ADR Insight: Attorneys' Fees Must Be Addressed in New York State-Governed Arbitration Provisions

I. INTRODUCTION

As the business and commercial capital of the world, New York State is a frequent venue for arbitrations, and New York State law is often chosen to govern disputes. Although New York State courts have long followed the "American Rule," which prohibits a prevailing party in litigation from recovering its attorneys' fees, recent State decisional law emphasizes that unless such a remedy is explicitly excluded from the arbitrator's power in an agreement to arbitrate, the arbitrator may retain the authority to award attorneys' fees.

II. RECOVERY OF ATTORNEYS' FEES IN ARBITRATION IN NEW YORK STATE

Generally, under New York State law, arbitrators are not permitted to award attorneys' fees in arbitration.[1] New York State courts recognize three exceptions to this rule: "(1) where a statute provides for such an award, (2) where it was authorized by an express provision in the agreement, or (3) where it is 'unmistakably clear' that both parties intended such an award."[2] While the first two exceptions are self-explanatory, the third exception is not so simple, especially given that New York State courts have defined "unmistakably clear intent" broadly in recent years.

For example, when both parties include requests for attorneys' fees in their pleadings, in the absence of a contractual provision expressly precluding such recovery, New York State courts have found these requests to constitute the parties' "unmistakably clear intent" that the arbitrator may award fees. A recent decision from a New York State intermediate appellate court affirmed an arbitrator's award of attorneys' fees because "mutual demands for counsel fees in an arbitration proceeding constitute, in effect, an agreement to submit the issue [of attorneys' fees] to arbitration, with the resultant award being valid and enforceable."[3]

Relatedly, a party can satisfy the "unmistakably clear" standard—perhaps inadvertently—by designating a specific Alternative Dispute Resolution (ADR) service in the operative arbitration clause, when "the [service's] rules themselves authorize [the arbitrator to award] fees."[4] Thus, when a contractual provision mandates filing a dispute with a particular ADR service (*e.g.*, American Arbitration Association (AAA), International Institute for Conflict Prevention & Resolution (CPR), or JAMS), and the rules of that service permit the arbitrator to award attorneys' fees, New York State courts have held that the parties have implicitly consented to the rules of that forum, which may include the arbitrator's power to award legal fees.[5] Relying on this reasoning, a New York State intermediate appellate court confirmed an arbitrator's fee award of $76,195 because the parties' arbitration clause incorporated AAA rules, which "authorized an award of attorneys' fees where … all parties have requested such an award," and the parties each included requests to recover attorneys' fees in their pleadings.[6]

III. TAKEAWAY

When drafting or evaluating an arbitration clause, parties should strongly consider whether to include language that explicitly excludes an arbitrator's ability to award attorneys' fees, which could become a substantial amount over the course of an arbitration. Likewise, when participating in an arbitration, parties must strongly consider whether to include demands for legal fees in their pleadings, as a boilerplate fee request can imply "unmistakable intent" that an arbitrator has the ability to award attorneys' fees and, thus, open the door for significant fee-shifting down the line.

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[1] CPLR 7513.
[2] *Steyn v. CRTV, LLC*, 175 A.D.3d 1, 7–8 (1st Dep't 2019) (citation omitted).
[3] *R.F. Lafferty & Co. v. Winter*, 161 A.D.3d 535, 536 (1st Dep't 2018) (internal quotations and citation omitted).
[4] *Steyn*, 175 A.D.3d at 8-9.
[5] The relevant rules of AAA, CPR and JAMS all allow a prevailing party to recover its attorneys' fees, subject to an agreement to the contrary.
[6] *Warner Bros. Records v. PPX Enterprises, Inc.*, 7 A.D.3d 330, 330–31 (1st Dep't 2004).