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Eleventh Circuit Holds Arbitrators Have Venue-Setting Authority in International Arbitrations

By Andy Tuck and Lee Deneen

In an international arbitration, when an arbitration provision is ambiguous about the seat of the arbitration, who resolves the question? The Eleventh Circuit held last week that interpretation of a venue provision is the arbitrator's prerogative. *Bamberger Rosenheim Ltd. v. OA Development Inc.*, No. 16-16163 (11th Cir. July 17, 2017).

The Underlying Arbitration

The question reached the Eleventh Circuit after the district court confirmed an arbitral award. The underlying arbitration involved a breach-of-contract claim by Bamberger Rosenheim Ltd., an Israeli company, and a defamation counterclaim by OA Development Inc., an American company. Bamberger filed its request for arbitration in Atlanta, Georgia. It did so pursuant to the parties' arbitration provision, which instructed that "[a]ny [arbitration] proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by [Bamberger]." Even though Bamberger had submitted its own claim in Atlanta, it took issue in the arbitration with OAD's counterclaim being heard in Atlanta instead of Tel Aviv. As Bamberger saw things, Tel Aviv was the proper forum for that claim because the counterclaim qualified as a "dispute" that was "submitted by OAD."

The arbitrator disagreed, reasoning that the dispute was submitted by Bamberger when it filed its request for arbitration and that Atlanta was therefore the proper seat for both parties' claims. On the merits, the arbitrator further held Bamberger liable on OAD's defamation counterclaim.

Federal Court Challenge to the Arbitrator's Decision

A petition to vacate the arbitral award soon followed in federal district court, with Bamberger arguing that the award should be vacated on two bases, both of which concerned the arbitrator's procedural decision about venue. First, Bamberger urged, vacatur was warranted under Article V of the New York Convention, which applies if the "arbitral procedure was not in accordance with the agreement of the parties." Second, Bamberger said, vacatur was

also proper under Chapter 1 of the Federal Arbitration Act (FAA). That statute allows vacatur in certain cases where "the arbitrator[] exceeded [his] powers."

The appellate court rejected both arguments and confirmed the arbitral award. As the Eleventh Circuit reasoned, it was required to defer to the arbitrator's interpretation regardless of whether the issue was analyzed under the New York Convention or the FAA. In the federal proceedings, Bamberger was not disputing the validity of the arbitration clause or that the clause applied to OAD's defamation claim, but was rather challenging only the arbitrator's interpretation of the venue provision. According to the Eleventh Circuit, that interpretation is precisely the type of procedural question that is for an arbitrator to decide. En route to that conclusion, the panel rejected the Ninth Circuit's contrary conclusion in *Polimaster Ltd. v. RAE Systems Inc.*, 623 F.3d 832 (9th Cir. 2010). The Eleventh Circuit went on to hold that because the arbitrator in this case at least arguably engaged with the contractual language in the venue provision, confirmation of the award was in order. Notably, the court treated the venue provision as a procedural matter and not a jurisdictional matter—it did not treat the "seat" question as a fundamental issue of whether the arbitrator had the power at all to hear OAD's counterclaim at, as Bamberger alleged, an improper seat.

The Eleventh Circuit's holding follows the holdings of four other circuits—the First, Second, Fourth, and Tenth—and also honors the principle that arbitration clauses should be read to channel all disputes to arbitrators except those of so-called substantive arbitrability. The case shows that in international arbitration cases, the losing party will have no basis to file an after-the-fact challenge in the Eleventh Circuit to an arbitral venue.

The FAA as an Additional Basis for Vacatur?

The Eleventh Circuit's decision is potentially important for another reason, too. In the district court and on appeal, Bamberger asserted that it was entitled to vacatur on the basis of both the New York Convention and the FAA. The federal circuits are split on whether the FAA serves as a proper basis for vacatur of an international arbitration award. In this case, the panel saw "no reason to analyze [Bamberger's] arguments under the New York Convention or [the FAA] separately," since Bamberger's argument was the same for both bases for vacatur. The court stated in a footnote that it "assume[d], without deciding, that [the FAA] applies to the award in the present case."

Some might read this language as an authorization for losing parties to seek vacatur of an international arbitration award on the basis of the FAA, in addition to the New York Convention. Not so fast. The Eleventh Circuit has already definitively resolved the question in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998), an international arbitration case that the Bamberger panel cited only in passing. In that case, the Eleventh Circuit held that "the [New York] Convention's enumeration of defenses is exclusive." The panel in that case further reasoned that the New York Convention provided the only basis for challenging an international arbitration decision.

The Eleventh Circuit's decision in *Industrial Risk Insurers* is the law of this circuit. The *Bamberger* panel did not hold—and indeed could not have held—that the FAA provides an additional basis for vacating international arbitration awards. That result will occur in this circuit only when the Eleventh Circuit sitting en banc, or the U.S. Supreme Court, says so.

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