Kluwer Arbitration Blog

Of Rats and Lions….or, The Importance of Agreements to Arbitrate

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Saturday, November 6th, 2021

John Steinbeck's classic novella, "Of Mice and Men," took a modern day form in the U.S. Supreme Court earlier this week – appropriately enough, for purposes of this blog, in an arbitration matter. As others have commented on social media, during oral argument in *Badgerow v. Walters, Case No. 20-1143 (U.S. S. Ct.)*, the Supreme Court considered the fairly technical question "[w]hether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the Federal Arbitration Act when the only basis for jurisdiction is that the underlying dispute involved a federal question." A transcript of the oral argument can be accessed here.

During oral argument before the Supreme Court, however, things moved from technical issues of federal subject matter jurisdiction to a more universal theme, with Justice Breyer asking:

> "JUSTICE BREYER: All right. But, if that's the main argument, what we're doing here normally is we are having, let's call him an arbitration rat. There is the guy who loves arbitration and then there is the rat who hates it, although he agreed to it, okay?
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> Now he will express his ratitude in many different ways. First, he will not want to go in in the first place. Then, if you make him go in in the first place, he's not going to want the other guy to get any witnesses. And then, if you go and get that, he's not going to want anybody to enforce this thing which he lost in the third place.
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> So, of course, these don't all just always follow. It depends on which of these provisions the guy can use and invoke in order to stop what he agreed to, which is the arbitration. …
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> CHIEF JUSTICE ROBERTS: So you coul\d call them an arbitration rat or a judicial lion, I suppose."

Now, "rats" do not enjoy a high reputation in U.S. (or many other) legal settings. One dictionary defines a rat as "a despicable, contemptible, and untrustworthy person," while another characterizes a rat as a "wretched-acting person." In many cultures, and contexts, rats are symbols of betrayal and bad faith, as in "ratting out" your colleagues, being one of the "rats deserting the sinking ship" or "smelling a rat."

Although partly tongue in cheek, Justice Breyer's characterization of "arbitration rats" with "ratitude" is in fact both perceptive and important. Provisions to arbitrate future disputes arising from commercial contracts are sui generis agreements: parties exchange mutual commitments to resolve any future disputes in an expeditious, efficient, expert and enforceable manner, with each committing itself to arbitrate in good faith and not to seek unilateral advantage in other, putatively more favorable fora. Arbitration agreements play a vital role in commercial contracts, by enabling trade and commerce to proceed in a reliable and predictable manner, with the parties comfortable that the rule of law is respected if or when a dispute arises in the future. This is particularly the case in international matters, where numerous possibilities exist for parties to shop for home court advantages, corrupt or unpredictable national courts, or similar fora. While there may be a variety of options available to parties aside from arbitration, in many ways arbitration is the superior fora, as discussed in some of my prior posts.

When parties resile from their agreements to arbitrate – whether by initiating litigation, by seeking to obstruct the arbitral process once it has begun or by refusing to comply with a tribunal's award – they often do take on rodent-like characteristics. In many cases, non-compliance with agreements to arbitrate bespeaks both untrustworthiness and an absence of good faith. "Guerilla tactics" are one description of such conduct, but Justice Breyer's rat metaphor is also instructive.

Chief Justice Roberts offered a counter-analogy, still in the Animal Farm, suggesting that those who violate arbitration agreements may instead only be "judicial lions." That comparison is seldom accurate, particularly in international matters: parties who resile from their promises to arbitrate seldom aim for genuine resolution of their dispute, in fact their conduct demonstrates an intent to take through self-help what an arbitral or other adjudicative process would not allow them to keep. That is particularly true in investor-state disputes, but also applies in many international commercial contexts.

More fundamentally, judicial lions have an obvious path to the courthouse. It's called a forum selection agreement, rather than an arbitration clause. Lions, tigers and others, who don't want to arbitrate, shouldn't agree to do so. The reason that Justice Breyer's rodent metaphor is accurate is not because only rats refuse to arbitrate; there is nothing wrong with declining to conclude an arbitration agreement. Rather, Justice Breyer's metaphor is instructive because agreeing to arbitrate, and then breaking that promise, inherently demonstrates the untrustworthiness and bad faith with which rats are commonly associated.

Nor should the rat's place in Chinese and other zodiacs lend any comfort to those who breach their arbitration agreements. The rat, of course, deserves its place far less than other animals in the Zodiac, especially the cat, and only obtained its position through betrayal and bad faith: in the race for places in the Zodiac. Indeed, "the hardworking Ox departed early and should [have been] the first one to reach. However, the Rat hid in the Ox's ear and jumped down when arriving, occupying the first place." That betrayal might have worked in ancient China, but it doesn't and shouldn't in today's arbitration landscape.

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