The agreement gave Pullman the exclusive option to purchase the song catalog following a 180 day period in which Pullman was to conduct due diligence. Once Pullman completed his investigation he had the right to terminate after giving written notice. In the event a dispute arose, it was to be arbitrated in New York City under the Rules of the American Arbitration Association. There was a dispute over what was uncovered, when it was disclosed, and what was disclosed, if anything. As a result of the dispute, the sale of the song catalog to Warner Chappell Music for $4.4 million was also undermined.

The case was heard by a panel of three distinguished arbitrators in 2014. The panel dismissed the breach of contract and tort claims and dismissed the estate's request for a declaratory judgment as moot. It also concluded that Pullman had failed to introduce evidence sufficient to prove he ever notified Whitehead and McFadden that he had completed his due diligence. As a result, the panel ruled that Pullman's option to purchase had lapsed and the agreement was no longer enforceable. Pullman's primary argument to overturn the panel was that it erred in the application of the Dead Man's Statute, N.Y. C.P.L.R 4519, which states:

> Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person . . . except where the executor, administrator, survivor . . . or person so deriving title or interest is examined in his own behalf . . . concerning the same transaction or communication.

The Court opined that the way this matter was handled by the arbitral panel was skillful and permitted all evidence and testimony to come in but, as a protection, the arbitrators agreed to discount any testimony about oral communications between Pullman and his contractual counterparties. The Court agreed with the district court that even if the arbitral panel erred in application of the Dead Man's Statute, that error was not sufficient to overturn the agreement. The Court noted the four exceptions in the FAA to vacate an arbitral award. This Court stated that the error must not simply be an error of law but one which so effects the rights of a party that it may be said he was deprived of a fair hearing. The Court held that it did not discern "unfairness at all." Instead, it commented favorably that the arbitral panel "reasonably chose not to consider potentially self-serving testimony about communications with persons who are no longer able to present their side of the story."

Pullman also argued that the arbitrators' actions amounted to "manifest disregard of the law." The Court of Appeals acknowledged that this standard is not yet settled as a ground to vacate an arbitral award. It acknowledged a split among the circuits and said that the Third Circuit had not yet weighed in but this panel on this case did not intend to do so. In sum, the Third Circuit ruled that Pullman twice agreed to settle disputes arising under the 2002 agreement through arbitration – "[h]aving made that commitment he is now bound by the terms of his bargain."

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