An Alternative to Arbitration Via Commercial Division Rule 9

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In late 2018, the First Department's decision in Daesang Corporation v. The NutraSweet Company, 167 A.D.3d 1, 85 N.Y.S.2d 6 (1st Dep't 2018) refused to vacate a $100 million arbitration award premised upon a purported manifest disregard of law, confirming that:

"The potential for . . . mistakes [by the arbitrators] is the price for agreeing to arbitration" [] and, "however disappointing [an award] may be," parties that have bargained for arbitration "must abide by it" [] ["Errors, mistakes, departures from strict legal rules, are all included in the arbitration risk"] [internal citations omitted]).

With this caveat in mind, transactional counsel may consider an alternative to mandatory arbitration because in all likelihood, arbitration will limit a party's ability to obtain appellate-type review of findings of fact, conclusions of law and the ultimate arbitration award. Indeed, for transactional counsel interested in the putative expedited and less costly substitute to litigation, the Commercial Division offers a viable alternative, specifically Rule 9 Accelerated Adjudication.

Factual background

According to the decision, in 2002 petitioner Daesang Corporation and respondent The NutraSweet Company (the world's largest producer of the artificial sweetener aspartame) began to discuss NutraSweet's potential acquisition of Daesang's aspartame business. During 2003, Daesang and NutraSweet entered into an Asset Purchase Agreement wherein Daesang sold all of its aspartame assets to NutraSweet for $79,250,000, $5 million of which was to be paid at closing and the remainder in five annual installment payments. The APA, governed by New York law, provided that disputes were to be resolved through arbitration by a three-member tribunal in New York under the rules of the International Chamber of Commerce. After the May 2003 closing, NutraSweet made the 2004 and 2005 annual installment payments of the purchase price under the APA but failed to remit the third installment payment due in June 2006. In December 2006, after NutraSweet failed to cure the default, Daesang accelerated the $55 million balance of the purchase price. In June 2008, Daesang commenced an arbitration proceeding against NutraSweet, seeking about $80 million in damages, plus interest, while NutraSweet filed its answer, defenses and counterclaims seeking, inter alia, rescission.

Ultimately, after the submission of 20 declarations, hundreds of exhibits, and a nine-day hearing, the ICC panel awarded Daesang $100,766,258 in damages (which included, inter alia, the unpaid balance of the purchase price under the APA, plus interest through June 2016). The ICC panel dismissed all of NutraSweet's defenses and counterclaims. Daesang thereafter sought to confirm the

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award, while NutraSweet cross moved to vacate the same, arguing that the arbitration award constituted a manifest disregard of the law sufficient to vacate.

The First Department's refusal to vacate the Arbitration Award

Prior to undertaking its analysis as to why the NutraSweet arguments in favor of vacating the arbitration award did not constitute a manifest disregard of the law, the First Department confirmed that public policy considerations weighed in favor of deference to arbitration and likewise highlighted Court of Appeals precedent which guided the analysis:

The Court of Appeals has offered the following guidance concerning the enforcement of arbitration awards under the FAA:

"It is well settled that judicial review of arbitration awards is extremely limited. An arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached. Indeed, we have stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (Wien & Malkin, 6 N.Y.3d at 479–480, 813 N.Y.S.2d 691, 846 N.E.2d 1201 [citations, brackets and internal quotation marks omitted][emphasis added]).

The First Department ultimately reversed the trial court decision to vacate in part and remand to the ICC panel, and granted the petition seeking to confirm the award in favor of Daesang, observing:

The order vacating the award in part cannot be justified under the "emphatic federal policy in favor of arbitral dispute resolution" embodied in the FAA, a policy that "applies with special force in the field of international commerce" (Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 [1985]). Under the FAA, even if an arbitral tribunal's legal and procedural rulings might reasonably be criticized on the merits, an award is not subject to vacatur for ordinary errors of the kind the court identified in this case, as opposed to manifest disregard of the law, a concept that, as more fully discussed below, means "more than a simple error in law" [internal omissions]).

After analyzing NutraSweet's arguments, the First Department concluded that the same did not substantiate a manifest disregard of the law:

The foregoing suffices to show that the resolution in the partial award of the issue of the viability of NutraSweet's fraud counterclaims — whether or not that resolution was correct (a question on which we express no opinion) — does not meet the high standard required to establish manifest disregard of the law, namely, a showing that "the arbitrator[s] knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it" (Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 217 [2d Cir. 2002]) [bold added].

In light of the foregoing daunting threshold, sufficient to trigger appellate review pursuant to a manifest disregard of the law standard, transactional counsel may consider alternatives to mandatory arbitration due to the fact that arbitration is unlikely to afford a party with substantive review of an arbitration finding of fact, conclusion of law or the ultimate award, despite inherent errors contained within the same. In this regard, the Commercial Division's Rule 9 Accelerated Adjudication Procedure may provide a party with truncated discovery and expedited judicial relief while preserving appellate review of the merits of the court's determination.

Those in favor of arbitration will tout its inherent confidentiality, as compared to publicly-available documents that are available in Commercial Division practice via the ECF system. But truth be told, very few disputes require absolute confidentiality, and there is risk nonetheless of public disclosure when the inevitable motion to confirm or vacate surfaces after the arbitration decision. Accordingly, transactional counsel drafting dispute resolution provisions must evaluate the pros and cons incident to an arbitration clause (including its ancillary limited appellate review) with the miscellaneous waivers which Rule 9(c) incorporates.

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