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Arbitration Trap

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Arbitration Advantages

Arbitration is a popular way to resolve many kinds of disputes, especially business disputes. Arbitration offers many advantages. It is private. The parties have flexibility to customize the process to fit the nature of the dispute. The arbitrator is selected with input from both parties. Arbitration awards are not published and are not precedential. Arbitration awards are also extremely difficult to overturn in court. Arbitration may also be quicker and less expensive than court, though this is not necessarily so. (See "Pitfalls of Arbitration" article at www.kftrlaw.com/Media/Pitfalls-of-Arbitration.pdf)

Some Drawbacks Worth Considering

One of the principal drawbacks to arbitration is that the arbitrator does not have the powers of a court and the arbitration award is not directly enforceable. If a respondent refuses to pay an award, the claimant will have to go to court anyway to enforce it. Another related drawback is that the court's jurisdiction to review arbitration awards can be lost inadvertently. Imagine the mortification of winning an arbitration only to discover that the court won't enforce the award. Here's how it happened in the Land of Lincoln.

Relation of Arbitration Venue to Jurisdiction

An arbitration clause in a contract normally will specify the place where the arbitration hearing will occur. Under the Uniform Arbitration Act, the agreement to arbitrate in a particular state confers jurisdiction in the courts of that state to review and enforce the arbitration award. Sometimes, however, the specified venue will turn out to be inconvenient for the parties, or the venue may be unsatisfactory due to the location of the key witnesses. In such situations, the parties may be tempted to move the arbitration hearing someplace else. In several cases, however, the Illinois courts have held that holding the arbitration hearing in a venue not specified in the written arbitration agreement deprives the court of jurisdiction to either confirm or vacate the arbitration award. If the court will not act at all, a successful claimant could be left with an unenforceable award, or an unsuccessful respondent could be left with no

chance whatsoever to appeal, even if the arbitrator was corrupt, exceeded his or her powers, or deprived the party of due process.

Unexpected Outcomes

The trend in Illinois traces back to an Illinois Supreme Court ruling in *Chicago Southshore & South Bend R.R. v. Northern Indiana Commuter Transp. Dist.*, 184 Ill. 2d 151, 703 N.E.2d 7 (1998), which held that the Illinois court lacked jurisdiction to confirm an arbitration award entered in a proceeding which was required by the arbitration agreement to be held in Indiana, even though both parties waived the venue clause and arbitrated in Illinois. Soon thereafter, in *CPM Productions, Inc. v. Mobb Deep, Inc.*, 369 Ill. App. 3d 369, 742 N.E.2d 393 (1st Dist. 2000), the Illinois Appellate Court reversed a judgment entered by the circuit court confirming an arbitration award. The Appellate Court instead vacated the award because the arbitration had occurred in Illinois while the arbitration agreement called for arbitration in New York. The appellant succeeded in vacating the arbitration award, even though the jurisdictional issue was raised for the first time on appeal. See also, *Valent BioSciences Corp. v. Kim-C1, LLC*, 2011 IL App. (1st) 102073, decided on June 1, 2011 (an Illinois court was not the proper tribunal to review an arbitration award where the arbitration occurred in California and no written agreement specified otherwise).

Lessons in Arbitration

Several lessons may be drawn from these cases. First, when negotiating or drafting an arbitration agreement, always include a venue clause, not just a choice of law clause. Identify specifically the state in which the arbitration hearing is to be conducted, and understand that you may be giving that state exclusive jurisdiction to review any arbitration award.

Second, if you have an actual dispute, don't just informally agree or acquiesce to a request to move an arbitration to another venue not specified in the agreement (unless you think you're going to lose and want to try to prevent the court from confirming the award).

Third, although this strategy is untested, the parties may be able to avoid the *Chicago Southshore* rule by agreeing in writing before the arbitration hearing begins to formally amend the arbitration agreement and change the agreed venue. The Uniform Arbitration Act does not state that the agreement to arbitrate has to precede the dispute. To the contrary, Section 1 of the Act explicitly provides that agreements to submit to arbitration "any existing controversy or any controversy thereafter arising between the parties" are enforceable. 710 ILCS 5/1 (2011). Therefore, it would seem unlikely that a court would find that it had no jurisdiction to review an arbitration award simply because Illinois was not the originally specified venue. Again, there is no judicial precedent to rely upon at this time.

If you have any questions or comments regarding this article, or about arbitration in general, please contact your KFT&R attorney or Ray Fylstra at rfylstra@kftrlaw.com.

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