Civil · Tentative Rulings

DEPARTMENT 58 LAW AND MOTION RULINGS

If oral argument is desired, kindly refer to CRC 324(a)(1).

Case Number: BC320763 **Hearing Date:** January 18, 2005 **Dept:** 58

CALENDAR: January 18, 2005 #5

COMPLAINT FILED: August 27, 2004

TRIAL DATE: Not set

MOTION TO STAY LITIGATION PENDING ARBITRATION:

MOVING PARTY: Defendant and Cross-complainant INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Attorney: Jeffrey A. LeVee, John Sasaki, Sean W. Jaquez, Jones Day

RESPONDING PARTY: Plaintiff and Cross-defendant VERISIGN, INC.

Attorney: Ronald Johnston, Laurence J. Hutt, Suzanne V. Wilson, James S. Blackburn, Arnold & Porter

TENTATIVE RULING :

The motion of defendant and cross-complainant Internet Corporation for Assigned Names and Numbers to stay litigation pending arbitration is denied.

ANALYSIS:

Cal. Civ. Proc. Code § 187 provides in part: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given."

"The power of a court to stay proceedings in circumstances is inherent at common law and is now vested in the superior courts of this state. A trial court has inherent power to exercise a reasonable control over all proceedings connected with the litigation before it, a power which should be exercised by the courts in order to insure the orderly administration of justice." Bailey v. Fosca Oil Co., Ltd., 216 Cal. App. 2d 813, 817 (5th Dist. 1963) (Citing § 187, the Court affirmed trial court's stay of proceedings on two causes of action pending determination of motion to furnish security on a third cause of action).

The parties have identified two issues for determination: (1) whether the provision for dispute resolution in the 2001 .net Registry Agreement provides for binding arbitration (in which case the court should stay this action because the arbitrators' findings and legal conclusions will have a preclusive effect on the same issues in this case); and (2) if the .net arbitration provision is binding, whether ICANN has waived its right to request a stay of this action pending the outcome of the arbitration.

Subsection 5.9 of the .net Registry Agreement provides in part: "Disputes arising under or in connection with this Agreement … shall be referred in the first instance to arbitration conducted as provided in this Subsection 5.9 pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. … Either party, if dissatisfied with the result of the arbitration, may challenge that result by bringing suit against the other party in a court located in Los Angeles, California, USA to enforce its rights under this Agreement."

Cal. Civ. Code § 1636 provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable." Section 1639 provides: "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible."

Section 1649 provides that if the language of a contract is "ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

The Court finds there is nothing ambiguous or uncertain about the wording of subsection 5.9. Therefore, interpretation is unnecessary, as the intent of the parties is clearly ascertainable from the words used.

The Rules of Arbitration of the International Chamber of Commerce, International Court of Arbitration are attached to the Pope declaration in opposition to the motion, Exhibit 10. Article 28, paragraph 5 of the Rules, page 27, states that "[e]very award shall be binding on the parties." Binding arbitration is inconsistent, however, with the language of Subsection 5.9 which permits a party dissatisfied with the results of the arbitration to "challenge that result by bringing suit … to enforce its rights under this Agreement" in court. The Court finds the clear intent of the parties was to permit a trial de novo.

To determine the intention of the parties, ICANN, in reply, has submitted a declaration from its negotiator, Louis Touton. Touton states that the original version of Subsection 5.9 did not have the language permitting a party dissatisfied with the arbitration to file suit (Touton declaration, 17, p. 7:14-17). VeriSign requested the language "to more explicitly reflect that results of arbitrations under the .net agreement would be subject to judicial scrutiny on the same terms that other arbitration awards are judicially reviewable." Touton argues that the change which VeriSign requested "reflected the legal reality that results of arbitration are, by statute, subject to some type of judicial review, thus addressing VeriSign's concern" (Touton declaration, 18, p. 8:12-13).

Touton's statement of VeriSign's intention is not consistent with the language added and deleted to Subsection 5.9.

The scope of judicial review of arbitration awards in California is provided in Cal. Civ. Proc. Code § 1285, et seq. Section 1285 provides in part (emphasis added):

"Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award." The grounds to vacate an arbitration award are provided in § 1286.2(a):

"[T]he court shall vacate the award if the court determines any of the following:

(1) The award was procured by corruption, fraud or other undue means.

(2) There was corruption in any of the arbitrators.

(3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.

(4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. ….”

Section 1286.8 provides grounds for correction of an arbitration award:

“[T]he court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that:

(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.”

“The California Arbitration Act, Cal. Civ. Proc. Code § 1280 et seq., clearly limits judicial review of private arbitration awards. … [T]hat limitation was intended by the Legislature.” Crowell v. Downey Community Hospital Foundation, 95 Cal. App. 4th 730, 737 (2d Dist. 2002).

In Crowell, the Court held that “parties cannot expand the jurisdiction of the court to review arbitration awards beyond that provided by statute.” Id. at 732. Dr. Crowell and the hospital entered into an agreement for Emergency Department services. The agreement provided for binding arbitration of disputes according to the provisions of the California Arbitration Act except that the arbitrator was required to prepare written findings of fact and conclusions of law.

The parties agreed that the decision of the arbitrator would be final and binding except that any party could petition a court which would have the authority “to vacate the arbitrator’s award, in whole or in part, on the basis that the award is not supported by substantial evidence or is based upon an error of law.” Id. at 733.

Dr. Crowell filed a declaratory relief action seeking a judicial determination that the arbitration agreement was valid and enforceable. The hospital demurred on the grounds that the arbitration agreement was void and unenforceable. The trial court sustained the demurrer without leave to amend, stating that “the parties agreed to do something that does not exist, conduct a Cal. Civ. Proc. Code § 1280 et seq. arbitration with a guaranteed right of judicial review of the merits, making the arbitration clause at issue unenforceable.” Id. at 734.

The Supreme Court has “expressed a strong concern that judicial intervention in the arbitral process be minimized to ensure that the benefits of arbitration were not lost. … The merits of the controversy between the parties are not subject to judicial review.” Id. at 736. “[T]he statutory bases for vacating and correcting arbitration awards are exclusive. … None of the grounds for vacating or correcting an award suggests that a court can review the merits of an award for errors of law or lack of adequate supporting evidence.” Id. at 737.

The present case is similar to Crowell. The scope of judicial review in Subsection 5.9 goes beyond that provided in §§ 1286.2 and 1286.6: the court is authorized to enforce the rights under the Agreement (not under the California Arbitration Act) of a party dissatisfied with the arbitration award. Moving party argues that the enforcement of “rights under the agreement” limits the parties to that review “usual for arbitrations” (Reply, P.1, ll. 9-10). If that indeed was the intent, subsection 5.9 could easily have so stated, or better yet, words to the effect that review of the award would be governed by California law.

In the present case, the parties agreed to arbitration according to the rules of the International Court of Arbitration except that a party dissatisfied with the arbitration award may file suit (not a petition as § 1285 provides) "to enforce its rights under the Agreement."

The added language of the subsection does not support the interpretation urged by Touton that it merely confirmed that the arbitration award would be reviewed according to the "standard of judicial review … provided by law" (Touton declaration, 18) . The standard of judicial review provided in the California Arbitration Act does not permit a party to challenge the results of the arbitration by bringing a suit to enforce its rights under the Agreement. As in Crowell, the "parties agreed to do something that does not exist, … arbitration with a guaranteed right of judicial review on the merits."

After holding that the parties could not expand the trial court's jurisdiction to review arbitration awards by contract to include a review on the merits, Id. at 739, the Court further held that the provision for judicial review on the merits could not be severed from the arbitration agreement. "To do so would be to create an entirely new agreement to which neither party agreed." Id. at 740. "Without that provision a different arbitration process results. Courts reform contracts only where the parties have made a mistake, and not for the purpose of saving an illegal contract. Id.

ICANN is moving to stay this action pending the results of that the .net arbitration proceeding. Since the arbitration provision in the .net Registry Agreement is found by the Court to be invalid, however, the arbitrators' findings and award in the .net Registry Agreement arbitration will have no legal preclusive effect on this present case.

The Court denies the motion.

Waiver.

In view of the above ruling, the Court does not reach the issue of waiver.