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Arbitration

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Abstract

Since the enactment of the Florida Arbitration Code ("FAC") in 1957, the use of arbitration to resolve disputes has grown at a steady, if not breathtaking, pace in Florida.

KEYWORDS: code, arbitration, Florida

Arbitration

Robert M. Jarvis*

I. INTRODUCTION

Since the enactment of the Florida Arbitration Code ("FAC")¹ in 1957, the use of arbitration to resolve disputes has grown at a steady, if not breathtaking, pace in Florida.² As may be expected, many of the more perplexing issues concerning arbitration in the state have been long since resolved by the courts. Nevertheless, case law continues to develop as both the state and federal courts address new issues and reanalyze old problems. This survey discusses such developments during the period from October 1, 1989 to September 30, 1990.

For the most part, the opinions generated during the year under review were a predictable reprise of previous decisions. Thus, while the courts once again made it clear that they favor arbitration as a method of resolving disputes,³ they were not adverse to adopting positions that

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1. FLA. STAT. §§ 682.01-.22 (1989).

2. A useful history of the growth of arbitration in Florida is contained in Comment, *Seeking Its Place in the Sun: Florida's Emerging Role in International Commercial Arbitration*, 19 U. MIAMI INTER-AM. L. REV. 363, 367-70 (1987-88).

3. See, e.g., *Gibson v. The Florida Bar*, 906 F.2d 624, *reh'g denied*, 917 F.2d 570 (11th Cir. 1990) (bar association's decision to refer to arbitration all disputes involving the use of compulsory membership dues held proper); *United Paperworkers Int'l, Local #395 v. ITT Rayonier, Inc.*, 740 F. Supp. 833 (M.D. Fla. 1990) (although federal law contained six month statute of limitation, Florida's one year statute of limitation was held applicable where it would serve important policy of promoting arbitration to resolve labor disputes); *Feather Sound Country Club v. Barber*, 567 So. 2d 10 (Fla. 2d Dist. Ct. App. 1990) (courts must yield their jurisdiction when confronted with a valid arbitration agreement); *Mitchell v. School Bd. of Dade County*, 566 So. 2d 2 (Fla. 3d Dist. Ct. App. 1990) (plaintiffs' tort claims were cognizable, if at all, only in arbitration); *Thomson, Bohrer, Werth & Razoook v. Multi Restaurant Concepts*, 561 So. 2d 1192 (Fla. 3d Dist. Ct. App. 1990) (pleading mistake by counsel did not affect party's right to immediate review of trial court's decision denying motion to compel arbitration); *Air Conditioning Equip. v. Rogers*, 551 So. 2d 554 (Fla. 4th Dist. Ct. App. 1989) (trial court had no authority to remove dispute from arbitration and submit it to

weakened arbitration when they felt that larger principles were at stake.⁴ They insisted that valid arbitration agreements be enforced fully,⁵ yet were adamant that parties not be referred to arbitration unless solid evidence existed that they had signed an arbitration agreement.⁶ They demanded that the agreement clearly cover the specific controversy,⁷ and refused to order arbitration when they considered the

mediation).

4. *See, e.g., Harbuck v. Marsh Block & Co.*, 896 F.2d 1327 (11th Cir. 1990) (state court's decision as to appropriate forum for arbitration was not reviewable in federal court); *JDC (America) Corp. v. Amerifirst Florida Trust Co.*, 736 F. Supp. 1121 (S.D. Fla. 1990) (Federal Arbitration Act does not in itself confer subject matter jurisdiction on the federal courts); *Robert M. Swedroe, P.A. v. First Am. Inv. Corp.*, 565 So. 2d 349 (Fla. 1st Dist. Ct. App. 1990) (expert who testified at arbitration hearing was not entitled to a mechanic's lien for his services); *Allen v. Interstate Sec.*, 554 So. 2d 23 (Fla. 2d Dist. Ct. App. 1989) (once a party elects a forum for arbitration it may not switch to a different forum without the consent of the opposing party); *Anstis Ornstein Assocs. v. Palm Beach County*, 554 So. 2d 18 (Fla. 4th Dist. Ct. App. 1989) (although party had waited for months to raise statute of limitations defense, once the defense was made arbitration had to be stayed until court could rule on the issue).

5. *See, e.g., Prudential-Bache Sec. v. Goldin*, Fed. Sec. L. Rep. (CCH) ¶ 95,397 (S.D. Fla. June 22, 1990) (arbitration clause in securities contract that used the term "transactions" was meant to cover investors' total relationship with brokerage house and would not be read to cover only matters affecting trading in investors' account); *Fernandez v. Smith Commercial Group*, 560 So. 2d 1389 (Fla. 3d Dist. Ct. App. 1990) (justice required president of company to be permitted to invoke arbitration agreement even though agreement was actually between his company and another company); *deWindt v. Shearson Lehman Hutton, Inc.*, 40 Fla. Supp. 2d 125 (Fla. 19th Cir. Ct. 1990) (fact that arbitration agreement was entered into by predecessor company did not bar successor company from asserting its right to arbitrate dispute with employee).

6. *See, e.g., Birchtree Fin. Servs. v. Lance*, 561 So. 2d 8 (Fla. 2d Dist. Ct. App. 1990) (question of whether parties had entered into a valid arbitration agreement could only be decided by trial court after full evidentiary hearing); *Prudential-Bache Sec. v. Greenspoon & Marder, P.A.*, 551 So. 2d 584 (Fla. 4th Dist. Ct. App. 1989) (trial court may enjoin arbitration proceeding if it finds that the parties did not agree to arbitrate); *Spitz v. Prudential-Bache Sec.*, 549 So. 2d 777 (Fla. 4th Dist. Ct. App. 1989) (investors who claimed that they had been fraudulently induced to sign an arbitration agreement were entitled to a new trial when jury's verdict on the question was inconsistent and, as a result, incomprehensible).

7. *See, e.g., Kincaid Constr. Co. v. Worsham Underground Util. Constr.*, 566 So. 2d 600 (Fla. 5th Dist. Ct. App. 1990) (arbitration agreement in construction contract covered only disputes over price and did not include disputes arising from who was to furnish equipment); *Allstate Ins. Co. v. Banaszak*, 561 So. 2d 465 (Fla. 4th Dist. Ct. App. 1990) (arbitration agreement in insurance policy did not extend to question of whether tortfeasor, who was not a party to the policy, had been negligent); *McClure v. Painewebber, Inc.*, 549 So. 2d 1157 (Fla. 3d Dist. Ct. App. 1989) (arbitration agree-

dispute premature.⁸ Although the courts continued to insist on a high level of proof before finding that a party had waived its right to arbitration,⁹ they again made it clear that a bankruptcy filing trumps an arbitration agreement.¹⁰ And while they continued to defer to arbitrators on matters involving hearing procedure,¹¹ they refused to expand the types of relief arbitrators may afford disputants.¹² Finally, even as the courts again showed great willingness to confirm arbitration awards,¹³ they continued to be extremely cautious in enforcing the re-

ment in employment contract did not reach dispute involving separately negotiated promissory note).

8. See *Graham v. Friendly Ford, Inc.*, 552 So. 2d 1165 (Fla. 3d Dist. Ct. App. 1989) (indemnity claim involving landlord and tenant could not be sent to arbitration until after court had determined whether underlying lease was valid).

9. See, e.g., *Stone v. E.F. Hutton & Co.*, 898 F.2d 1542 (11th Cir. 1990) (party that engaged in discovery for almost two years before seeking arbitration waived its right to arbitration); *Hardy Contractors v. Homeland Property Owners Ass'n*, 558 So. 2d 543 (Fla. 4th Dist. Ct. App. 1990) (party's decision to seek discovery after expressly requesting that dispute be referred to arbitration warranted trial court's conclusion that party had waived its right to arbitration).

10. See, e.g., *In re Murray Indus.*, 114 Bankr. 749 (Bankr. M.D. Fla. 1990) (automatic bankruptcy stay would not be lifted to permit arbitration to go forward where claimant failed to demonstrate that exceptional circumstance justified such action); *In re Bicoastal Corp.*, 111 Bankr. 999 (Bankr. M.D. Fla. 1990) (automatic bankruptcy stay would be lifted so that contract price adjustment dispute could be submitted to arbitration because matter required special expertise possessed by the arbitrator and would not unduly interfere with the handling of the estate).

11. See *Boudreau v. L.F. Rothschild & Co.*, No. 89-250-CIV-ORL-18 (M.D. Fla. Feb. 23, 1990) (WESTLAW, 1990 WL 81861) (whether arbitration was to be held in New York City or Orlando was question for the arbitrator). *But see Latin Am. Property & Casualty Ins. Co. v. Pastor*, 561 So. 2d 1302 (Fla. 3d Dist. Ct. App. 1990) (trial court was justified in instructing arbitrators to specify nature of insured's damages because of insurer's previous actions).

12. See *Complete Interiors, Inc. v. Behan*, 558 So. 2d 48 (Fla. 5th Dist. Ct. App.), *rev. denied*, 570 So. 2d 1303 (Fla. 1990) (arbitrator exceeded his power by awarding punitive damages where arbitration agreement did not expressly provide for such damages).

13. See *Carpet Concepts v. Architectural Concepts*, 559 So. 2d 303 (Fla. 2d Dist. Ct. App. 1990) (arbitration award must be confirmed except where statutory grounds for vacating or modifying the award are shown to exist). *But see Ainsworth v. Skurnick*, 909 F.2d 456 (11th Cir. 1990) (trial court may award damages denied by arbitrator where party is entitled to such damages as a matter of law); *Cone Corp. v. State*, 556 So. 2d 530 (Fla. 2d Dist. Ct. App. 1990) (decision by State Arbitration Board in dispute arising from the building of a state road was not consistent with the plain meaning of the relevant regulation).

sulting judgments.¹⁴

The year, however, did not represent merely a retread of previously travelled terrain. Rather, at least one case, *Fewox v. McMerit Construction Co.*,¹⁵ involving the often visited issue of attorneys' fees, proved that sometimes the trip is more interesting than the destination. To fully appreciate the decision, a brief review of the landscape is in order.

II. BACKGROUND

Although arbitrators in Florida enjoy substantial discretion when it comes to making awards, they are prohibited from granting attorneys' fees. Instead, the prevailing party in an arbitration may recover its attorneys' fees only by making a post-award motion in circuit court. This state of affairs is the result of section 682.11 of the FAC, which reads as follows: "Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpire's expenses and fees, together with other expenses, *not including counsel fees*, incurred in the conduct of the arbitration, shall be paid as provided in the award."¹⁶

Over the years, the bifurcation mandated by the FAC, while unwieldy, provoked little comment — that is, until 1988, when the Second District Court of Appeal dropped an unexpected bombshell in *Glen Johnson, Inc. v. L.M. Howdeshell, Inc.*¹⁷

The facts of the case were simple. Glen Johnson, Inc. ("Johnson"), a contractor on a construction project, had entered into a subcontract with L.M. Howdeshell, Inc. ("Howdeshell"). When a dispute arose between the parties, Howdeshell filed a complaint against Johnson and The American Insurance Company ("American"), the surety on Johnson's contractor's bond. The complaint sought damages as well as attorneys' fees, as provided in the surety agreement. Upon being served with the complaint, Johnson and American moved to have the dispute

14. See, e.g., *Ocala Breeders' Sales Co. v. Brunetti*, 567 So. 2d 490 (Fla. 3d Dist. Ct. App. 1990) (arbitration award would not be deemed *res judicata* where party seeking to invoke the award was dropped "from the style of the case"); *Perez v. Great Republic Ins. Co.*, 559 So. 2d 1266 (Fla. 3d Dist. Ct. App. 1990) (insured who received arbitration award against its insurer would not be permitted to collect on the award until after suit against the third party tortfeasor was concluded).

15. 556 So. 2d 419 (Fla. 2d Dist. Ct. App. 1989).

16. FLA. STAT. § 682.11 (1989) (emphasis added).

17. 520 So. 2d 297 (Fla. 2d Dist. Ct. App. 1988).

submitted to arbitration.

The arbitrator to whom the case was referred dismissed Howdeshell's claim without prejudice on the ground that it could not be decided until after Johnson was paid by the construction project's owner. In response, Howdeshell filed a motion with the circuit court in which it asked the court to either modify or vacate the award.

The motion was heard by Judge Crockett Farnell, who agreed with Howdeshell. Finding that all of the conditions precedent to payment had been satisfied,¹⁸ he entered a final judgment for Howdeshell in the amount of \$20,762.60. Of this sum, \$9,717.50 represented attorneys' fees incurred by Howdeshell in conducting its case before the arbitrator.

Johnson and American appealed Judge Farnell's decision to the Second District Court of Appeal. There, in a terse opinion authored by Judge Edward F. Threadgill, Jr., with whom joined Chief Judge Paul W. Danahy, Jr., and Judge Jack R. Schoonover, Sr., the court agreed with Judge Farnell that Howdeshell was entitled to damages, but ruled that it could not recover its attorneys' fees.¹⁹ The panel explained its decision by saying: "Attorney's fees for arbitration proceedings are expressly excluded by section 682.11, Florida Statutes (1985)."²⁰ Despite the remarkable nature of its conclusion, no authority was offered to support this view, nor was any explanation provided as to why the court was reversing summarily thirty years of precedent.

Ten months later, another panel of the Second District Court of Appeal was faced with the same issue in *St. Paul Fire & Marine Insurance Co. v. Sample*.²¹ Judith and Robert H. Sample had taken out an automobile insurance policy with the St. Paul Fire and Marine Insurance Company ("St. Paul"). Subsequently, Mrs. Sample was involved in a car accident with an uninsured motorist and filed a claim with St. Paul. When St. Paul informed the Samples that their policy did not include uninsured motorist coverage, the Samples sought and received an order directing St. Paul to submit the issue of coverage to arbitration.

The arbitrators agreed with the Samples and awarded them \$19,230.77. The Samples then proceeded to court to recover their attorneys' fees and were awarded an additional \$30,000 by Judge Wil-

18. *Id.* at 298.

19. *Id.*

20. *Id.*

21. 533 So. 2d 1196 (Fla. 2d Dist. Ct. App. 1988).

liam L. Walker. St. Paul appealed.

On appeal, the Second District Court of Appeal, in an opinion authored by Judge Vincent T. Hall and joined in by Acting Chief Judge James E. Lehan and Judge Jerry R. Parker, reversed Judge Walker. Citing *Glen Johnson*, the panel issued an opinion as cryptic as its predecessor's:

St. Paul's first contention in this appeal is that the trial judge erred in including the hours the Samples' attorney spent on the arbitration proceeding in calculating the attorney's fee award because attorney's fees are not normally awarded for time spent in connection with arbitration proceedings. This contention is correct.²²

III. *Fewox v. McMerit Construction Co.*

Although the Second District took it as self-evident in both *Glen Johnson* and *Sample* that section 682.11 prohibited the recovery of attorneys' fees, in the months that followed no other appellate court in Florida adopted *Glen Johnson*.²³ Thus, parties in the First, Third, Fourth, and Fifth Districts continued to be able to recover their attorneys' fees, while parties in the Second District found themselves left out in the cold. And so matters stood in December 1989 when the Second District decided *Fewox*.

Robert D. Fewox and the Adalia Condominium Partnership of Florida ("Adalia") were the owners of a condominium built by the McMerit Construction Company ("McMerit"), the predecessor of the McCarthy Construction Company ("McCarthy"). After a controversy

22. *Id.* at 1197.

23. Indeed, in *Zac Smith & Co. v. Moonspinner Condominium Ass'n*, 534 So. 2d 739 (Fla. 1st Dist. Ct. App. 1988), the First District Court of Appeal explicitly rejected *Glen Johnson* by writing:

Appellants interpret this provision [FLA. STAT. § 682.11] to exclude the award of attorneys fees in arbitration proceedings, relying on . . . *Glen Johnson, Inc. v. L.M. Howdeshell, Inc.*, 520 So. 2d 297 (Fla. 2d DCA 1988).

. . . .
We accept appellee's interpretation of section 682.11 as the more logical [position]. The statute does not proscribe attorney fees in arbitration proceedings, but merely states that the arbitration panel is authorized to award all fees and costs *except* attorney fees.

Id. at 742 (footnote omitted) (emphasis in original).

arose between the parties, Fewox and Adalia sued McMerit, McCarthy, and the Federal Insurance Company ("FIC"), which had issued a performance bond. The defendants successfully moved for an order referring the case to arbitration.

The dispute was heard by the American Arbitration Association and an award ultimately was issued against McCarthy for \$185,888.35. Upon receiving the award, the claimants filed a confirmation motion and moved for attorneys' fees from FIC as provided in the performance bond.

While the motions were pending, McCarthy voluntarily satisfied the award.²⁴ Judge Morton J. Hanlon subsequently denied the motion for attorneys' fees on the basis of *Glen Johnson*. Fewox and Adalia appealed to the Second District Court of Appeal.

In a lengthy *en banc* opinion, the Second District, speaking through Judge Herboth S. Ryder, reversed the trial court and admitted the obvious: *Glen Johnson* and *Sample* had gotten the law wrong. Judge Ryder began the court's *mea culpa* by writing:

Upon a close examination of section 682.11 and the relevant case law, we conclude that *Glen Johnson* and *Sample* were wrongly decided insofar as they hold that the statute prohibits an award of attorney's fees for services rendered by the attorney during arbitration proceedings. The "not including counsel fees" clause in section 682.11 merely indicates that an arbitrator may not include attorney's fees in his award of expenses and fees incurred during arbitration proceedings. . . . The legislature apparently eliminated attorney's fees from the subject matter jurisdiction of arbitration because arbitrators are generally businessmen chosen for their expertise in the particular subject matter of the suit and have no expertise in determining what is a reasonable attorney's fee. . . . Thus, the intent of the statute is merely to prohibit arbitrators

24. Although McCarthy issued a check for the full amount of the arbitrator's award, Fewox and Adalia did not receive the money:

McCarthy[s] . . . check . . . [was made] payable to both appellants and the Federal Savings & Loan Insurance Corporation (FSLIC), which had claimed an interest in the proceeds of the award. McCarthy and FIC then filed a motion to interplead the funds into the registry of the court. The trial court, pursuant to a written stipulation between appellants and FSLIC, ordered that the funds be deposited into an interest-bearing account pending a determination of the claims of appellants and FSLIC thereto.

Fewox, 556 So. 2d at 420.

from awarding attorney's fees.²⁵

Judge Ryder sought to put the best face possible on *Glen Johnson* and *Sample*:

Upon examining *Glen Johnson* and *Sample*, we are of the opinion that our erroneous conclusion in those cases regarding the effect of section 682.11 may very well have stemmed from our misinterpretation of our previous decision in *Beach Resorts International [v. Clarmac Marine Construction]*, 339 So. 2d 689 (Fla. 2d Dist. Ct. App. 1976)], although *Glen Johnson* did not cite *Beach Resorts International*. Other courts have also misconstrued *Beach Resorts International* to hold that section 682.11 prohibits an award of attorney's fees for services rendered during arbitration *Beach Resorts International*, however, merely holds that section 682.11 prohibits an arbitrator from awarding attorney's fees associated with arbitration and that such fees are awardable by the trial court if there is statutory authorization or contractual agreement between the parties therefor. In *Beach Resorts International*, there was neither a contractual agreement nor an applicable statute authorizing an award of attorney's fees.²⁶

Seemingly aware that even with the discussion of *Beach Resorts International* the mistake made in *Glen Johnson* and *Sample* was inexplicable, Judge Ryder made one final attempt to exonerate himself and his colleagues. Claiming that a conflict existed among the circuits as to the holding in *Beach Resorts International*, he certified the following question to the Florida Supreme Court as one involving inter-district conflict and being of great public importance: "Does section 682.11, Florida Statutes (1987), prohibit an award of attorney's fees incurred during arbitration proceedings, or does it merely prohibit the arbitrator from making such an award?"²⁷

IV. POST MORTEM

In January 1990, Judge John M. Scheb, another member of the Second District Court of Appeal, certified the same question in *Park Shore Development Co. v. Higley South, Inc.*²⁸ One month later, how-

25. *Id.* at 421-22.

26. *Id.* at 422.

27. *Id.* at 423.

28. 556 So. 2d 439 (Fla. 2d Dist. Ct. App. 1990).

ever, Judge Ryder threw in the towel.

In *Raymond James & Assocs., Inc. v. Wieneke*,²⁹ Judge Ryder, now elevated to Acting Chief Judge, admitted that there was no inter-district conflict, the certified question was not of great public importance, and no guidance was required from the Supreme Court. As his final word on the subject, he wrote: "The Florida Arbitration Code specifically takes attorney's fees out of the broad grant of authority it gives to arbitrators Consequently, arbitrators cannot award attorney fees. When the case is taken to the trial judge for confirmation, however, the judge may then assess fees. *Fewox*."³⁰

V. CONCLUSION

Although *Fewox* is likely to be remembered chiefly as a study in judicial embarrassment, it contains an important message that should not be lost: the Florida Legislature's decision to bar arbitrators from including attorneys' fees in their awards is fundamentally unsound. Not only does it undermine confidence in the arbitral process by suggesting that arbitrators cannot be trusted to know the difference between what is reasonable and what is unreasonable, it creates needless work for the courts. Moreover, it prohibits parties from receiving the full benefit of their decision to arbitrate because they still must go to court to recover their attorneys' fees.

Perhaps the best reason to scrap the ban, however, is the need for intellectual honesty. In 1986, the Legislature enacted the Florida International Arbitration Act ("FIAA")³¹ to govern international, as opposed to domestic, arbitrations.³² Unlike the FAC, the FIAA specifically authorizes arbitrators to decide whether any party is entitled to attorneys' fees.³³ Obviously, there is no basis for distinguishing between those who arbitrate domestic disputes from those who arbitrate dis-

29. 556 So. 2d 800 (Fla. 2d Dist. Ct. App. 1990).

30. *Id.* at 801.

31. FLA. STAT. §§ 684.01-35 (1989).

32. For a detailed examination of the FIAA, see Jarvis, *International Arbitration, ALTERNATE DISPUTE RESOLUTION IN FLA.* §§ 7.1-57, at 7-1 to 7-26 (1989).

33. The FIAA states: "The arbitral tribunal may award reasonable fees and expenses actually incurred, including, *without limitation*, fees and expenses of legal counsel, to any party to the arbitration and shall allocate the costs of the arbitration among the parties as it determines appropriate." FLA. STAT. § 684.19(4) (emphasis added).

putes of an international character; if international arbitrators can be trusted to determine what is a reasonable fee, so can domestic arbitrators.