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Lessons from 'Deflategate': Drafting the right arbitrator picks

What can litigants do when they get pulled into an arbitration where the arbitrator, or members of an arbitration panel, are biased?

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In the aftermath of the so-called “Deflategate” scandal involving the alleged deflation of footballs used in the 2014 AFC Championship Game, four-time Super Bowl Champion Tom Brady was suspended for four games by the NFL, causing ire and uncertainty among the fantasy football world. When Brady—through the NFL Players Association—appealed the four-game suspension as part of the NFL’s arbitration process, Commissioner Roger Goodell unilaterally appointed himself as arbitrator to hear Brady’s appeal based on the Collective Bargaining Agreement’s provision that “the Commissioner may serve as hearing officer in any appeal . . . at his discretion.”

The problem with Goodell’s appointment — Brady’s attorneys and fantasy followers lamented — was that Commissioner Goodell seemed to be decidedly biased against Brady. At the outset, the Players Association filed a motion with Goodell seeking his recusal from arbitrating Brady’s appeal. They pointed out his vocal support for Brady’s suspension, and that he was likely to be called as a witness. Commissioner Goodell refused to recuse himself, forcing Brady to submit to an arbitration before him. The proceeding concluded in a decision that — as Brady’s attorneys predicted — upheld Brady’s suspension. The Players Association was then forced to look to federal court to get the decision invalidated based on deficiencies in the arbitration process.

Brady’s arbitration before Goodell illustrates a common struggle that extends beyond the woes of fantasy leagues, and highlights a key dilemma in the arbitration process: What can litigants do when they get pulled into an arbitration where the arbitrator, or members of an arbitration panel, are biased? Crafting an effective arbitration agreement in advance is the best way to achieve a winning season.

Pre-Award Disqualification of Arbitrators

As an alternative to traditional litigation, arbitration is intended to be a speedy and economical process to dispute resolution. Based on the longstanding policy of keeping judicial interference in the arbitration process to a minimum, courts have developed a general rule that parties to an arbitration may not seek judicial intervention prior to the issuance of a final arbitration award. This can leave the Tom Bradys of the world stuck with a shoddy officiating crew, and no recourse to disqualify them.

For example, in Gulf Guaranty Life Ins. Co. v. Connecticut Gen. Life Ins. Co., 304 F.3d 476 (5th Cir. 2002), the Fifth Circuit held that allowing parties to seek a pre-award arbitrator disqualification undercuts the congressional purpose to promote just and expeditious dispute resolution with minimum judicial interference. Id. at 490-92. The court held that such disqualification attempts could "spawn endless applications [to the courts] and indefinite delay," and "there would be no assurance that [the party seeking removal] would be satisfied with [the removed arbitrator's] successor and would not bring yet another proceeding to disqualify him or her." Id. at 492.

Arbitrator bias becomes particularly tricky when arbitration agreements require a "panel" containing two party-appointed arbitrators who then select a neutral umpire. Under this common arrangement, parties may be tempted to draft the most friendly arbitrator pick for their fantasy panel, hoping that he or she might go to great lengths to secure an award for their side. Challenging those picks is an uphill battle; most courts will refuse to intervene until after the panel issues a final award. And, even then, the court will only overturn that final ruling on the field if there is indisputable evidence that that arbitrator was partial.

The Strategic Play Call: Breaching the Draft Selection Criteria

Arbitration fantasy players ought not lose hope, though, as there is at least one offensive play that can be used to challenge the general bar to judicial intervention where an arbitrator pick fails to comply with the parties' pre-set draft selection rules. The Michigan Court of Appeals recently recognized that option in Oakland-Macomb Interceptor Drain Drainage Dist. v. Ric-Man Const., Inc., 850 N.W.2d 498 (Mich. 2014), explaining that "[c]ourts will not entertain suits to address preaward general objections to the impartiality or expertise of an arbitrator. But when suit is brought, as here, to enforce the key provisions of the agreement to arbitrate — i.e., when the criteria and method for choosing arbitrators are at the heart of the arbitration agreement — then courts will enforce these contractual mandates." Id. at 500.

In Oakland-Macomb, the court adjudicated a pre-award arbitrator disqualification dispute because the arbitration agreement contained "very particularized qualifications

that the panel members must possess." Id. at 501. Those qualifications included specific memberships and levels of experience the arbitrators must have. Because the arbitrator pick did not have the right stats, the court found that it had authority to disqualify the arbitrator and order appointment of a qualified arbitrator.

A similar issue arose in Swiss Center, Inc. v. 608 Company, LLC, Index No. 651999/10 (N.Y. Sup. Ct. Apr. 4, 2011), which involved the parties' agreement to appoint "disinterested" arbitrators. Id., Decision and Order, at p.6. There, the arbitration arose out of a lease dispute. After the parties made their arbitrator picks, but prior to the commencement of the arbitration, Swiss Center brought an action in state court to disqualify 608 Company's arbitrator because he was not "disinterested," given his intimate involvement in the underlying lease. The court held that it had authority to disqualify 608 Company's appointed arbitrator, holding that "[t]his kind of prior involvement with the issues integral to those with which the panel of 'disinterested arbitrators' will be faced" rendered the arbitrator "not qualified to serve as a 'disinterested arbitrator.'" Id. at p.13.

Conclusion

As Brady's struggle demonstrates, companies and organizations considering arbitration as a method for resolving disputes should consider the risk that others in their league might be unscrupulous in their arbitrator picks. Unwary parties to an arbitration may soon find themselves facing a losing season with the stats stacked against them. A well-structured arbitration agreement — setting forth the appropriate rules of the game and appropriate criteria for arbitrator selection in advance — can make all the difference when it comes to staying at the top of the standings.