

business law today

Month-In-Brief: Business Litigation & Dispute Resolution

— CURRENT MONTH (MARCH 2021)

Dispute Resolution

Bankruptcy Courts Continue to Decline Enforcement of Arbitration Clauses in Core Cases

By Leslie Berkoff

Although the Federal Arbitration Act generally supports enforcement of arbitration clauses, bankruptcy courts often utilize an exception to preclude arbitration of a dispute where there is an inherent conflict between arbitration and the underlying purposes of the implicated statute. A recent decision in the Ninth Circuit held that a bankruptcy court has the discretion to decline enforcement of an otherwise applicable arbitration provision if the arbitration would conflict with the underlying purposes of the Bankruptcy Code. In *Pillsbury Winthrop Shaw Pittman, LLP v. Cuker Interactive, LLC*, the court denied the request by a law firm to compel arbitration of a dispute for attorneys' fees based upon an arbitration clause in an engagement letter. The district court found that the underlying dispute was a core bankruptcy issue as it went to whether the claim was a secured claim and held that compelling arbitration would conflict with the underlying purposes of the Bankruptcy Code: (1) having bankruptcy law issues decided by bankruptcy courts; (2) centralizing resolution of

bankruptcy disputes; and (3) avoiding piecemeal litigation. This decision is consistent with holdings by other circuit courts dealing with core matters. While courts addressing non-core matters generally find that they don't have the discretion to deny request for arbitration, several courts, however, have left open the possibility for such discretion, as they limited the importance of the core/non-core distinction and simply analyzed whether arbitration of the non-core matter would undermine the goal of reorganization under the Bankruptcy Code. This area continues to develop along with the growing desire to utilize dispute resolution as a means to address issues.

Key Changes to Rules Governing Certain International Arbitrations

By Leslie A. Berkoff

On March 1, 2021, the International Centre for Dispute Resolution ("ICDR") amended its *Dispute Resolution Procedures for both Arbitration and Mediation*, changing the governing rules ("Rules") so that they are in line with the publication of new Rules by various other institutions, including the *London Court of International Arbitration* (LCIA) and *International Chamber of Commerce* (ICC). These changes are intended to increase the efficiency of the Dispute Resolution processes available through the ICDR, and enhance the cost effectiveness of those processes. The Rules are the by-product of a year-long effort by worldwide experts in the field and also recognize the current state of the world as well as the ongoing

COVID-19 pandemic. In an effort to streamline and expedite the processes, which in turn will reduce the associated costs, the Rules promote early disposition of issues, encourage the consideration and use of mediation as opposed to arbitration, which tends to be more costly. The Rules also raise the ceiling amount for use of expedited arbitration procedures to \$500,000 and expand the applicability of these procedures in an effort to cover more matters. The Rules now require the tribunal to discuss cybersecurity, privacy and data protection issues during the procedural hearing and also expressly state that video or audio technology may be used for expedited procedures and mediation. The Rules also recognize and address the growing use of third-party funding, and provide that, upon the application by a party or on its initiative, the tribunal has the express, albeit discretionary, power to require a party to disclose the existence and identity of a third-party funder and to confirm if the funder has undertaken to cover the costs of the arbitration. The Rules further allow the case administrator to join two arbitrations, and allow the tribunal to determine that a third party should be joined to a proceeding, provided the impacted party agrees.

The Rules also include a new mandate to act in accordance with the *AAA-ICDR's Code of Ethics for Arbitrators in Commercial Disputes* which contains 10 canons that further expand on an arbitrator's mandate, including to act fairly, to avoid entering into business relations with a party to the arbitration, to disclose personal or financial interests and not to discuss proceedings with a

party in the absence of the other party, amongst many others.

The ICDR also amended its Mediation Rules, implementing changes to the procedure for the appointment of a mediator, providing additional guidance regarding the mediation process, and implemented some processes for the potential enforcement of settlements under the [Singapore Convention](#) on mediated settlements.

For those who are counseling companies with a global reach or concerning international business dealings it is important that they are aware of these changes as they may impact contracts that are currently being drafted to include Dispute Resolution clauses and/or impact potential disputes that are anticipated in the near future where Dispute Resolution may be considered as an option for resolution of such dispute.

— EDITED BY



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