

TEXAS LAWYER

MONDAY, MAY 25, 2015

An ALM Publication

www.texaslawyer.com

HOW TO EXPAND AN ARBITRATOR'S AUTHORITY WITHOUT REALLY TRYING

BY KAREN WILLCUTTS (Former), JAMS

It is axiomatic that “arbitration is a creature of contract.” This means, inter alia, that the parameters of the arbitration, including the issues upon which the arbitrator is authorized to rule, are defined by the parties’ arbitration agreement. Pursuant to the Federal Arbitration Act, one of the few situations in which an arbitration award may be vacated is when an arbitrator exceeds his authority. However, a recent Fifth Circuit case illustrates that counsel can expand an arbitrator’s authority without necessarily intending to do so.

In *OMG, L.P. v. Heritage Auctions, Inc.*, 2015 WL 2151779 (5th Cir. May 8, 2015,) the parties had entered into an Asset Purchase Agreement and a Consulting Agreement whereby *OMG* was to provide consulting services to Heritage and receive commissions on the sales of certain merchandise. Both the Asset Purchase Agreement and the Consulting Agreement mandated arbitration of all disputes arising out of the agreements and gave the arbitrator authority to “grant any equitable and legal remedies that would be available in any judicial proceeding.” *OMG*, at 2. When a dispute arose concerning the commissions *OMG* to which was entitled, Heritage terminated the Consulting Agreement and filed a demand for arbitration.

Heritage argued, in the alternative, that there was never a meeting of the minds between the parties with respect to the commissions *OMG* was entitled to receive, and that, as a result the

contract should be rescinded. In response to these arguments, *OMG* argued, inter alia, that the agreements were not ambiguous and that Heritage’s argument that the Consulting Agreement should be rescinded because there was no meeting of the minds was meritless. However, *OMG* did not contend that the arbitrator lacked authority to decide the issue of contract formation. The arbitrator agreed with Heritage and entered an award cancelling the contract. *OMG* filed suit in the district court seeking to vacate the award, contending that the arbitrator exceeded his authority in cancelling the contract. The district court agreed with *OMG*, vacated the award, and remanded the matter to the arbitrator. *Id.*

On appeal, the Fifth Circuit found that, because both parties argued throughout the arbitration about whether there was a meeting of the minds and whether rescission was an appropriate remedy, and never disputed the arbitrator’s authority to decide the contract formation issue until after the award, the parties consented to arbitrate the issue. Furthermore, the Court found it unnecessary to decide whether the original arbitration agreement gave the arbitrator the authority to decide the issue of contract formation because “[b]y submitting issues for an arbitrator’s consideration, parties may expand an



arbitrator’s authority beyond that provided by the original arbitration agreement.” *Id.* at p. 1.

The lesson learned is that if there is any possibility that a claim asserted or a remedy requested by the opposing party is beyond the authority of the arbitrator

to decide, counsel must promptly and specifically object to the arbitrator’s authority to rule on the issue. Calling the claim meritless or arguing the remedy is not appropriate will not suffice. In fact, the Fifth Circuit seems to suggest that *OMG* should have immediately taken the issue to the district court. *Id.* at p.5 (“If *OMG* did not believe the arbitrator had the authority to decide those issues, it should have refused to arbitrate, leaving a court to decide whether the arbitrator could decide the contract formation issue.”) *Id.* at p. 5. By failing to do so, the parties can expand the arbitrator’s authority beyond that provided for in the arbitration agreement and forfeit the right to challenge that authority post-award.

Karen Willcutts is a JAMS neutral with more than 25 years of experience as a trial lawyer, judge, mediator and arbitrator with case management skills to effectively and efficiently resolve a wide range of civil litigation matters. You can reach her at kwillcutts@jamsadr.com.

