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11th Circ. Defers To Arbitrator On Venue For Real Estate Row

By **Caroline Simson**

Law360, New York (July 18, 2017, 4:56 PM EDT) -- The Eleventh Circuit refused Monday to disturb a lower court's confirmation of an international arbitral award favoring a U.S. developer following a dispute with an Israeli real estate company, concluding questions regarding the arbitral venue were properly left to the arbitrator.

The Israeli company, Bamberger Rosenheim Ltd. — referred to throughout the case as Profimex — had argued that a Georgia federal judge should never have **confirmed** the International Chamber of Commerce award, after which Profimex was left on the hook for approximately \$454,000 to the Georgia-based real estate developer OA Development Inc. for defamation claims. The two companies had fallen into dispute over an agreement under which Profimex had exclusive rights to secure investors in Israel for OAD's real estate projects.

Profimex told the circuit court that U.S. District Judge Eleanor L. Ross should have vacated the award instead of only trimming \$58,000 from the amount owed by Profimex to OAD, claiming the arbitrator improperly applied the arbitral venue provision in the companies' contract by allowing OAD's counterclaim to proceed in the Georgia proceeding, instead of in Israel, and that he exceeded his powers.

But the three-judge Eleventh Circuit panel disagreed, concluding that disputes over the interpretation of forum selection clauses in arbitration agreements fall to arbitrators. That means a court's review of the arbitrator's venue determination is limited to whether the arbitrator interpreted the parties' contract, not whether he or she got its meaning right or wrong, they wrote.

"Here, in deciding whether venue for the counterclaim was proper in Atlanta, the arbitrator engaged with the language of the venue provision and determined that the 'dispute' was submitted by Profimex," the decision said. "Thus, 'the briefest glance at the [award] reveals that the arbitrator in this case arguably interpreted the [venue provision].'"

That means that the arbitrator's conclusion stands no matter what he or she decided, the judges wrote. They noted that their position is consistent with at least four other circuits.

In the underlying arbitration, the arbitrator had concluded that a defamation counterclaim submitted by OAD in the proceeding that had been initiated by Profimex was properly included in the Atlanta, Georgia, proceeding.

Profimex's argument was based on a provision in the parties' agreement that arbitration initiated by Profimex would take place in Atlanta, while arbitration initiated by OAD would take place in Tel Aviv, Israel. The Israeli company claimed that since the counterclaims had been initiated by OAD they belonged in Tel Aviv.

An attorney for OAD, Simon Bloom of Bloom Sugarman LLP, told Law360 on Tuesday that the Eleventh Circuit panel's decision is consistent with "the vast majority" of other circuit courts.

Hecht Walker PC partner Jon W. Jordan, who represented Profimex, meanwhile, said Tuesday that while he and his client respect the panel's decision, they are nevertheless considering further appeal

of the case.

"We believe that the unique legal significance of international forum selection agreements make them questions of substantive arbitrability and that too much deference to arbitrators on such issues may have a chilling effect on international parties' willingness to engage in arbitration agreements," Jordan said.

In the underlying arbitration, OAD's counterclaim accused Profimex of defaming it in statements to Israeli investors. Ultimately, the arbitrator found Profimex liable on that counterclaim.

The arbitrator awarded Profimex nearly \$500,000 for various fees owed under the contract, along with interest and attorneys' fees, but on the defamation counterclaims it awarded OAD \$950,000 — meaning that ultimately, Profimex was on the hook for approximately \$454,000. Last August, a Georgia federal judge confirmed most of the award to OAD except for around \$58,000 which could be subtracted and traced back to findings and damages related to three defamation claims that had been excluded by the arbitrator before the final hearing.

Circuit Judges Beverly B. Martin, Jill A. Pryor and Michael J. Melloy sat on the panel for the Eleventh Circuit.

OA Development is represented by Simon H. Bloom and Troy R. Covington of Bloom Sugarman LLP.

Profimex is represented by Jon W. Jordan and Greg K. Hecht of Hecht Walker PC.

The case is *Bamberger Rosenheim Ltd. v. OA Development Inc.*, case number 1:15-cv-04460, in the U.S. District Court for the Northern District of Georgia, Atlanta Division.

--Editing by Pamela Wilkinson.