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# Case Over Hebrew Insults Prompts International Arbitration Challenge in Atlanta U.S. Court

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An Israeli company has asked a federal judge in Atlanta to declare that an arbitrator had no authority to levy hundreds of thousands of dollars in damages against it in response to claims of defamation made by a Norcross company.

The case stems from a sprawling dispute between Israel-based Profimex and Norcross-based OA Development (OAD). It started when Profimex claimed to an arbitrator in Kennesaw that OAD owed Profimex hundreds of thousands of dollars in fees from real estate deals. OAD responded with counterclaims that Profimex officials defamed OAD to investors in emails, some of which were written in Hebrew.

The arbitrator, Nisbet Kendrick III of Kennesaw's Kendrick Conflict Resolution, in December awarded Profimex $401,675 in unpaid fees, interest and attorney fees. But Kendrick also awarded OAD $950,000 on its counterclaims, leaving OAD ahead by about $550,000.

Profimex argues that OAD's claims should have been handled in Tel Aviv, Israel, because the arbitration clause in the companies' contract mandated that any dispute be arbitrated in the defendant company's chosen venue, Atlanta for claims against OAD and Tel Aviv for claims against Profimex.

Lawyers for OAD argue that Profimex's effort to have their claims set aside turns the federal court into an appellate forum for arbitration awards losing parties don't like. Allowing Profimex's case to go forward, OAD's lawyers said, threatens to undermine the very reasons that binding alternative dispute resolution exists.

Attorneys on each side argue that the contract's language and International Chamber of Commerce rules—which the contract specified should govern any disputes—support their contentions.

"The agreement that has the arbitration clause specifically provides that any claims against our client by OAD are to be arbitrated in Tel Aviv," said Jon Jordan of Stockbridge's Hecht Walker, who represents Profimex with firm partner Greg Hecht.

Jordan noted that there is little case law dealing with such a dispute, but he pointed to a 2010 decision out of the Ninth U.S. Circuit Court of Appeals. It held 2-1 that claims and counterclaims between a California company and one based in Belarus should have been adjudicated separately in each party's home venue.

The appellate court in *Polimaster Ltd. V. RAE Sys. Inc.* 623 F.3d 832, said Jordan, "said the arbitrator never should have considered the counterclaim, no matter how much more inconvenient it may be, even if there's redundancy, the parties' agreement is the parties' agreement."

But Simon Bloom, who represents OAD with firm colleague Troy Covington, said his opponents are simply trying to misuse the Federal Arbitration Act's provision that an arbitration award be confirmed, vacated or modified by a federal court.

JOHN DISNEY/DAILY REPORT

SIMON BLOOM

"They want to do away with the whole award; they're trying to manipulate the FAA confirmation process to create an appeal process," said Bloom. Profimex has detailed what it claims are errors in the arbitrator's award "in an effort to bootstrap their challenge to the merits of the award itself," he said.

"The rules say the final award is the final word," Bloom said. "If we're serious about persuading parties to pursue binding arbitration, there must be deference paid to the rules; otherwise it's a complete farce and waste of money and we shouldn't be telling

clients to include arbitration clauses in their contracts."

Both sides claim the issue is clear-cut. But Alston & Bird partner Randall Allen, who co-chairs the firm's International Arbitration and Dispute Resolution practice and reviewed some of the dispute's filings at the Daily Report's request, said the issue was not straightforward.

He said the Ninth Circuit case Profimex is relying on involved a different contractual agreement than that at issue in the local dispute.

Under arbitration rules, said Allen, "jurisdiction is a creature of contract, so the arbitrator has the authority to rule on issues that he has been given permission to rule on."

"One of the parties here is saying that, once the arbitration is launched, the tribunal has the power to arbitrate all of the issues between the parties surrounding this dispute. The other side says, 'No, he only has the power to rule on a dispute raised by the Israeli company.'"

"I don't think there's an abundantly clear answer," Allen said. In particular, he said, in 2012—two years after *Polimaster*—the ICC modified its rules so that claims involving the same parties and related issues are to be consolidated in one venue.

Thus, he said, even if OAD had done exactly what Profimex said it should have done, by filing its claims in Tel Aviv, there's a "reasonable probability that those claims would have been consolidated in the Atlanta venue," since that was where the first claims were filed.

Even so, he said, the issue of whether OAD should have filed its claims in Tel Aviv "is not a frivolous argument." A key question, he said, may be whether U.S. District Judge Eleanor Ross, to whom the case has been assigned, will agree that the Georgia company should have filed its claims in Israel and then asked the arbitrators to combine the claims, "or whether it was more appropriate, in a word, to skip all those bureaucratic steps and just consolidate them."

"The court will either, one, conclude that there was a violation of the rules by the arbitrator or, two, that this is an argument that's essentially form over function."

Allen added that the case raises issues that are becoming more common as home-venue agreements crop up in international contracts.

"It's fascinating, because you're increasingly seeing these kinds of clauses where, if you file a claim against me in my backyard, I file against you in yours," he said. "If you file counterclaims, there's a tendency to bring them forward at the same time, so this is a pattern that's likely to repeat itself."

## Sour Deals, Trash Talk

The dispute involves a 2008 agreement under which Profimex, a subsidiary of Israeli company Bamberger Rosenheim Ltd., would act as a "capital aggregator" to solicit investors to help bankroll real estate development projects for several projects that OAD found, developed and managed.

As detailed in case filings and in interviews with the lawyers, Profimex and OAD collaborated on eight projects, most involving office space developments. There was an overall agreement between the parties, and there would also be individual project-specific deals as to how each party would be paid. Most of the projects were successful and either sold or are still in business, but around 2012 "things really went sour," Bloom said. "The market went to hell; the deals with strong income-producing rent-rolls were able to survive. The ones that were more speculative were dying on the vine."

There was a dispute over Profimex's refusal to allow OAD to secure a line of credit on a College Park project; then in 2013, an office park in Alpharetta was sold, realizing a "very favorable return to investors."

Profimex contended it was due hundreds of thousands of dollars under a "disposition fee" and "promote fee" from the deal. In April 2014, Profimex demanded that its claims be arbitrated in Atlanta as stipulated by the parties' solicitation agreement. Two months later, OAD filed its answer and counterclaims for defamation involving five comments made by two Profimex principals in emails to investors.

The emailed comments accused OAD of fraud and breach of trust and included assertions that there were "crooks in Atlanta and crooks in Israel. Birds of a feather!!!"

As discovery proceeded, OAD's lawyers found dozens more instances of Profimex officials badmouthing OAD officials and accusing them of lying and hiding money, Bloom said. Many of the statements were in Hebrew and had to be translated, he added.

OAD ended up asking that at least 70 statements be included in its defamation claim. Over Profimex's objections, dozens of those statements were ultimately allowed to be added to complaint by the arbitrator.

On Dec. 1, Kendrick, the arbitrator, entered his final award granting Profimex $401,675, including $296,052 in principal, $34,674 in pre-award interest and $70,949 in attorney fees.

In ruling on OAD's counterclaims, Kendrick had disallowed many of the allegedly defamatory statements, but he determined that the remaining statements met the legal standard for defamation and assessed $500,000 in general damages, $200,000 in punitive damages and $250,000 in attorney fees.

On Dec. 23, Profimex filed its petition in federal court challenging the award. In addition to disputing Kendrick's authority to hear OAD's counterclaims, the petition to vacate or modify the award also disputed the arbitrator's decisions allowing in the additional statements he deemed defamatory, and said he had included some disqualified statements in his calculation of damages. It also said he miscalculated the amount of interest OAD owes Profimex.

Jordan, Profimex's lawyer, said Kendrick had improperly considered all of the allegedly defamatory statements as a group, instead of treating each as a separate factual issue.

"A defamation claim is created by the publication of the statement, and certain elements have to be satisfied," Jordan said. "By lumping everything into one omnibus claim, it's really difficult to analyze each claim separately."

Jordan said the same argument applied to the punitive damages award.

"You have to find that they were made to spite the other side. … Reading the award, there was no matching of that finding to each claim; just 'We're going to award you $500,000 for these statements,' done in an omnibus manner. We don't think that was proper."

Covington, representing OAD, said Kendrick's 55-page award painstakingly analyzed each statement he found defamatory.