NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW

Volume 5 | Number 2 Article 6

Spring 1980

Judicial Intervention in the Arbitral Process: Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd.

Steven H. Sholk

Judicial Intervention in the Arbitral Process: *Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd.*

The New York Civil Practice Law and Rules regarding arbitration[1] severely restrict the scope of judicial review over arbitral awards.[2] In *Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd.*[3] the court addressed the issue of when judicial review of the arbitration process is permitted under the New York statute. Mobil claimed that the arbitrators exceeded their statutory authority by issuing a prehearing discovery order and filed suit in the New York courts to have the order overturned.[4] The New York Court of Appeals held that it lacked jurisdiction over the dispute because the discovery order was interlocutory and the statute permitted judicial review only after the arbitrators had rendered a final and definite award.[5] The holding of the court strongly supports the arbitration statute's policy of protecting the independence of the arbitral forum from judicial intervention.

In July 1968 Asamera granted Mobil exploration and production rights for certain petroleum reserves in Sumatra, Indonesia in exchange for royalty payments. The contract provided that the parties would submit all disputes to arbitration "in accordance with the Rules of the International Chamber of Commerce."[6] Subsequently, a dispute over royalty payments occurred, and in November 1974 Asamera instituted arbitration. At the time the parties entered into the contract and Asamera instituted arbitration, the International Chamber of Commerce's 1955 Rules of arbitration were in effect.[7] However, on June 1, 1975, after arbitration had commenced, a new set of Rules went into effect.[8] Shortly thereafter Asamera filed a request for prehearing discovery, and the arbitrators had to determine which set of Rules would govern the proceeding because the 1955 Rules did not permit discovery whereas the 1975 Rules granted the arbitrators authority to order discovery.[9]

---

[1] N.Y. CIV. PRAC. LAW §§ 7501-7514 (McKinney 1963).

[2] *See* Lentine v. Fundaro, 29 N.Y.2d 382, 278 N.E.2d 633, 328 N.Y.S.2d 418 (1972).

[3] 43 N.Y.2d 276, 372 N.E.2d 21, 401 N.Y.S.2d 186, *rev'g* 56 A.D.2d 339, 392 N.Y.S.2d 614 (1977).

[4] *Id.* at 281, 372 N.E.2d at 22, 401 N.Y.S.2d at 187.

[5] *Id.*

[6] *Id.* at 279, 372 N.E.2d at 22, 401 N.Y.S.2d at 187.

[7] INT'L CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION (1955).

[8] INT'L CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION (1975).

[9] Article 16 of the 1955 Rules provided that "in the event of no provision being made in

A majority of two arbitrators construed the arbitration clause to refer "to those Rules as they are from time to time."[10] Therefore, the majority held that the 1975 Rules applied and ordered discovery. Mobil immediately appealed to the International Chamber of Commerce Court of Arbitration to order the arbitrators to apply the 1955 Rules, but the court refused to interfere with the ruling.[11]

Mobil then filed a complaint in the New York Supreme Court to vacate the arbitrators' ruling under CPLR 7511[12] on the ground that the arbitrators exceeded their authority by ordering prehearing discovery. The court vacated the award, holding that "it is for the courts, not the arbitrators, to determine which procedural rules apply."[13] On appeal the Appellate Division found that the trial court had jurisdiction over the controversy, but reversed on the merits.[14] The Appellate Division certified the question of jurisdiction to the New York Court of Appeals which held that section 7511 did not permit judicial review of interlocutory arbitral orders.[15] Since the court lacked jurisdiction over the controversy, it did not reach the merits of Mobil's claim.

The court in *Asamera* held that the procedure for judicial review was found exclusively in the New York arbitration statute.[16] That statute authorizes judicial intervention before arbitral proceedings have commenced and after the delivery of an arbitral award, but prohibits judicial interference while arbitration is underway. This rule is set forth in three sections of the statute. First, section 7503 provides for motions to stay or

---

these Rules, those of the law of procedure chosen by the parties or, failing such choice, those of the law of the country in which the arbitrator holds the proceedings" shall apply. INT'L CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION, art. 16 (1955).

Since under New York law arbitrators do not have authority to order prehearing discovery, *see* De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 321 N.E.2d 770, 362 N.Y.S.2d 843 (1974); Katz v. State Dep't of Correctional Serv., 64 A.D.2d 900, 407 N.Y.S.2d 967 (1978) (mem.); 8 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE § 7505.06, at 75-128 (1963), Asamera could not have obtained discovery under the 1955 Rules.

The 1975 Rules, on the other hand, allow the arbitrators to determine the procedural law they deem appropriate in the absence of an agreement to the contrary. Article 11 provides:

> The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.

INT'L CHAMBER OF COMMERCE, RULES OF CONCILIATION AND ARBITRATION, art. 11 (1975). Thus, under the 1975 Rules, the arbitrators were not bound by the New York law barring discovery in arbitral proceedings.

[10] 43 N.Y.2d at 280, 372 N.E.2d at 23, 401 N.Y.S.2d at 188. A dissenting arbitrator found that the parties intended the 1955 Rules to apply. *Id.*

[11] *Id.*

[12] N.Y. CIV. PRAC. LAW § 7511(b)(1)(iii) (McKinney 1963).

[13] 56 A.D.2d at 341, 392 N.Y.S.2d at 615.

[14] The Appellate Division held that absent a provision to the contrary in the arbitration agreement, the arbitrators have authority to decide all procedural, evidentiary and substantive questions. As long as the arbitrators reach a rational result, they do not exceed their authority. 56 A.D.2d at 342, 392 N.Y.S.2d at 616. *See also* note 22 *infra*.

[15] 43 N.Y.2d at 281, 372 N.E.2d at 23, 401 N.Y.S.2d at 188.

[16] *Id.*

compel arbitration.[17] These motions occur prior to the commencement of arbitral proceedings and address the issue of the validity of the agreement providing for arbitration. Second, section 7511(a) states that a party may move to modify or vacate an award within ninety days after the award is delivered.[18] Third, section 7511(b) provides that a court shall vacate an award where "an arbitrator, or agency or person making the award exceeded his power."[19]

The principle that the right to judicial review is found exclusively in the statute is well established in the case law.[20] However, the right to judicial review of interlocutory arbitral orders presented an issue of first impression for the court. Since section 7511 provides for judicial review only after delivery of an arbitral award, the dispositive issue in *Asamera* was how the court defined the word "award" within the context of the statute. The Court of Appeals construed "award" to mean the final, conclusive determination of all issues submitted for arbitration.[21] By employing this definition, the court adopted the construction which furthered the statutory purpose of ensuring the independence of the arbitral forum from judicial interference.[22]

In arriving at its definition of "award" the court relied on the nineteenth century case of *Jones v. Welwood*.[23] In *Welwood* the parties submitted various disputes arising from contracts for the sale of land to arbitration. The court held that where the parties had submitted a dispute to arbitration "the award must be co-extensive with the submission, and that it must be a final determination of the matter submitted."[24]

The court's reliance on *Welwood* to determine what constituted a final award was proper even though the issue of statutory construction

---

[17] N.Y. CIV. PRAC. LAW § 7503 (McKinney 1963).

[18] *Id.* § 7511(a).

[19] *Id.* § 7511(b)(1)(iii).

[20] *See, e.g.*, Livingston v. Gindoff Textile Corp., 32 Misc. 2d 258, 223 N.Y.S.2d 968 (Sup. Ct. 1961); Cresroad Estates, Inc. v. Tenzer, 194 Misc. 649, 87 N.Y.S.2d 259 (N.Y. City Mun. Ct. 1949).

[21] 43 N.Y.2d at 281, 372 N.E.2d at 23, 401 N.Y.S.2d at 188.

[22] *Id.* at 282, 372 N.E.2d at 23, 401 N.Y.S.2d at 188. The courts have interpreted the substantive parameters of judicial review under section 7511(b)(1)(iii) with the same end in view. An arbitrator exceeds his power only when he (1) gives a completely irrational construction of a contract, Pavilion Cent. School Dist. v. Pavilion Faculty Ass'n, 51 A.D.2d 119, 380 N.Y.S.2d 387 (1976), (2) acts outside the scope of authority conferred by the contract, Civil Service Employees Ass'n v. Steuben County, 50 A.D.2d 421, 377 N.Y.S.2d 849 (1976), or (3) issues an award which violates a statute or a strong public policy, Psychoanalytic Center, Inc. v. Burns, 62 A.D.2d 963, 404 N.Y.S.2d 106 (1978) (mem.) (arbitrator does not have power to split fees in violation of statute); Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976) (arbitrator does not have power to award punitive damages).

An arbitrator is not bound by substantive rules of law or the rules of evidence, and a court will not disturb an award because of an error of law or fact, or misconstruction of a contract. Rochester City School Dist. v. Rochester Teachers Ass'n, 41 N.Y.2d 578, 362 N.E.2d 977, 394 N.Y.S.2d 179 (1977). Even where an arbitrator applies substantive law, a court will not vacate an award because of erroneous application of law. Schine Enterprises, Inc. v. Real Estate Portfolio of N.Y., Inc., 26 N.Y.2d 799, 257 N.E.2d 665, 309 N.Y.S.2d 222 (1970) (mem.).

[23] 71 N.Y. 208 (1877).

[24] *Id.* at 212.

was not involved in that decision. The court's reliance on a pre-statutory case to define "award" comported with the rules of statutory construction because the New York statute did not specifically define "award" and the language of section 7511 was drawn heavily from the common law.[25] In the absence of a statutory definition the court properly turned to *Welwood* which set forth the common law standard for a final arbitral award.[26] Moreover, the language of the statute provides additional support for the court's conclusion. Section 7511(b) states that an award shall be vacated where an arbitrator "so imperfectly executed [his power] that a final and definite award upon the subject matter submitted was not made."[27] Thus, construing "award" to embrace an interlocutory order would conflict with the statutory requirement that an arbitrator fully execute his power so as to render a final and definite award.

The Court of Appeals did not discuss the line of cases which the Appellate Division relied on in finding jurisdiction over the controversy. The most important case relied on by the Appellate Division, *Astoria Medical Group v. Health Insurance Plan*,[28] involved a dispute between an insurer and its physician composed medical groups over fee arrangements. The insurer in *Astoria* nominated a physician to the arbitral panel who was also a member of its Board of Directors and a paid consultant.[29] Several medical groups moved to disqualify the arbitrator because of bias. The Appellate Division held that it had jurisdiction over the controversy, stating:

> The absence of statutory authority is not an absolute bar to pre-award judicial intervention for the purpose of disqualifying an arbitrator. . . . [I]t is inconceivable that a court of equity must sit idly by and permit an arbitration proceeding to continue where, by reason of the surrounding circumstances, any award made in favor of one party is preordained to be vacated. The courts are not that impotent.[30]

Despite the *Astoria* court's sweeping language with regard to the ab-

---

[25] *See* Matter of Wilkins, 169 N.Y. 494, 62 N.E. 575 (1901). Prior to the enactment of the predecessor of § 7511, the law courts had no jurisdiction to review arbitral awards, and courts of equity granted relief only on the ground of corruption. The statute granted courts the power to vacate an award on the grounds of corruption, fraud, misconduct, or where the arbitrators have exceeded or imperfectly executed their powers. *Id.* at 497, 62 N.E. at 576.

[26] 43 N.Y.2d at 281, 372 N.E.2d at 23, 401 N.Y.S.2d at 188.

[27] N.Y. CIV. PRAC. LAW § 7511(b) (1) (iii) (McKinney 1963).

[28] 13 A.D.2d 288, 216 N.Y.S.2d 906 (1961)(per curiam), *rev'd on other grounds*, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962). The Appellate Division also cited Western Union Telegraph Co. v. Selly, 295 N.Y. 395, 68 N.E.2d 183 (1946)(per curiam), and Pisciotta v. Newspaper Enterprises, 5 A.D.2d 1014, 174 N.Y.S.2d 419 (1958) (mem.). In *Selly* a court appointed the arbitrator in a labor dispute, and the employer moved to remove him because of disqualification and disability. The trial court granted the motion and the Court of Appeals affirmed. 295 N.Y. at 398, 68 N.E.2d at 183. In *Pisciotta* a contract provided for arbitration before three arbitrators consisting of the two parties and an umpire. One party moved for an order to stay arbitration. The Appellate Division held that since the parties expected to act as litigants the umpire would serve as the sole arbitrator. The clause providing for the parties to serve as arbitrators was excised. 5 A.D.2d at 1014, 174 N.Y.2d at 420.

[29] 13 A.D.2d at 289, 216 N.Y.S.2d at 907.

[30] *Id.* at 289-90, 216 N.Y.S.2d at 908.

sence of statutory authority for judicial interference in arbitral awards, the *Asamera* case is clearly distinguishable on its facts. In *Astoria* judicial review occurred *before* arbitral proceedings commenced, whereas in *Asamera*, the trial court attempted to assert jurisdiction over the arbitral panel *during* the actual arbitral proceeding. Unlike *Asamera*, *Astoria* did not involve review of an interlocutory arbitral order, but rather a pre-arbitral review of a party's behavior.[31] As such, *Astoria* is totally consistent with the New York arbitration statute, which provides for limited judicial review prior to the commencement of arbitration proceedings in a motion to stay or compel arbitration. Similarly the decision in *Asamera* is consistent with the design of the statute. It authorizes limited judicial review after the completion of arbitral proceedings in a motion to modify or vacate an award, but does not set out any provision for judicial intervention during the proceeding itself. After weighing the conflicting policy considerations, the *Asamera* court held that once arbitration proceedings have commenced the policy of safeguarding the speed and economy of arbitration outweighs the policy of preventing arbitrators from rendering awards which will later be vacated.[32]

Recent New York cases have reached results consistent with the reasoning of *Asamera*. In *Adelstein v. Thomas J. Manzo, Inc.*,[33] the Appellate Division held that an arbitrator who retained jurisdiction to fix the amount of back pay in the event that the parties could not agree to a settlement among themselves had not rendered a final award.[34] The court relied exclusively on *Asamera* in holding that no appeal was authorized under section 7511.[35]

In different circumstances, the New York Supreme Court, in *Shay v. 746 Broadway Corp.*,[36] held that the policy underlying the arbitration statute did not prohibit judicial intervention. *Shay* addressed the issue of whether a court can grant injunctive relief in the period between the demand for arbitration and the appointment of an arbitrator. In *Shay*,

---

[31] *Selly* and *Pisciotta* are similarly distinguishable. In both cases judicial review occurred before arbitration proceedings commenced. Consequently, *Selly* involved review of a decision of a court, and *Pisciotta*, like *Astoria*, involved review of an act of a party.

[32] 43 N.Y.2d at 282-83, 372 N.E.2d at 23, 401 N.Y.S.2d at 188.

Under the English Arbitration Act, 1950, 14 Geo. 6, c. 27, § 21, the courts can decide legal questions arising in an arbitration proceeding through a procedure known as the special case. An arbitrator can present either a question of law in the form of a special case to a court during the arbitration proceedings, or the final award itself for a review as to its legal correctness. In the former situation a party can appeal the court's decision only with permission of the rendering or appellate court, whereas in the latter situation an appeal lies as of right. *Id.* The Act distinguishes between interlocutory appeals and appeals of the final award in order to prevent unreasonable delays and enable the arbitrator to arrive at a final award in as efficient a manner as possible. *See* Note, *Commercial Arbitration: Expanding the Judicial Role*, 52 MINN. L. REV. 1218, 1237 (1968). Although the New York and English statutes create different roles for the courts, both aim to prevent delay and maintain the speed and economy of arbitration.

[33] 61 A.D.2d 933, 402 N.Y.S.2d 1009 (1978) (mem.).

[34] *Id.*

[35] *Id.*

[36] 96 Misc. 2d 346, 409 N.Y.S.2d 69 (Sup. Ct. 1978).

petitioner agreed to convert two buildings into multiple-unit residential dwellings in exchange for respondent's promise to convey a one-third interest in one of the buildings. A dispute arose over petitioner's performance and the parties submitted the problem to arbitration in accordance with their agreement. However, petitioner sought an injunction prohibiting respondent from conveying or encumbering the property until an arbitrator was appointed.[37] The court found that it had an inherent power to grant injunctive relief in this period before formal proceedings could begin and therefore granted the injunction. The court's reasoning was consonant with *Asamera* because the purpose of the injunction was to prevent irreparable harm and preserve the status quo so that arbitration would be effective.[38] The court asserted that the injunction protected the integrity of the arbitral forum.

The *Asamera* court's interpretation of the New York arbitration statute is also consistent with federal court interpretations of the virtually identical United States Arbitration Act.[39] Under the United States Arbitration Act, the remedy for bias or prejudice of an arbitrator lies exclusively in a motion to vacate the award after it is rendered.[40] The concern of the federal courts, as with the *Asamera* court, was the inviolability of the arbitral process.[41]

In light of the well established policy underlying the New York statute, the court in *Asamera* correctly resolved the issue of judicial review of interlocutory orders. The holding represents a policy decision to sacrifice arbitral economy in a few cases of egregious abuse of the arbitrator's authority in order to prevent minor interlocutory disputes from reaching the courts and causing an even greater dissipation of arbitral economy. Since cases of egregious abuse of arbitral authority are relatively rare, protection of the integrity of the arbitral process requires that judicial review occur in such cases only after a final award has been rendered.

—STEVEN H. SHOLK

---

[37] *Id.* at 347, 409 N.Y.S.2d at 70.

[38] *Id.* at 349, 409 N.Y.S.2d at 71. The Court in *Shay* did not cite or discuss *Asamera*. *Id.*

[39] 9 U.S.C. §§ 1-14 (1976).

[40] *E.g.*, Marc Rich & Co. v. Transmarine Seaways Corp., 443 F. Supp. 386 (S.D.N.Y. 1978); Petition of Dover Steamship Co., 143 F. Supp. 738 (S.D.N.Y. 1956). Sections 10-12 of the Act provide the procedures and grounds for a motion to vacate an arbitral award.

[41] *See* cases cited in note 40 *supra*.