New York's Highest Court Finds Public Policy Exception Applicable Before Even Deciding the Issue of Arbitrability, Barring Arbitration of Job Security Clauses

February 6, 2012 by Louis M. Solomon

We have previously posted on the limits that courts inevitably find to the arbitrability of disputes, such as with "manifest disregard" oversight or grounds of public policy (see for example here). In a recent decision by New York' highest court, *In the matter of the arbitration between Johnson City Prof. Firefighters Local 921, et al. v. Village of Johnson City*, No. 191 (N.Y. Ct. App. 2011), the New York Court of Appeals addressed this issue in the context of job security clauses. There are principles in the decision that do or should affect the litigation of international disputes and are worthy of a brief analysis.

Job security clauses have been found to violate public policy, or not, under certain circumstances. New York law requires these "no-layoff" clauses to be explicit, for a reasonable period of time, and then only if the clause "was not negotiated in a period of a legislatively declared financial emergency between parties of unequal bargaining power". Absent these conditions the courts will find the clauses impermissibly take away the municipality's "right to eliminate positions or terminate or lay off workers for budgetary, economic or other reasons". As applied in the context of arbitration, the courts are concerned that absent these conditions, the "ability to abolish positions or terminate workers will be subject to the whim of arbitrators".

In the case at hand, the Court of Appeals found that the clause was not explicit enough. The Court made that determination and did not leave it to the arbitrators to do so. Nor did the Court of Appeals permit the arbitrators in the first instance to determine the "contrary to public policy" exception. Indeed, the Court did not need to reach the question whether the parties had agreed to arbitrate the issue — arbitration was preempted by dint of the Court's view of the public policy prohibition. The state Court of Appeals plainly seeks the public policy issue as one for the court and to be decided prior to the question of whether the parties' even agreed to arbitrate.

The decision might be contrasted with the recent decision of the Eleventh Circuit, applying federal law, which we discussed here. In that case, *Lindo v. NCL (Bahamas), Ltd.*, No. 10-10367 (11th Cir. 2011), the federal Court of Appeals narrowly defininig the public policy bar to arbitration and, more important for these purposes, discussion the allocation of responsibility between courts and arbitrators in terms of when the issue of a public policy bar arises (after, not before, the issue of agreement to arbitrate).

Tagged Judge vs. Arbitrator, Sequencing Dispute Resolution