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ALTERNATIVE DISPUTE RESOLUTION

Supremes Bolster Arbitration's Finality, Flexibility

By PETER W. BENNER

Chalk up another win for arbitration in Connecticut. Through its recent decision of *LaSalla v. Doctor's Associates Inc.*, the Connecticut Supreme Court continues its march to the front of the judicial pack in support of the finality and flexibility of the arbitration process.

The holding is straightforward: that an arbitration panel is not required to adhere to the doctrine of claim preclusion when interpreting the same provision of a contract between the parties which was the subject of a prior arbitration between those parties.

LaSalla is a "development agent" for Subway restaurants, for which the defendant Doctor's Associates (d/b/a Subway) is the franchisor. LaSalla previously had filed an arbitration claim over the manner in which Subway calculated his compensation under their agreement. The agreement contained a broad, unrestricted clause requiring all disputes to be resolved through arbitration. Four years after the panel in the first proceeding issued a declaratory ruling favoring LaSalla's interpretation of the disputed contract provision, LaSalla filed a second arbitration claim seeking 14 years of damages under that same provision.

Subway unsuccessfully moved that the panel dismiss the second arbitration on the grounds of claim preclusion, arguing that the request for damages in the second arbitration could have been made, and was not, thus barring further dispute of the claim. Subway sought to vacate the arbitration panel's ensuing $1.7 million damages award on the grounds that Connecticut public policy requires the imposition of claim preclusion in private arbitration.

Violation of public policy is a judicially created basis for *vacatur* beyond the narrow grounds set out in C.G.S. §52-418 (a). In refusing to vacate the damages award, the Supreme Court relied heavily on its 1999 decision in the case of *Stratford v. International Assn of Firefighters*, which found that the doctrine of *issue* preclusion does not apply to hold a second arbitration panel to the ruling of a prior panel on a common disputed issue. The high court characterized issue preclusion and claim preclusion as "first cousins," such that no clear public policy required it to distinguish between them.

Subway also claimed that the second award was issued in manifest disregard of the law—another judicially created basis to vacate an award. Such a ground is almost never successful, and the Supreme Court had little trouble dispensing with it since it had already found that the panel had acted correctly in refusing to find issue preclusion.

The real significance of the *LaSalla* opinion lies in what the Supreme Court says about the consensual use of arbitration to resolve disputes. A primary reason for not finding a public policy favoring the application of claim preclusion is that arbitrators "are free to apply or reject the doctrine to the extent they deem it appropriate because the parties have bargained for their judgment."

The high court made a key distinction between *LaSalla* and the 1996 case of *Fink v. Goldenbock*, on the ground that the application of claim preclusion in *Fink* was in a subsequent *judicial* proceedings where the plaintiff could have brought the same claims in an earlier arbitration. The Supreme Court observed that conservation of judicial resources is not a concern in a second arbitration and that the parties in *LaSalla* could have included in their agreement "a system of arbitral precedent." Having not done so, the meaning and scope of the clause in the agreement that the first arbitration shall be "final and binding" is to be "determined by each arbitrator in turn," giving arbitrators "the maximum opportunity to render correct and just decisions."

The Supreme Court piled on a further reason for rejecting claim preclusion by recognizing consensual arbitration as a dispute resolution mechanism well-suited to businesses whose relationship will continue. One party may choose not to assert a claim it could bring in arbitration in the hopes that the claim might be resolved by agreement in their continuing course of dealing.

The *LaSalla* opinion is yet another strong statement by the state's highest court underscoring both the purposes and value of arbitration as a means of dispute resolution, while recognizing the flexibility the parties have to fashion a process to suit their needs. The case highlights the importance of care and foresight in the drafting of arbitration provisions. Rather than rote use of unrestricted clauses we are accustomed to seeing in business agreements, *LaSalla* invites principals and their counsel to think about what might happen in the course of the relationship created by the agreement and take the opportunity at the negotiation and drafting stage to tailor a process to their circumstances. ■

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