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ARBITRATION

BY SAMUEL ESTREICHER AND STEVEN C. BENNETT

Untimely Arbitration Awards

Arbitration is a "creature of contract." A party cannot be compelled to arbitrate, absent agreement, and parties generally may determine the scope and method for the arbitration proceedings to which they consent.[1]

Thus, if parties were to agree that arbitration will be conducted on an expedited basis, with a decision to be rendered by a date certain, one might expect that failure to deliver an arbitration award within the specified time frame could mean that consent to arbitration has lapsed, and any arbitration award rendered thereafter would be void.

Despite some earlier views,[2] the weight of modern authority is that untimeliness of an award is typically not fatal to enforceability of an award.[3]

As a result, drafters of arbitration agreements, and arbitration practitioners, must take special care in the drafting of the arbitration agreement to ensure that their intent to obtain a timely award is implemented.

Interpreting Organization's Rules

• ***Power of Arbitration Organization to Interpret Its Own Rules.*** The Commercial Arbitration Rules of the American Arbitration Association (AAA) provide one example of provisions regarding the timeliness of arbitration awards. AAA Rule 41 provides: "The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator." Even this relatively straightforward provision leaves open questions regarding what constitutes a timely award. Thus, for example, in *Koch Oil, S.A. v. Transocean Gulf Oil Co.*,[4] the U.S. Court of Appeals for the Second Circuit held that even though an award was received by the parties more than 30 days after the close of hearings, the AAA had the authority to interpret its own rules and could reject a challenge to the timeliness of the award, based on the fact that the award was signed (but not issued) within the 30-day deadline.[5]

Samuel Estreicher *Steven C. Bennett*

Prejudice Showing Required

In the more recent case of *I Appel Corp. v. Katz*,[6] the U.S. District Court for the Southern District of New York ruled that "[a] district court has discretion to enforce a late award if no objection to the delay has been made prior to the rendering of the late award *or* if the losing party fails to demonstrate prejudice or actual harm caused by the delay."[7] To "demonstrate prejudice," moreover, a petitioner must "do more than show it lost the arbitration or otherwise fared poorly under the terms of the late award."[8]

The petitioner in *Appel* attempted to construct a "prejudice" argument from the fact that the arbitrators had apparently adopted (but not issued) an initial (timely) arbitration award and then later modified the decision resulting in an (untimely) award. The District Court flatly rejected this argument. Citing *Koch Oil,* the court explained that the AAA could (interpreting its own rules) properly determine that the initial award was not "final."[9] Further, the court noted, it was "far from clear" what the award would have looked like had it been issued at the earlier date, since the reason that the initial award was not timely issued was because the complaining petitioner's party-appointed arbitrator had not been available to give input.[10]

Failure to Object

The Second Circuit has long disfavored "post-award technical objections by a losing party as a means of avoiding an adverse arbitration decision."[11] In a recent case, the U.S. District Court for Connecticut held that, despite a set of state regulations requiring issuance of arbitration awards on a specific timetable, there was no basis to set aside an arbitration award where "plaintiff has made no showing that it objected to the delay prior to the issuance of the award[.]"[12] Indeed, under some arbitral systems (such as the AAA Commercial Rules), failure to object may constitute a waiver, even if the objection might otherwise be entirely appropriate.[13] Where failure to object is combined with a lack of prejudice (or even a showing that the petitioner contributed to the delay), moreover, the untimeliness complaint is almost certainly doomed to fail.[14]

'Time of the Essence' Requirement

Yet another basis for upholding enforcement of an untimely award appears in the recent decision in *Hasbro, Inc. v. Catalyst USA, Inc.*[15] There, the U.S. Court of Appeals for the Seventh Circuit (applying Wisconsin law), noted that untimely performance of a contractual obligation should not result in the "harsh penalty of forfeiture" unless the parties agree that "time is of the essence."[16] Such a "time of the essence" element must be expressly stated in the arbitration agreement if an award is to be considered unenforceable for delay in rendering an award. Moreover, since neither the arbitration agreement nor the applicable AAA rules contained such a requirement, "the arbitrators did not exceed their authority by issuing an untimely award[.]"[17] The *Hasbro* court suggested, however, that time could be made "of the essence" by "reasonable notice" to the arbitrators, and to all parties, so that all concerned would "know whether there is still time remaining to raise points[.]"[18]

Practical Considerations

Given the variety of ways in which an untimely arbitration award may be upheld, it is not surprising that there is a relative dearth of cases that answer the practical question: what happens if a party can properly present a claim for violation of a mandatory, binding deadline for issuance of an arbitration award? One can imagine a case, for example, where parties have included specific, mandatory language in their arbitration agreement, requiring an award by a date certain, where the time for the award has passed, where at least one party has properly stated an objection, and where some form of prejudice from delay can be shown.[19] What then?

The classic view (perhaps greatly influenced by early historical antipathy to arbitration) is that any such award is a nullity, as it exceeds the power of the arbitrators.[20] But what are the

Samuel Estreicher *is Dwight D. Opperman Professor Law at New York University School of Law and of counsel to Jones Day.* **Steven C. Bennett** *is a partner at Jones Day and teaches commercial arbitration at Brooklyn Law School. The views expressed are solely those of the authors, and should not be attributed to the authors' firm or its clients.*

parties to do at that point? On one view, because the power of the arbitrators has lapsed, the parties are no longer bound to arbitrate, and any stay of conventional litigation must be lifted.[21] On another view, only the authority of the specific arbitration panel has lapsed; thus, upon vacatur of the untimely award, a new proceeding could be commenced, before a new arbitration panel.[22] Both of these solutions, however, embody an inherent flaw, in that they do not prevent delay in resolution of the dispute. Indeed, these purported solutions actually make the delay worse, as (either in court, or before a new arbitration panel) the merits of the dispute would have to be reconsidered.

These approaches also suffer from the defect that they place the initial arbitration panel's legitimacy into question. If, on expiration of the time for rendering of an award, an arbitration panel becomes "functus officio,"[23] then the panel lacks power to take any steps, and the panel (arguably) loses its quasi-judicial arbitral immunity. In a recent (unpublished) state court decision in Connecticut, for example, a losing party in arbitration claimed that an arbitrator lost immunity after the passage of time for rendering an award.[24] Although the award was vacated as untimely, the court held that, because of an exception to the "functus officio" doctrine, immunity nevertheless applied.[25] An earlier case in California, however, held that arbitral immunity might not apply in circumstances where an arbitration tribunal fails to render a timely award.[26]

Ultimate Obligation

The solution to this quandary may lie in earlier intervention by courts, in appropriate circumstances where an arbitration tribunal's failure to render a timely award may result in prejudice. In the context of administrative agencies, courts have determined that they may have jurisdiction, even before an agency renders a decision, to direct the agency to decide the case. The theoretical basis for intervention appears in the ultimate obligation of the courts to review agency decisions, when rendered. Thus, "[b]ecause the statutory obligation of a [court] to review on the merits may be defeated by an agency that fails to resolve disputes, a [court] may resolve claims of unreasonable delay in order to protect its future jurisdiction."[27]

Similarly, a court could conceivably exercise jurisdiction to review the "decision" in a delayed arbitration proceeding, where the "decision" consists of the arbitration tribunal's nondecision. The court might then remand the matter to the arbitration tribunal, for issuance of a "final and definite" award.[28]

An early decision, in *Brandon v. Hines*,[29] illustrates how this system could work. The court there held (in the context of court-approved arbitration):

> [I]f the arbitrators request additional time to render their award, the parties have a good-faith duty to grant a reasonable extension. Each party's consent, moreover, is presumed unless the party promptly makes known to the court his objection and the grounds therefor. The court then can determine whether the requested extension is reasonable and how much more time, if any, the arbitrators may have to render their award.[30]

Thus, as in *Brandon*, where no request was made for court intervention to compel decision and the delay was relatively modest and understandable, the award could be upheld. In egregious cases, however, where an immediate award is essential and where the arbitration tribunal's delay is not well-founded, prompting from a court may be entirely appropriate.

1. See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 569-70 (1960) (Brennan, J., concurring) ("[S]ince arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute."); see generally Steven C. Bennett, "Arbitration: Essential Concepts" 59 (ALM Publishing, 2002) (discussing "contractual nature" of arbitration).

2. For a review of early cases holding that, whenever the agreement of the parties prescribes a time limitation within which an arbitration award must be made, the authority of the arbitrators to make an award terminates with the expiration of such time, see Allan E. Kopela, "Construction and Effect of Contractual or Statutory Provisions Fixing Time Within Which Arbitration Award Must Be Made," 56 A.L.R.3d 815, §3 (1974).

3. This article principally deals with commercial disputes, where the terms of the parties' arbitration agreement (and/or the rules of arbitration accepted by the parties) principally determine the timeliness of an award. There are many circumstances where express statutes and rules may alter the courts' view regarding timeliness. See, e.g., *Maquoketa Valley Cmty. Sch. Dist. v. Maquoketa Valley Educ. Ass'n*, 279 N.W.2d 510 (Iowa 1979) (statutory period for collective bargaining arbitration enforced).

4. 751 F.2d 551 (2d Cir. 1985).

As in 'Brandon,' where no request was made for court intervention and the delay was modest and understandable, the award could be upheld. In egregious cases, however, prompting from a court may be entirely appropriate.

5. See id. at 554 (citing AAA Rule 53, which grants AAA authority to interpret rules).

6. No. 02 Civ. 8879, 2005 WL 2995387 (S.D.N.Y. Nov. 9, 2005).

7. See id. at *8 (citing authorities) (emphasis in original).

8. See id. ("prejudice from losing the case later, rather than sooner, does not justify setting aside of an arbitration award") (quotation omitted).

9. See id. at *6 ("To hold otherwise would put this court in the uncomfortable position of second-guessing the AAA's conduct of its own affairs[.]").

10. See id. at *9. The court also rejected the petitioner's argument that its arbitrator had been excluded from deliberations, as the party-appointed arbitrator had simply been outvoted by the majority. See id. Another recent decision, *Coca-Cola Bottling Co. Consol., Inc. v. IBT Local No. 991*, 411 F. Supp.2d 1338 (S.D. Ala. 2006), rejected the view that untimeliness constitutes "affirmative misconduct" justifying vacatur of an award. The court suggested that "[w]ith regard to the issue of untimeliness . . . procedural aspects of arbitrable disputes are for the Arbitrator, not for the Court." Id. at 1351.

11. *West Rock Lodge No. 2120, Int'l Ass'n of Machinists and Aerospace Workers v. Geometric Tool Co., Div. of United-Greenfield Corp.*, 406 F.2d 284, 286 (2d Cir. 1968).

12. *Success Vill. Apts., Inc. v. Amalgamated Local 376, IUUAA*, 380 F. Supp.2d 95, 98 (D. Conn. 2005). The court also held that the plaintiff had failed to show "actual harm stemming from the delay." Id.; see also *Green v. Ameritech Corp.*, 12 F. Supp.2d 662, 665 (E.D. Mich. 1998) (where party "cajoled" and "prodded" arbitrator to decide case, but did not otherwise object, party waived objection to untimely award).

13. See AAA Commercial Rules, Rule 37 ("Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object."); see also *McMahon v. RMS Electronics, Inc.*, 695 F. Supp. 1557, 1559 (S.D.N.Y. 1988) (fact that counsel did not respond to AAA's request for extension of time to issue award before time limit expired "constitutes waiver of the deadline" notwithstanding subsequent objection letter).

14. See *Blank Rome, LLP v. Vendel*, 29 Del. J. Corp. L. 208 , 216 (Del. Ch. Aug. 5, 2003) (rejecting delay as basis to refuse enforcement of award, where defendants "themselves created the need for delay by asking the Arbitrator, on several occasions, to clarify his previous rulings and to revisit certain of their arguments that had been rejected"); *Barker v. GEICO*, 339 F. Supp. 1064, 1067 (D.D.C. 1972) (rejecting defense to enforcement of award where respondent waived objection, respondent contributed to delay, and respondent was not prejudiced by delay).

15. 367 F.3d 689 (7th Cir. 2004).

16. Id. at 692. Wisconsin law applied, the court held, because the underlying action was based in diversity jurisdiction. See id.; see also *Texas E. Transmission Corp. v. Barnard*, 285 F.2d 536, 539 (6th Cir. 1960) (noting that, "[a]t law and in equity," time is "ordinarily not of the essence, unless it is made so by express stipulation, or unless something in its nature, or connected with its purpose, makes it apparent the parties intended the contract to be performed with the time specified") (party's failure to appoint arbitrator within required period did not warrant excluding arbitrator).

17. 367 F.3d at 693. The court further remarked on the complaining party's failure to object, and the lack of prejudice from delay. See id.

18. Id. at 693-94. The court was careful to note that it did not "condone the [arbitration] panel's substandard performance." Id. at 693.

19. In *Fraternal Order of Police, Lodge #8 v. City of Cleveland*, 1998 WL 229412 (Ohio Ct. App. May 7, 1998) (unpublished), for example, the court upheld, against a motion to dismiss, a claim that a party had been prejudiced by the issuance of an untimely arbitration award because the "record had become too stale" during the pendency of the proceedings. See id. at *3.

20. In *Brandon v. Hines*, 439 A.2d 496 (D.C. 1981), for example, the court explained the "common law" view that an arbitration award was void if made after the time limitation specified by the parties: "This rule rests on the premise that, as in an agency relationship, the parties have delegated to the arbitrators only specified powers. The passing of the stated time period for rendering the award, therefore, automatically deprives the arbitrators of their authority." Id. at 510; see id. at 511 (explaining modern view that time limitations are "directory," absent express withdrawal of consent to continue arbitration, or showing of actual prejudice from delay).

21. See *Freed v. Oehmke*, 1991 WL 270119 at *2 (6th Cir. Dec. 13, 1991) (unpublished) (upholding untimely award and noting, if the award had been vacated, "[t]he district court would have been required to try the case itself").

22. See *Local Union 560, IBT v. Anchor Motor Freight, Inc.*, 415 F.2d 220, 226 (3rd Cir. 1969) (upholding award, and noting vacatur "would require the commencement of a new arbitration proceeding before another arbitrator").

23. The "functus officio" doctrine is explained in greater detail in our recent article on arbitration remand. See Samuel Estreicher & Steven C. Bennett, "Remand of Arbitration Awards," 234 N.Y.L.J., 3 (Sept. 6, 2005).

24. See *JLM Marking v. Bloomer*, 2005 WL 2082914 (Conn. Super. Ct. Aug. 8, 2005). The award was vacated as untimely in a separate proceeding. In the subsequent proceeding, the plaintiff claimed that one of the arbitrators (defendant in this subsequent proceeding) was liable for malfeasance and negligence, for failure to recuse himself in the matter.

25. The *JLM* court noted that the doctrine of "functus officio" permits an arbitrator to continue to act, after an award, where the award is incomplete. Because the arbitration panel had initially determined liability, but had not determined damages, the court held, this exception to the doctrine applied. See id. at *4.

26. See *Baar v. Tigerman*, 189 Cal. Rptr. 834 (Cal. Ct. App. 1983). The court held that a cause of action for breach of contract by the arbitrator was stated, although it did not rule on the ultimate validity of the claim. See id. at 839.

27. *Int'l Union, UMWA v. U.S. Dept. of Labor*, 358 F.3d 40, 43 (D.C. Cir. 2004) (quotation omitted); see generally Carol R. Miaskoff, Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act, 55 Geo. Wash. L. Rev. 635 (1987).

28. See Federal Arbitration Act, 9 USC §10(a)(4) (grounds for vacatur of award include circumstances where arbitrators "so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made").

29. 439 A.2d 496 (D.C. 1981).

30. See id. at 512.