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News+Media Cap. Grp. LLC v. Las Vegas Sun, Inc., 137 Nev. Adv. Op. 45 (Sep. 16, 2021)

Molly Marias

News+Media Cap. Grp. LLC v. Las Vegas Sun, Inc., 137 Nev. Adv. Op. 45 (Sep. 16, 2021)[1]

ARBITRATION AWARDS: DEFINING THE STANDARD OF REVIEW FOR PRIVATE ARBITRATION RESULTS

SUMMARY

The Nevada Supreme Court considered whether an arbitrator's award in a commercial contract dispute was so egregiously wrong that the Court could overturn the results. A mere error of law or fact is an insufficient basis to overturn an arbitration award, but courts may overturn an award if the arbitrator either exceeds the scope of his or her powers pursuant to NRS 38.241(1)(d), renders an award that is arbitrary, capricious, or unsupported by the parties' agreement, or manifestly disregards the law.

In this matter, the Court reaffirmed the district court's finding that the arbitrator's award was appropriate because (1) the arbitrator's interpretation of the contract was minimally plausible, (2) evidence in the record supports the award, and (3) the arbitrator did not knowingly disregard clearly controlling law or reach a result contrary to his own understanding of the law and the parties' agreement.

FACTS AND PROCEDURAL HISTORY

In 1989, the Las Vegas Sun ("the Sun") entered into a joint operating agreement ("JOA") with the Las Vegas Review Journal ("the RJ") to maintain its financial stability. Under this agreement, both the Sun and the RJ retained their separate news operations, but the RJ was responsible for production, distribution, and advertising and collected all revenue. The RJ paid the Sun a percentage of total operating profits each month after deducting joint "Agency Expenses" which included news and editorial expenses.

The parties entered into an amended agreement in 2005. Though this new agreement was like the 1989 JOA, the agreement did not refer to "Agency Expenses." By eliminating this reference, the new agreement altered the RJ's payment structure to the Sun because the RJ could no longer deduct news and editorial expenses from the total operating profits.

Though the 2005 agreement ceased to allow for deductible editorial expenses, the agreement instructed that the total operating profits be calculated in a manner consistent with the 'Retention' calculation as it appears in the 2004 Stephens Media Group profit-and-loss statement. In this profit-and-loss statement, the 'Retention' computation deducted editorial costs, thus creating a conflict between the language of the agreement and the calculation instructions. The 2005 agreement also contained a mandatory arbitration clause which covered payment disputes.

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The RJ continued to deduct editorial expenses from the total operating profits prior to paying the Sun its monthly percentage, and in 2018 the Sun sued the RJ for breach of contract. During arbitration, the Sun argued that because "Agency Expenses" were eliminated in the 2005 agreement, it was improper for the RJ to deduct editorial expenses from the total operating profits. In response, the RJ contended it was proper to deduct editorial expenses pursuant to the 'Retention' calculation in the profit-and-loss statement. The arbitrator ultimately found that editorial expenses were not deductible, and that the Sun had proven damages. The arbitrator declined to award either side their requested attorney fees.

The Sun moved the district court to confirm the substantive award but to vacate denial of attorney fees, and the RJ cross-moved the district court to vacate the arbitrator's entire decision. The district court denied both motions, confirmed the award, and reasoned that there was no clear and convincing evidence to support the contention that the arbitrator either exceeded his powers, rendered an award that was arbitrary and capricious, or manifestly disregarded the law in making his decision.

DISCUSSION

Nevada adopted the Uniform Arbitration Act of 2000 which is consistent with the state's policy of promoting the efficient enforcement of agreements.[2] When compared with litigation, arbitration is faster, allows parties to enjoy use of an arbitrator with specialized knowledge and competence, and is entitled to more privacy.[3] To opt for mandatory binding arbitration is a contractual choice, and courts respect this choice by heavily erring on the side of arbitration when disputes arise over the results.[4] Not only do courts want to preserve the efficiency and other benefits of arbitration, but the party that seeks to overturn an arbitration award must also overcome the high burden of showing by clear and convincing evidence that the arbitrator made more than a mere mistake in rendering the award.[5]

Both the RJ and the Sun argue that (1) the arbitrator exceeded his powers pursuant to NRS 38.241(1)(d), (2) the award was arbitrary, capricious, and unsupported by the agreement, and (3) the arbitrator manifestly disregarded the law.

The arbitrator did not exceed his powers

NRS 38.241(1)(d) dictates that arbitrators exceed their powers when they make decisions or results based on information or issues outside the scope of the parties' agreement.[6] Arbitrators do not exceed their powers so long as their interpretation of the agreement is rational; it is

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[2] Tallman v. Eighth Jud. Dist. Ct., 131 Nev. 713, 718, 359 P.3d 113, 117 (2015).
[3] Clark Cty. Pub. Emps. Ass'n v. Pearson, 106 Nev. 587, 597, 798 P.2d 136, 142 (1990); *see* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010).
[4] *See id*.
[5] *See Stolt-Nielsen*, 559 U.S. at 671.
[6] NEV. REV. STAT. § 38.241(1)(d) (2015).

irrelevant whether that interpretation is erroneous.[7] As such, the issue on review becomes whether the arbitrator had the authority to decide an issue at all and *not* whether the arbitrator *correctly* decided the issue.[8] Though arbitrators may not expressly contradict the plain language of the agreement, they may interpret this language however they choose so long as the interpretation and subsequent award are "colorable."[9]

The Court reviewed the 2005 agreement and determined that the arbitrator's award did not directly contradict the express language of the contract and was "colorable" because there was a minimally plausible argument to support the arbitrator's decision. In deciding that editorial expenses were non-deductible, the arbitrator merely weighed the presented evidence and decided an arguable question, which was within his scope of authority under the arbitration clause. Additionally, the arbitrator did not exceed his authority by choosing not to award either party attorney fees. Although the agreement included "fees and costs of arbitration," the arbitrator's interpretation that this did not include attorney fees was a plausible construction, and this is all that is required to support that the arbitrator acted within his scope of authority in making the decision.

The arbitrator's decision was not arbitrary or capricious

The common law permits vacatur of an arbitration award if the award is arbitrary and capricious or unsupported by the parties' agreement.[10] An arbitrator's findings are arbitrary and capricious if they are not substantially supported by evidence in the record, and this standard ensures that the arbitrator is not wholly disregarding the terms of the agreement.[11] Because the "unsupported by the agreement" factor employs functionally the same analysis as NRS 38.241(1)(d)'s "exceeding the scope" factor, the Court determined that because the arbitrator did not exceed the scope of his authority, his award was also supported by the parties' agreement. Therefore, the Court focused its attention solely on whether the award was based on findings not substantially supported by evidence in the record.

In this case, the facts were not in dispute, and the arbitrator based his determinations solely on his legal interpretation of the Sun and the RJ's 2005 agreement. As such, the arbitrator's interpretation cannot be arbitrary and capricious because the standard does not apply to invalidate an arbitrator's legal conclusions.[12] The Sun argues that the arbitrator's choice to exclude certain expenses from the award other than attorney fees constitutes a factual dispute. However, because this assertion is unsupported by any record citation, it categorically fails to clear the "clear and convincing" hurdle needed to prove that the arbitrator's choice to exclude those costs was arbitrary and capricious.

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[7] Health Plan of Nev., Inc. v. Rainbow Med., LLC, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004).
[8] *Health Plan*, 120 Nev. 689 at 698, 100 P.3d at 178.
[9] *Id.*
[10] Washoe Cty. Sch. Dist. v. White, 133 Nev. 301, 306, 396 P.3d 834, 839 (2017).
[11] *White*, 133 Nev. at 308, 396 P.3d at 841.
[12] Fed. Ins Co. v. Am. Hardware Mut. Ins. Co., 124 Nev. 319, 322, 184 P.3d 390, 392 (2008).

The arbitrator did not manifestly disregard the law

A reviewing court may vacate an arbitration award if the arbitrator consciously and manifestly disregarded the applicable law.[13] Courts treat "manifest disregard" as akin to intentional misconduct in that it is not enough for an arbitrator to reach a legally incorrect result; rather, the arbitrator must reach that incorrect result deliberately.[14] The RJ argued that in *Coblentz v. Hotel Employees & Restaurant Employees Union Welfare Fund*, the Court required less than a showing of conscious and deliberate error prior to vacating an arbitration award, and that a manifest disregard for the law requires only that the award render language in the agreement without effect.[15] In response, the Court partially overruled *Coblentz* to require a "knowing" element to prove manifest disregard.

In holding that the arbitrator here did not manifestly disregard the law, the Court reasoned that all but one of both parties' arguments can be reduced to assertions that the arbitrator incorrectly applied the law and do not allege the requisite subjective intent necessary to show manifest disregard. The one potentially viable argument is the RJ's contention that the arbitrator manifestly disregarded the law by issuing an award that disallowed deducting editorial costs after acknowledging that editorial costs were allowable deductions under the profit-and-loss statement. Yet, the Court concluded that the record does not support this assertion because there were multiple ways to interpret the 2005 agreement. Nothing in the arbitrator's award suggests that the arbitrator knowingly issued the award in contrast to his own understanding of the applicable law or his interpretation of the agreement.

CONCLUSION

To preserve the integrity and benefits of the arbitration process, it is paramount that any judicial review be abbreviated and that courts give due deference to the results of arbitration by overturning awards only in extremely limited circumstances.

Errors of law or fact—even serious errors—are insufficient to overturn an award. Rather, parties seeking to overturn must show by clear and convincing evidence that the arbitrator either (1) exceeded the scope of his or her authority by issuing an award that lacks even minimal plausibility, (2) based the award on a factual finding that is arbitrary and capricious because it is not supported by substantial evidence in the record, or (3) knowingly disregarded the controlling law prior to issuing the award.

Here, the Court found the district court's affirmation of the arbitrator's award appropriate because (1) the arbitrator's interpretation of the contract was minimally plausible, (2) evidence in the record supports the award, and (3) the arbitrator did not knowingly disregard clearly controlling law or reach a result contrary to his own understanding of the law and the parties' agreement.

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[13] *White*, 133 Nev. at 306, 396 P.3d at 839.
[14] Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1459–62 (11th Cir. 1997).
[15] Coblentz v. Hotel Emp. & Rest. Emp. Union Welfare Fund, 112 Nev. 1161,1169, 925 P.2d 496, 501 (1998).