

# *The Arbitration Newsletter*

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(John Allen Chalk, Sr., Editor)

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*The Arbitration Newsletter* is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.<sup>1</sup>  
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## HEAR IT ALL!

### **Parker v. Interactive Brokers LLC, 2017 Tex. App. LEXIS 8023 (Tex. App. – Houston [First Dist.] August 22, 2017, no pet.)**

The Houston (First District) Court of Appeals issued a Memorandum Opinion affirming the trial court’s vacatur of a FINRA arbitration panel award pursuant to the Federal Arbitration Act.<sup>2</sup> The Panel heard claims by the beneficiaries of a testamentary trust against a brokerage firm for the loss of approximately \$726,000.00 of \$800,000.00 in the trust. The beneficiaries sued the trustee of the trust in a Travis County Probate Court but filed their claims against the brokerage firm in a FINRA administered arbitration. The brokerage firm defended the claims by asserting the terms of its investment agreement with the trustee of the trust who opened a “self-directed” brokerage account that gave the brokerage firm no “discretionary trading authority” and required no investment advice of the firm.<sup>3</sup> The testamentary trust required the trustee, a friend of the deceased father of the Claimant beneficiaries, to make “permanent investments” that would produce “probable income” with “probable safety.”<sup>4</sup> Instead the trustee opened the “self-directed” brokerage account and engaged in highly speculative “margin trading” and other “high-risk investments.”<sup>5</sup>

On the last day of the four-day arbitration final hearing, after the evidence had closed, the Claimants’ lawyer announced to the Panel that the former trustee (now replaced) had told the probate court that the former trustee intended to file bankruptcy and that would stay the claims against the trustee currently pending in the probate court.<sup>6</sup> The same lawyer for the Claimants also

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<sup>1</sup> Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.

<sup>2</sup>2017 Tex. App. LEXIS 8023, \*20 (9 U.S.C. §1 *et seq.*).

<sup>3</sup>2017 Tex. App. LEXIS 8023, \*4.

<sup>4</sup>2017 Tex. App. LEXIS 8023, \*2.

<sup>5</sup>2017 Tex. App. LEXIS 8023, \*2.

<sup>6</sup>2017 Tex. App. LEXIS 8023, \*8.

stated in closing argument to the Panel that the former trustee “just declared bankruptcy.”<sup>7</sup> Within a few days after the closing arguments in the arbitration, the Respondent learned that not only had the former trustee not filed bankruptcy, as claimed in the arbitration by Claimants’ lawyer, but had settled with the arbitration Claimants the same day of the false report to the arbitrator Panel.<sup>8</sup> Respondent’s attorney requested that the Panel accept as part of the arbitration final hearing record a report that attached a copy of the probate court record showing the probate litigation had not been stayed. The Panel refused to accept this post-final hearing filing from the Respondent.<sup>9</sup> The Panel later awarded the Claimants against the brokerage firm \$725,770 in damages and \$483,853 in attorney’s fees. The award also recited the Panel’s denial of Respondent’s post-hearing submission describing the subject matter of the post-submission.<sup>10</sup> The Chair of the Panel dissented because of the Panel’s refusal to accept Respondent’s post-submission.<sup>11</sup>

The Respondent moved for vacatur based on 9 U.S.C. §10(a)(3): “where the arbitrators were guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy.” Respondent also requested vacatur based on 9 U.S.C. §10(a)(4): “where the arbitrator exceeded their powers” and called the arbitration hearing “fundamentally” unfair because of the Panel’s refusal to allow Respondent to correct the record regarding the false report of the former trustee’s bankruptcy.<sup>12</sup> The trial court commented that 9 U.S.C. §10(a)(1): “where the award was procured by ... fraud” possibly also applied but the Respondent chose the Panel’s refusal to hear evidence as the basis for the vacatur request.<sup>13</sup> The Harris County trial court granted Respondent’s motion to vacate and denied Claimants’ motion to confirm without stating the basis for its vacatur decision.<sup>14</sup>

FINRA Rule 12609 provides that the Panel has the discretion to “reopen the record on its own initiative or upon motion of any party at any time before the award is rendered, unless prohibited by applicable law.”<sup>15</sup> The comments by the Chair of the Panel during the final hearing and closing arguments about the trustee’s alleged bankruptcy indicated to the trial court and the court of appeals that the Panel “*did* plan to consider it in rendering its award.”<sup>16</sup> Approximately one month after Respondent’s post-hearing submission the Panel issued its award and “expressly stated that it did ‘consider[] and decide[]’ the issue of [the trustee’s bankruptcy].”<sup>17</sup> Although Claimants had argued that the trustee’s bankruptcy was irrelevant and immaterial to the arbitration claims, the express consideration of the bankruptcy by the Panel as confirmed in the award implicated 9 U.S.C. §10(a)(3) and required the Panel to accept Respondent’s post-submission on the bankruptcy status.<sup>18</sup>

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<sup>7</sup>2017 Tex. App. LEXIS 8023, \*9.

<sup>8</sup>2017 Tex. App. LEXIS 8023, \*16.

<sup>9</sup>2017 Tex. App. LEXIS 8023, \*11.

<sup>10</sup>2017 Tex. App. LEXIS 8023, \*11.

<sup>11</sup>2017 Tex. App. LEXIS 8023, \*11-12.

<sup>12</sup>2017 Tex. App. LEXIS 8023, \*13.

<sup>13</sup>2017 Tex. App. LEXIS 8023, \*18.

<sup>14</sup>2017 Tex. App. LEXIS 8023, \*18 and \*22 fn9.

<sup>15</sup>2017 Tex. App. LEXIS 8023, \*23.

<sup>16</sup>2017 Tex. App. LEXIS 8023, \*24 fn11.

<sup>17</sup>2017 Tex. App. LEXIS 8023, \*26.

<sup>18</sup>2017 Tex. App. LEXIS 8023, \*27.

The Court of Appeals found that the Respondent “did not receive a full and fair hearing as a result of the panel’s denial of its request to present about the assertion of the [Claimants’] counsel that [the trustee] had filed for bankruptcy.” This denial established the right to vacatur based on 9 U.S.C. §10(a)(3).<sup>19</sup>

### OBSERVATIONS

1. Fundamental fairness is at the heart of all four vacatur provisions in 9 U.S.C. §10(a).<sup>20</sup>
2. Fundamental fairness is at the heart of 9 U.S.C. §10(a)(3).<sup>21</sup>
3. All arbitration parties must be afforded a level playing field by the arbitrator.
4. The arbitrator has extensive powers to fashion all kinds of remedies and other measures during the final hearing to assure **on the record** that all parties have been treated fairly.<sup>22</sup>
5. Casual remarks by arbitrators during the final hearing can have unintended consequences.
6. Unnecessary remarks by arbitrators in awards may open the door for post-award vacatur.
7. Arbitrators must stay alert and disciplined throughout the arbitration process but especially during the final hearing and in statements made in the award.

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<sup>19</sup>2017 Tex. App. LEXIS 8023, \*30.

<sup>20</sup>2017 Tex. App. LEXIS 8023, \*29-30; citing *Gulf Coast Industrial Workers Union v. Exxon Co., USA*, 70 F.3d 847, 848 (5<sup>th</sup> Cir. 1995).

<sup>21</sup>2017 Tex. App. LEXIS 8023, \*22-23.

<sup>22</sup>2017 Tex. App. LEXIS 8023, \*22 (“broad discretion to make evidentiary decisions” and “not bound by the formal rules of procedure and evidence”).