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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.¹

Arbitrator's Inherent Power to Sanction²

In *Hamstein Cumberland Music Group v. Estate of Williams*, a music publisher, Hamstein Cumberland Music Group ("Hamstein"), initiated arbitration proceedings after the songwriter, Jerry Lynn Williams ("Williams"), allegedly breached the royalties clause in the settlement agreement³ Hamstein had with Williams.⁴ During arbitration, Hamstein moved for sanctions against Williams for failure to respond to multiple written requests for information and documents.⁵ "In response, Williams cross-moved for sanctions against Hamstein on precisely the same basis."⁶ The arbitrator agreed with Hamstein and awarded Hamstein \$500,000 in sanctions against Williams for consistently and without justification failing to respond to ordered discovery.⁷ The arbitrator further warned Williams that "if he failed to comply with the arbitrator's discovery orders, Williams would not be permitted to present evidence that was not properly disclosed during discovery"⁸

Williams never responded to the arbitrator's discovery orders. At the final hearing, Williams was only allowed to cross-examine Hamstein's expert witness and present the testimony of his own expert. Williams was barred from introducing evidence of the royalties he

¹ 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.

² Special thanks to Schyler P. Simmons, Third-year Student, Texas A&M School of Law, for her research and drafting assistance in this *Newsletter*.

³ The settlement agreement between Hamstein and Williams stated that any royalties Williams received after the Settlement effective date for songs that Hamstein previously administered would be paid to Hamstein. *Hamstein Cumberland Music Group v. Estate of Williams*, 2013 WL 3227536 *1 (5th Cir. May, 10, 2013).

⁴ *Id.* at *3.

⁵ Hamstein sent interrogatories and requested documents from Williams claiming that those documents would show royalties that Williams had received following the Settlement's effective date that should have been paid to Hamstein. *Id.* at *2.

⁶ *Id.*

⁷ *Id.*

⁸ "The arbitrator ordered Williams to respond to all interrogatories by January 15, 2005 and to produce all responsive document by January 22, 2005 and warned: 'if Williams fails to provide all discovery responses ordered herein, Hamstein may present evidence of estimated royalties on or before February 4, 2005 at 9:00 a.m. before the arbitrator...and Williams may not present evidence controverting such estimate.'" *Id.*

had in fact received because of his failure to comply with the arbitrator's discovery orders.⁹ Subsequently, the arbitrator issued an award in favor of Hamstein in the amount of \$1,149,140.¹⁰ The district court for the Western District of Texas *sua sponte* reduced the award and entered final judgment in favor of Hamstein in the amount of \$564,162.51 because the settlement agreement did not authorize sanctions.¹¹ The district court concluded that the arbitrator had no authority to award sanctions.¹²

On appeal, Williams argued that the arbitrator was not empowered to issue sanctions and therefore exceeded his authority under FAA § 10(a)(4).¹³ The Fifth Circuit disagreed with Williams and held that the arbitrator did not exceed his authority under the FAA by imposing sanctions for Williams's failure to comply with discovery.¹⁴ The Fifth Circuit reasoned that "arbitrators enjoy inherent authority to police the arbitration process and fashion appropriate remedies, including with respect to conducting discovery and sanctioning failures to abide by ordered disclosures."¹⁵

Furthermore, the Fifth Circuit held that the scope of an arbitrator's authority is not limited to the arbitration agreement. Instead, "the arbitrator's authority is a function of *both* the arbitration agreement" and the parties' additional submissions to the arbitrator asking him to decide an issue.¹⁶ Thus, "if the parties are permitted to modify the scope of their contractual agreement by submitting additional issues to the arbitrator, then surely the parties may, jointly, empower the arbitrator to issue certain sanctions."¹⁷

Here, Hamstein and Williams both decided to move for sanctions against one another. As a result, the Fifth Circuit reasoned that "even assuming the arbitrator lacked the authority to issue sanctions based solely on the [settlement agreement] and his inherent authority to police the arbitration process, the parties' decision to move for sanctions against one another . . . revealed that both parties sought to confer that power on the arbitrator."¹⁸

The Fifth Circuit concluded that the district court was required to confirm the arbitrator's award absent recourse to one of the statutory grounds for modification or vacatur under FAA §§ 10 and 11. The Fifth Circuit held that the arbitrator did not exceed his authority in sanctioning Williams for noncompliance with his discovery obligations because both parties moved for

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *3.

¹² *Id.*

¹³ *Id.* at *4; *See also* "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

¹⁴ 2013 WL 3227536 at *4.

¹⁵ *Id.* at *4. (citing *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1023 n. 8 (5th Cir. 1990)).

¹⁶ *Id.* at *4. (citing *Executone Info. Sys. Inc. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union*, 611 F.2d 580, 583–84 (5th Cir. 1980)).

¹⁷ *Id.* at *4.

¹⁸ *Id.* at *4.

sanctions against one another. Thus, the Fifth Circuit vacated the district court's judgment and remanded the case instructing the district court to confirm the award in its entirety.

Observations

1. The Second Circuit Court of Appeals has consistently upheld an arbitrator's discretion to order sanctions where the parties have agreed to a broad arbitration clause. *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life. Co.*, 564 F.3d 81, 86 (2d Cir. 2009).
2. An arbitrator's "inherent authority to police the arbitration process" should be used carefully.¹⁹
3. The parties' separate sanctions requests to the arbitrator gave the arbitrator express authority to grant sanctions.
4. The parties' separate sanctions requests made inapplicable the statutory vacatur ground provided at 9 U.S.C. § 10(a)(4) ("... exceeded ... power ...").
5. Parties in arbitration should be careful what they submit to the arbitrator for action.
6. The parties' submissions can broaden the powers given to the arbitrator in the arbitration clause.

¹⁹ 2013 WL 3227536 at *4.