

Has the Seventh Circuit Created Ambiguity Over Review of Arbitrators' Decisions? When Silence is Unambiguous...

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United States Soccer Fed'n, Inc. v. United States Nat'l Soccer Team Players Ass'n, No. 15-3402, 2016 U.S. App. LEXIS 17339 (7th Cir. Sept. 22, 2016).

The Seventh Circuit decided last month that an arbitrator exceeded his authority by looking to the parties' past dealings to resolve an ambiguity created by the silence in their agreement. While attempting to establish bright line rules for the interpretation of arbitration agreements, the court instead muddied long-standing principles giving arbitrators broad deference when interpreting agreements. Because the case opens the door to attacking arbitration decisions, it invites parties in arbitration to re-think their litigation strategies and parties negotiating agreements to tighten language to foreclose future attacks.

Lessons Learned

What are the lessons to be learned from *U.S. Soccer Federation*?

1. The decision opens up a new line of attack for parties unhappy with arbitration awards. Using *U.S. Soccer Federation* as authority, one can now argue: the arbitrator erred in adopting an unreasonable interpretation of contract language (in other words, he got it wrong). In such circumstances, no deference is due, and the award should be voided.
2. The case sends a message to contract drafters, as well. It may be obvious to say, but "don't leave gaps in agreements." This time the Seventh Circuit read silence as purposeful, but it could have just as

easily said the silence was a “yawning gap” that required filling.

3. Standard contract language, including integration and no-modification clauses, does matter. The panel looked to language that both limited the arbitrator’s authority and emphasized the completeness of the contract documents in determining the arbitrator exceeded his authority by looking to practices outside the express contract language. Thoughtfully including what others consider “boilerplate” can make a difference.

Arbitration Award Purported to Resolve an Ambiguity in the CBA Created by Silence

In *United States Soccer v. United States Nat’l*, 2016 U.S. App. LEXIS 17339, the United States Men’s Team Player Association successfully argued to both an arbitrator and the district court that it had the right, pursuant to the parties’ Collective Bargaining Agreement (CBA), to object to print advertisements promulgated by the U.S. Soccer Federation that contained the images of players. The Seventh Circuit reversed the arbitrator’s decision that the advertisements require prior approval based on the past dealings between the parties. In rejecting the arbitrator’s interpretation of the agreements, the Seventh Circuit imposed its own view of the contract language and shook off decades long precedent that deferred to an arbitrator’s contract interpretation.

To reach his decision, the arbitrator first reviewed the parties’ tangled CBA and Uniform Player Agreement (UPA), in particular the section governing the use of player likenesses taken or created during U.S. Soccer Federation activity. [UPA Section 6(b)].

The CBA/UPA agreement generally prohibited the federation from using a player’s likeness without prior approval from the player or his representative, or unless specifically excepted by the agreements. The agreement recognized that the federation and its sponsors may want to use print advertisements that included players’ images. But unlike uses of players’ images in other media, such as video ads, the agreement failed to address the mechanism for seeking or obtaining player approval for print advertisements. According to the arbitrator’s reading of the contract, a gap existed because language neither explicitly required the federation to obtain player approval nor described how such approval would be obtained.

Deciding that this silence created an ambiguity in the agreement, the arbitrator attempted “to shed light on the intent of the parties” by implying a contract term that was consistent with the parties’ practices over the previous 12 years. The arbitrator deemed his consideration of the parties’ past dealings to be within his authority because “he was interpreting the contract by resolving an ambiguity.” *Id.* at *10. Based on this review, he found in favor of the players, and ruled that the agreements required player approval before the federation could use print advertisements containing player images.

The District Court Deferred to the Arbitrator, Recognizing Its “Extremely Limited Authority to Review the Decisions of Arbitrators”

The federation challenged the award in federal court. The district court in *United States Soccer Fed’n, Inc. v. United States Nat’l Soccer Team Players Ass’n*, 140 F. Supp. 3d 738 (N.D. Ill. 2015), upheld the arbitrator’s award and “emphasiz[ed] its extremely limited authority to review the decisions of arbitrators,” relying on a long line of Supreme Court and Seventh Circuit precedent holding that arbitration decisions should not be disturbed. The district court found that the arbitrator “considered” and “interpreted” the parties’ written agreements, and “reached a conclusion . . . He did exactly what the parties bargained for under the CBA/UPA.” *Id.* at 747-48.

The Seventh Circuit Rejected the Arbitrator’s Reading of the Contract as “Unreasonable,” Imposing its Own Construction of the Contract Language

The federation appealed, and at the onset of its analysis, the Seventh Circuit seemed to agree with the district court. The Seventh Circuit noted the Supreme Court instruction that “[a]s long as the arbitrator’s award draws its essence from the collective bargaining agreement . . . the award is legitimate.” 2016 U.S. App. LEXIS 17339, at *12 (citing *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (internal quotation omitted)). The court also framed the issue presented to a federal court asked to set aside an arbitration award: the question is not whether the arbitrator erred in interpreting the contract, or even grossly erred in interpreting the contract. The question is simply “whether they interpreted the contract.” *Id.* at *11 (citing *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987)).

Despite this precedent, the Seventh Circuit reversed the arbitration award. First, the court rejected the central premise of the arbitrator’s decision: that silence created ambiguity: “As an initial matter, the arbitrator erred in his determination that ‘there is ambiguity . . . when the contract is silent . . .’” *Id.* at *13. Parsing the contract language, the panel read the language differently than the arbitrator. Where the arbitrator found the agreement was ambiguous as to the need for player approval, the Seventh Circuit deemed it to be explicit in requiring none. *Id.* at *14.

In particular, the court emphasized a section of the agreement that addressed whether and how much the players would be paid: “[the federation] will request, but not require the [sponsor] to make a contribution” to the players for advertisements containing six or more players. *Id.* (emphasis added). Despite the contrary interpretations of both the arbitrator and the district court, the Seventh Circuit reasoned that these terms solely governed the question; because the language did not address player approval, none was required. These terms, the panel held, were “clear and unambiguous because they can reasonably be construed only in one way . . .” *Id.* at *14-15 (no emphasis added). The arbitrator’s determination of ambiguity, as well as his ensuing determination of past practice “add[ed] terms to a contract that is plausibly complete without them.” *Id.* at *14.

In addition, the Seventh Circuit looked to standard integration and no-waiver clauses in the agreements. *Id.* at *3. And it found significant language that limited the arbitrator’s authority to “interpret” but not “add to, subtract from, or alter in any way” the contract language. *Id.* at *4. The panel determined that the arbitrator exceeded his authority by looking to the parties’ past dealings to imply an approval requirement. *Id.* at *14 (quoting *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608 (7th Cir. 1993)). Despite its earlier statements of authority in favor of great deference to an arbitration award, the Seventh Circuit took this opportunity to reverse the district court judgment and vacate the arbitration award pursuant to its own reading of the contract language. *Id.* at *27.

The players promptly filed a petition for rehearing, arguing that “[t]he panel’s decision is fundamentally out of step with this court’s arbitration case law.” *United States Soccer Fed’n, Inc. v. United States Nat’l Soccer Team Players Ass’n*, No. 15-3402 at Dkt. #31 (7th Cir. 2016). They were joined by a group of legal scholars writing to inform the court that the decision “threatens to undo six decades of labor arbitration jurisprudence and substantially complicate labor relations...in contravention of the clear purposes of federal labor law.” *Id.* at Dkt. #34. The petition is currently awaiting decision.

How U.S. Soccer Federation Changes the Analysis

Given the Seventh Circuit’s previous statements in favor of broad arbiter discretion (a sentiment that has been echoed by the Supreme Court), how did this panel reach a decision to overturn a seemingly legitimate arbitration award based on a reasonable interpretation of the relevant agreement and a fair review of the parties’ past dealings? Going forward, when can parties to an arbitration within the Seventh Circuit be confident in the validity of the outcome?

What is significant about the panel’s decision was its willingness to supplant the arbitrator’s reading of the contract language for its own. In so doing, the panel concluded both that the arbitrator was wrong and that language “can be reasonably construed only in one way . . .” *Id.* at *14-15. This approach is a departure from prior Seventh Circuit precedent which permitted a court to set aside an award only if “there is no possible interpretive route to the award.” *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505-06 (7th Cir. 1991) (quoted at *id.* 1506). And it is significant, because under such circumstance, the district court erred in deferring to the arbitrator’s discretion.

The difference between “no possible interpretive route” and “only reasonable construction” is more than mere semantics. It invites the court to adopt the better argument – usurping what traditionally is viewed as the role of the arbitrator. And it instructs a reviewing court that it need not defer to an arbitrator in doing so.

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