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Deadlocked arbitrators exceeded authority by delegating their job

In an unusual case where arbitrators deadlocked during deliberation, they voted to resolve the impasse by asking one of the defendants what he thought was a fair amount to pay the plaintiff. They ended up awarding the plaintiff what the defendant suggested.

Because of this unusual arrangement, the Illinois Appellate Court concluded the arbitrators exceeded their authority by improperly delegating their official functions.

The trial judge was ordered to vacate the award and instruct the parties to proceed with a fresh set of arbitrators. *Trimble v. Graves*, No. 5-10-0075 (April 14, 2011).

In 1998, R. Joe Trimble leased some registered Jersey cows to Clover Farms for one year. At some point, Clover Farms allegedly stopped paying rent. But Trimble reportedly failed to fetch the surviving cows until 2005.

A year later, Trimble signed an arbitration agreement with Jim Graves, Jerry Graves and Tony Graves (d/b/a Clover Farms). Trimble named Tim Butikofer as his arbitrator and the defendants selected Fred Kuenstler. Then Butikofer and Kuenstler picked Alois Kertz as the neutral.

Paragraph 6 of the arbitration agreement said that deliberations would start as soon as the parties finished presenting evidence and argument — and that the arbitrators “will not separate until the matter is resolved to their satisfaction and a written document prepared, which can be handwritten, making the award as they deem best supported by the evidence.”

Paragraph 12 said “the strict formal rules of evidence do not apply,” while Paragraph 17 authorized the arbitrators “to ask questions of any witness if they do not understand the answer or they want clarification for any purpose.”

As recounted by the reviewing court, there was no dispute about the following facts (taken from Butikofer’s dissent):

During deliberations, Kertz said he believed that Trimble was not entitled to any compensation because of the delay in asserting his claim, but Butikofer argued Trimble deserved \$158,675. After two



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hours of deliberation, Kertz reportedly suggested letting the defendants decide how much they owed Trimble.

With Butikofer dissenting, the motion passed and the parties and lawyers were summoned back into the conference room. Kertz asked Tony Graves what he thought would be a fair amount to pay Trimble and Graves said \$7,000.

The award — signed by Kertz and Kuenstler — gave Trimble \$7,676.

Trimble petitioned to vacate the award, but the trial judge rejected his request, concluding the arbitrators did not exceed their powers when they voted to ask Graves what he thought he owed Trimble. Because the strict rules of evidence did not apply — and the arbitrators were authorized to ask clarifying questions — they were entitled to reopen the evidence, the judge said.

Reversing, the appellate court explained that “the arbitrators exceeded their powers when they failed to adhere to the terms of the agreement.”

Here are highlights of Justice Richard P. Goldenhersh’s opinion (with omissions not noted in the text):

In an apparent attempt to reach a diplomatic result, the arbitrators inquired into what defendants thought would be a fair result.

This type of inquiry is perfectly acceptable in mediation. The difficulty with the present case is that the parties had entered into an agreement to arbitrate, not to mediate. The contrast between arbitration and mediation has been described concisely:

“Mediation is a form of alternative dispute resolution ‘in which a mediator facilitates communication and negotiation between parties to assist them in reaching a

voluntary agreement’ about a dispute. Unlike arbitrators, mediators do not apply the law, resolve factual disputes or adjudicate cases.” Mary Patricia Benz, “The Mediation Option for Attorney Discipline Cases,” 98 Ill. B.J. 262 (2010).

The arbitrators delegated their duties. This delegation exceeded their powers. The severity of their error is compounded by the fact that the arbitration was binding.

The circuit court found that the inquiry of the arbitrators fit under the relaxed rules for gathering evidence provided for in the agreement.

The flaw of the circuit court’s ruling is twofold. First, the inquiry itself was not justified by the terms of the agreement. Second, and of most importance, the analysis of the circuit court ignores the delegation of duty made by the arbitrators when they passed a motion to allow defendants to determine the amount of the award.

Impropriety of the inquiry

The circuit court focused on the propriety of the question asked by the arbitrators. The circuit court based its decision on provisions in the agreement allowing for the arbitrators to receive evidence in manners that would not be allowed at a trial.

In particular, the circuit court noted that Paragraphs 12 and 17 of the agreement allowed for the arbitrators to deviate from the rules for litigation and it found that these provisions permitted the arbitrators to ask defendants what they owed.

The agreement did not, however, authorize an examination that was not aimed at gathering evidence. The circuit court pointed out that in Paragraph 12 the parties “had agreed to relax strict formal rules of evidence.”

Similar language has been read to allow the admission of statements that would otherwise be barred as unreliable, such as hearsay. Indeed, evidence that would not be admissible at a trial has supported arbitration awards.

Nonetheless, the plain language of Paragraph 12 reiterated the principle that the arbitrators should base their decision on relevant evidence. Paragraph 12 reads as follows:

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"12. Since this is an arbitration proceeding, the strict formal rules of evidence do not apply, but the arbitrators will have to determine whether the evidence is or is not credible. Either side can argue that the evidence is not credible."

The question asked by the arbitrators fell outside the framework of Paragraph 12. The question was not in the pursuit of relevant facts.

Butikofer reported, "Alois Kertz asked Tony Graves how much he thought would be fair for [defendants] to pay [plaintiff]." Unlike evidence that might be barred by a strict and formal application of the rules, this question delved into the highly prejudicial and irrelevant topic of what defendants thought was fair.

Evidence of settlement matters is barred because it is prejudicial and irrelevant. The question of what Tony Graves thought was fair did not go to any fact of consequence.

The impropriety of the question does not derive from a strict and formal application of the rules. Instead, the question itself went beyond the realm of evidence and delved into the irrelevant.

Furthermore, the deviation by the arbitrators was not permissible under Paragraph 17.

This paragraph allowed the arbitrators to ask questions under two circumstances. First, the arbitrators were permitted to ask questions if they did not understand the initial answer of the witness. The inquiry by the arbitrators was no such follow-up.

Second, the paragraph allowed the arbitrators to ask for clarification for any purpose. Clarification is a means of

responding to doubt, confusion or an incomplete answer.

Clarification was not the basis for the question asked by the arbitrators. The question did not respond to doubt or confusion regarding a matter that had previously been addressed in the arbitration but was a new avenue of inquiry not aimed at the facts contested at the hearing.

The inquiry into opinions regarding fairness was outside the powers of the arbitrators listed in the agreement.

More disquieting, the inquiry was made after two of the arbitrators had passed a motion to base the award on the answer.

Improper motion

The circuit court characterized the proceedings as a simple reopening of the evidence.

Butikofer stated as follows: "Finally Alois Kertz made a motion that we would let [defendants] decide on how much they owed and that would be the final amount of the settlement. Alois Kertz and Fred Kuenstler voted 'yes' and Tim Butikofer voted 'no'. Motion passed."

As the trial court likened the events to a reopening of the evidence, its analysis failed to address the fact that the arbitrators had voted to delegate their duty to adjudicate.

The motion violated the plain language of several provisions in the agreement. The motion violated the stated purpose contained in the preamble for the arbitrators "to decide" the matter.

In other words, the arbitration called for the matter to be arbitrated, not mediated. Although "the strict formal rules of

evidence" were relaxed in Paragraph 12, the same paragraph stated that "the arbitrators will have to determine whether the evidence is or is not credible."

Furthermore, the agreement set forth an order for the proofs, calling for the presiding arbitrator to inquire if there would be any additional evidence before the closing arguments.

Regardless of whether an opening of the proofs for more evidence was permissible, Paragraph 21 reiterated that after the close of the proofs and final arguments the "arbitrators" would "make the decision for the award."

According to the paragraph, once the hearing was completed, the arbitrators were to engage in "deliberations" and make "the award as they deem best supported by the evidence."

Any alternative resolution to a deadlock required the consent of all the arbitrators. By two arbitrators passing a motion to let defendants decide on how much they owed and allowing that to be the final amount to resolve the claim, the arbitrators did not deliberate, nor did they make an award they deemed best supported by the evidence, nor did they have the consent of all the arbitrators to use this alternative resolution to a deadlock.

The arbitrators exceeded their powers when they failed to adhere to the terms of the agreement.

Illinois favors arbitration. Nonetheless, arbitration is a contractual matter and arbitrators exceed their powers if they do not proceed according to the terms of the agreement.