Image credit: erhui1979/DigitalVision Vectors

RUAA *Comes to the Rescue*

BY HOUSTON PUTNAM LOWRY AND ROY L. DE BARBIERI

A funny thing happened the other day

at Connecticut Superior Court.[1] In the prosecution of a motion to vacate a commercial arbitration award, one counsel attempted to subpoena the arbitrator who ruled on the matter. Sounds strange? Can this really happen? What is the law here?

For many years, arbitrator immunity and arbitrator fitness to testify had been addressed by Connecticut case law but it was not codified. One of the substantial concerns of lawyers and arbitrators in Connecticut was that no clear statute provided for traditional immunity or exemption of arbitrators in their capacity of decision making and

adjudicating. One of the arguments before the Connecticut General Assembly in the nearly two-decade quest to have the Revised Uniform Arbitration Act (RUAA) adopted was that the RUAA statute provided substantial protection for arbitrators. Arbitral immunity was part of the "black letter" of the Uniform Act:

> An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.[2]

The claim was that the arbitrator was biased. Now, this was a hotly contested arbitration and parties presented their case with vigor. The arbitrator was required to assert a fair bit of authority to move the hearing along and to keep the proceedings under control. The matter presented before the superior court was a full-blown assault on the arbitrator's immunity to be deposed, and an attempt to pull back the veil on the arbitrator's decision-making process.

In evidence, in the case before the court, the "arbitrator pointed out in a conference call to all counsel that he was incompetent to testify as a matter of law, and also bound by ethical obligations to the parties to maintain the privacy and integrity of the proceedings by not disclosing to anyone matters learned in that decision making process." Counsel demanded the subpoena be honored and a motion to quash was filed by the arbitrator. Although counsel conferred in advance of the court hearing, it was not possible to resolve the matter amicably.

The first question is: what was the applicable law? The original arbitration agreement predated the RUAA's effective date in Connecticut.[3] On the day of the arbitration, the parties entered into a new written arbitration agreement which defined how the arbitration would proceed that day and which matters would be held for a possible future hearing. If an arbitration agreement was made after October 1, 2018, then Connecticut General Statutes § 52-407nn applies, which reads:

> **Immunity of arbitrator; competency to testify; attorney's fees and costs.**
>
> (a) ***An arbitrator*** or an arbitration organization acting in that capacity is ***immune from civil liability*** to the same extent ***as a judge*** of a court of this state acting in a judicial capacity.
>
> (b) The immunity afforded by this section supplements any immunity under other law.
>
> (c) The failure of an arbitrator to make a disclosure required by section 52-407ll does not cause any loss of immunity under this section.
>
> (d) In a judicial, administrative or similar proceeding, ***an arbitrator*** or representative of an arbitration organization ***is not competent to testify and may not be required to produce records as to any statement, conduct, decision or ruling occurring during the arbitration proceeding*** to the same extent as a judge of a court of this state acting in a judicial capacity.
>
> This subsection does not apply:
>
> 1) To the extent necessary to determine the claim of an arbitrator, arbitration organization or representative of the arbitration organization against a party to the arbitration proceeding; or
>
> 2) To a hearing on a motion to vacate an award under subdivision (1) or (2) of subsection (a) of section 52-407ww if the movant establishes *prima facie* that a ground for vacating the award exists.
>
> (e) If a person commences a civil action against an arbitrator, arbitration organization or representative of an arbitration organization arising from the services of the arbitrator, organization or representative or ***if a person seeks to compel an arbitrator*** or a representative of an arbitration organization ***to testify or produce records*** in violation of subsection (d) of this section, ***and the court decides that the arbitrator***, arbitration organization or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization ***is not competent to testify, the court shall award to the arbitrator***, organization or representative reasonable attorney's fees and other reasonable expenses of litigation. [emphasis added]

This means an arbitrator is not competent to testify, so he couldn't testify even if the arbitrator wanted to. Furthermore, the arbitrator is entitled to reasonable attorney's fees to quash a subpoena. (The statutory phrase is "shall" and not "may.")

While the issue of when the arbitration agreement was concluded was discussed, it was abandoned during oral argument and the parties agreed the RUAA was applicable.

The first point raised in defense of the arbitrator was the notion that "if an arbitrator can be subpoenaed and ordered to testify," is initially a question of a court's subject matter jurisdiction and procedural power to conduct a deposition in the context of a confirmation hearing. A court does not have the *power* to order *pendent lite* depositions in the context of an application to confirm (or vacate) an arbitral award, *National Grange Mutual Insurance v. Carloni,* CV-92-039599-S (September 3, 1992) and *City of Waterbury v. Waterbury Police Union, Local 1237*, 176 Conn. 401, 408 (1979). While depositions are allowed in civil actions,[4] an application to confirm an arbitration award is not a civil action. This means there is no statutory or Practice Book provision which authorizes a deposition to be taken. While this is case law, the RUAA did not overturn this aspect of Connecticut decisional law.

Image credit: erhui1979/DigitalVision Vectors

The second defense point was the arbitrator's *competence* under Connecticut General Statutes § 52-407nn. It is not merely that the arbitrator has a privilege not to testify.[5] He may not do so, even if he wanted to, because the arbitrator is *incompetent* (such as someone who is unable to take the oath, a very young child, or someone who does not understand what "truth" is). No action by the arbitrator can make himself competent. In fact, he is overwhelmed by a constant duty of fidelity to his oath of office not to divulge the facts and circumstances learned in a private arbitration.

The third point was that the testimony of the arbitrator is not relevant, *Eder Brothers, Inc. v. International Brothers of Teamsters, Local 1040*, 36 Conn. Supp. 223, 225 (1980). The parties had an option of a verbatim transcript of the arbitral proceedings and they did not avail themselves of that opportunity. Not having taken the opportunity to have a court reporter present at the arbitral hearing, it was waived.

A subpoena is also inappropriate under Practice Book §13-28(e) since the information sought is not reasonably calculated to lead to the discovery of admissible evidence and a protective order was warranted under Practice Book §13-5 because a deposition would be annoying, embarrassing, oppressive, and an undue burden. The arbitrator is just *not competent* to testify. The arbitrator just could not be deposed.

Lastly, the arbitrator's testimony and file are not relevant given the limited scope of the court's review of the arbitral award, *DeRose v. Jason Robert's, Inc.*, 191 Conn.App. 781, 799 (2019). If the material sought is not relevant, there is no reason to conduct the deposition or to request the arbitrator's file.

The party seeking to vacate the award claimed to have made a prima facie case that the arbitrator was biased because the arbitrator disposed of his hearing notes immediately upon issuing the award. Most arbitrators follow the same practice.

The court did not believe this amounted to a *prima facie* showing of bias. The court cited to and relied upon RUAA Section 14 comment 6, which provides:

> Section 14(e) is intended to promote arbitral immunity. By definition, ***almost all suits against arbitrators***, arbitration organizations, or representatives of an arbitration organization arising out of the good-faith discharge of arbitral powers ***are frivolous*** because of the breadth of their respective immunity. Spurious lawsuits against arbitrators, arbitration organizations, and representatives of an arbitration organization or involvement in collateral judicial or administrative proceedings deter individuals and entities from serving in such capacities and thereby harm the arbitration process because of the costs involved in defending even frivolous actions. Parties considering such litigation should be discouraged by the prospect of paying the litigation expenses of the arbitrator, arbitration organizations, or representatives of an arbitration organization. When they are not, the statute enables the arbitrators, arbitration organizations, or representatives of an arbitration organization to recover their litigation expenses and not to lose their fee and incur other expenses in the defense of a frivolous lawsuit. The terms "other reasonable expenses of litigation" are intended to include both actions at the trial-court level and on appeal. [emphasis added]

A word of caution. Attorney's fees of $4,000.00 were awarded to the arbitrator's counsel by the court. A query remains: Is the Claimant liable to the arbitrator for his time and extended fees to defend the matter? ■

Houston Putnam Lowry *is a member of Ford & Paulekas LLP and a fellow of the Chartered Institute of Arbitrators. He represented the arbitrator in this case.*

Roy L. De Barbieri *is a distinguished dispute resolution neutral and continues to perform his independent services as an arbitrator and mediator throughout Connecticut and across the country. He has distinguished himself as a fellow of the College of Commercial Arbitrators, where he also served as the chair of the Law Firm CLE Education Committee, and a director. He is a member of the CBA Dispute Resolution Section Executive Committee, and a past chair.*

NOTES

1. With apologies to Zero Mostel in the film of the virtually the same name, *A Funny Thing Happened on the Way to the Forum*; https://en.wikipedia.org/wiki/A_Funny_Thing_Happened_on_the_Way_to_the_Forum_(film)
2. Connecticut General Statutes §52-407nn.
3. Connecticut General Statutes §52-407aa, et seq, which applies to arbitration agreements executed after October 1, 2018.
4. Connecticut General Statutes §52-148a(a) and Practice Book §13-26.
5. While a privilege can be waived, competence cannot be waived.