2017 IL App (1st) 161913-U

FOURTH DIVISION
December 21, 2017

No. 1-16-1913

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SOVERAIN SOFTWARE, LLC,	)	Appeal from
	)	the Circuit Court
Petitioner-Appellee,	)	of Cook County
	)	
v.	)	15-CH-12609
	)	
JONES DAY,	)	Honorable
	)	Kathleen M. Pantle,
Respondent-Appellant.	)	Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Ellis concurred in the judgment.

O R D E R

Held: Arbitration panel did not exceed its powers by interpreting ambiguous contract, and trial court erred in vacating award based on its alternative analysis of the facts and law.

¶ 1 Soverain Software, LLC and its former patent enforcement counsel, Jones Day, arbitrated the law firm's breach of contract claim for $10 million in past due fees and the client's counterclaims to be compensated for counsel's improper withdrawal from the litigation and other detrimental, self-serving acts. An arbitration panel ruled in favor of Jones Day, but found the first $8 million in legal fees were contractually conditioned on achieving litigation "success," which had not occurred, and that Jones Day was entitled to only the undisputed remainder from

Soverain, which was $1.5 million, not $2 million. Soverain then petitioned the trial court to vacate the $1.5 million award on grounds that the arbitrators exceeded their authority by crafting a compromise not based on any terms in the legal services contract. Jones Day counterpetitioned to confirm the award because Soverain was only disagreeing with the arbitrators' reading of the contract. The trial court was persuaded by Soverain's arguments and vacated the award. Jones Day seeks our further review and contends the arbitrators expressly based the award on what they considered governing provisions of the contract, which was within their authority, and that even an illogical or inconsistent award should be affirmed, so long as the award "draws its essence" from the parties' agreement, so that the arbitration process is the end of the parties' dispute rather than beginning of rounds of judicial intervention.

¶ 2 We address a trial court's decision to vacate or confirm an arbitral award *de novo*, meaning that we review the arbitrators' decision as if we were the first court to do so. *Herricane Graphics, Inc. v. Blinderman Construction Co., Inc.*, 354 Ill. App. 3d 151, 157, 820 N.E.2d 619, 624 (2004); *Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529, 537, 791 N.E.2d 8, 16 (2003) (when applying the *de novo* standard of review, the appellate court uses the record compiled in the trial court but reviews the law and facts without deference to the trial court's rulings).

¶ 3 Soverain's petition to vacate the award relied on the Illinois Uniform Arbitration Act (710 ILC 5/1 *et seq.* (West 2014)), while Jones Day's petition for confirmation relied on the Federal Arbitration Act (9 U.S.C. § 1 *et seq.* (West 2014)). The parties now disagree on whether the Illinois or Federal statute is controlling. This arbitration action in Illinois addressed a transaction involving interstate commerce, specifically a legal services contract between Soverain, which is a Delaware corporation located in Illinois, and Jones Day, which is an Ohio

entity, in which the parties provided for Jones Day attorneys officed in Texas, Ohio, and New York to represent Soverain's interests in Texas federal district court proceedings. The legal services contract specified disputes were subject to binding arbitration, judgment on any arbitration award "may be entered in any court of competent jurisdiction," and all contract terms were to be "governed by the laws of Delaware." We read this to be a preference for State law rather than federal law, but the parties' failure to cite Delaware law at any point in the arbitration action or the confirmation proceedings has resulted in mutual waiver of the laws of that particular jurisdiction. *Yates v. Doctor's Associates, Inc.*, 193 Ill. App. 3d 431, 438, 549 N.E.2d 1010, 1015 (1990) (finding parties' failure to invoke Connecticut statutes or court decisions resulted in mutual waiver of term in franchise agreement calling for application of Connecticut law). Where parties agree to arbitrate in accordance with State law, the Federal Arbitration Act does not apply, even when a transaction involves interstate commerce. *Yates*, 193 Ill. App. 3d at 438, 549 N.E.2d at 1015 (citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989)). Thus, the Illinois arbitration statute controls our review of the validity of the arbitrator's decision. *Yates*, 193 Ill. App. 3d at 437, 549 N.E.2d at 1015 (finding the Illinois Uniform Arbitration Act governed and the Federal Arbitration Act did not apply, even though the transaction involved interstate commerce); *Rauh v. Rockford Products Corp.*, 143 Ill. 2d 377, 391, 574 N.E.2d 636, 643 (1991) (following Illinois rather than federal principles for vacating an award); *Tim Huey Corp. v. Global Boiler & Mechanical, Inc.*, 272 Ill. App. 3d 100, 104, 649 N.E.2d 1358, 1361-62 (1995) (indicating the Federal Arbitration Act has never been construed to preempt all state law on arbitration and does not preempt State vacatur law); *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 4-5 (1st Cir. 1988) (indicating the Federal Arbitration Act supersedes State laws that seek to limit the use of

arbitration, but does not supersede all State arbitration laws); *Volt Information Services*, 489 U.S. at 476 (indicating there is no federal policy favoring arbitration under a certain set of procedural rules; the policy embodied in the Federal Arbitration Act is "simply to ensure the enforceability, according to their terms, of private agreements to arbitrate"). Although we look to the Illinois standards regarding vacatur of arbitration awards, we may incorporate federal law, as well as the opinions of other jurisdictions, as relevant. See 710 ILCS 5/20 (West 2014) ("This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it."); *Garver v. Ferguson*, 76 Ill. 2d 1, 8, 389 N.E.2d 1181, 1183 (1979) (in this context, "[o]pinions of the courts of other jurisdictions are *** shown greater than usual deference"). The parties implicitly acknowledge this fact by citing to Illinois and foreign precedent throughout their appellate briefs, with no apparent priority to any jurisdiction. Furthermore, as discussed below, we would reach the same conclusion under either the Illinois or federal standards for vacatur.

¶ 4 A party who wishes to vacate an arbitration award faces a difficult burden. Judicial review of an arbitration award is extremely limited—more limited than appellate review of a trial court's decision. *Garver*, 76 Ill. 2d at 8, 389 N.E.2d at 183; *Doral Financial Corp. v. Garcia-Velez*, 725 F. 3d 27, 31 (1st Cir. 2013) (review is so narrow and deferential that arbitral awards are nearly impervious to judicial scrutiny); *City of Chicago v. Chicago Loop Parking LLC*, 2014 IL App (1st) 133020, ¶ 1, 23 N.E.3d 453 (parties who choose arbitration as their method of resolving disputes restrict the reach of the courts). This deferential approach honors the parties' decision to avoid the expense and delay of litigation and instead have their disputes addressed through arbitration. *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960) (the court's function in confirming or vacating an arbitration award

is severely limited, otherwise, the advantage of arbitration, avoiding litigation, would be frustrated). Arbitration is not intended to be equivalent to litigation. For instance, arbitration differs from litigation in that it does not rely on legal precedent, and instead provides for all questions of law and fact to be determined by the arbitrator. *Colmar, Ltd. v. Fremantlemedia North America, Inc.*, 344 Ill. App. 3d 977, 985, 801 N.E.2d 1017, 1023 (2003). In addition, the usual rules of evidence are not controlling and the rights and procedures common to civil trials, such as discovery, cross-examination, and testimony under oath "are often severely limited or unavailable." *Colmar*, 344 Ill. App. 3d at 985, 801 N.E.2d at 1023. Although Illinois arbitrators may choose to use the familiar rules and procedures, they are required only to conduct the arbitration in a manner that is not inconsistent with the Illinois arbitration statute. *Colmar*, 344 Ill. App. 3d at 985, 801 N.E.2d at 1023. Thus, arbitration has been described as "a private system of justice offering benefits of reduced delay and expense." *Eljer Manufacturing, Inc. v. Kowin Development Corp.*, 14 F.3d 1250, 1253 (7th Cir. 1994); *Johnson v. Baumgardt*, 216 Ill. App. 3d 550, 555, 576 N.E.2d 515, 518 (1991) (arbitration avoids the formalities, delay, and expenses of litigation).

¶ 5 Intrusive judicial scrutiny of an arbitral award for legal or factual error would moot the parties' agreement to opt out of the judicial system. *Prostyakov v. Masco Corp.*, 513 F.3d 716, 723 (7th Cir. 2008); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) ("[W]e do not allow the disappointed party to bring his dispute into court by the back door, arguing that he is entitled to appellate review of the arbitrators' decision."). In fact, it is well established that the judiciary will not overturn an arbitration decision even when it is apparent that the award was based on errors of judgment as to law or fact. *Garver*, 76 Ill. 2d at 10-11, 389 N.E.2d at 1184; *Johnson*, 216 Ill. App. 3d at 556, 576 N.E.2d 515 at 518; *Rauh*, 143 Ill. 2d at

391, 574 N.E.2d at 643. Instead, the scope of judicial review of an arbitration award under the federal and Illinois arbitration statutes is "grudgingly narrow" (*Eljer Manufacturing*, 14 F.3d at 1253; *Garver*, 76 Ill. 2d at 8, 389 N.E.2d at 183), due to the voluntary contractual nature of commercial arbitration (*IDS Life Insurance Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 651 (7th Cir. 2001)), and a court must construe an arbitral award so as to uphold its validity whenever possible (*Garver*, 76 Ill. 2d at 10, 389 N.E.2d at 1184). Section 12 of the Illinois statute expressly limits judicial review and provides that a court shall vacate an arbitrator's award only in instances of fraud, corruption, partiality, misconduct, entry of an award that exceeds the arbitrators' powers, refusal to postpone the hearing after sufficient cause shown, refusal to hear evidence material to the controversy, or failure to submit the question to arbitration. 710 ILCS 5/12(a)(1)-(5) (West 2014); *American Federation of State, County & Municipal Employees, AFL-CIO v. Dept. of Central Management Services*, 173 Ill. 2d 299, 304, 671 N.E.2d 668, 672 (1996).[1] Similarly, section 10 of the Federal Arbitration Act provides that a court may vacate an award only in four instances, including (1) where the award was procured by corruption, fraud, or undue means, (2) where there was evident partiality or corruption in the arbitrators, (3) where the arbitrators were guilty of misconduct which prejudiced the rights of any party, and (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10 (West 2014).

¶ 6 We note that the listed grounds do not include mistake, misinterpretation, or

[1] Soverain argued in the trial court that under Illinois law, a court may also vacate an award where a gross error of law appears on the award's face. On appeal, Soverain does not repeat the argument or its citation to *Amerisure Mutual Insurance Co. v. Global Reinsurance Corp. of America*, 399 Ill. App. 3d 610, 616, 927 N.E.2d 740, 746 (2010).

inconsistency and that the statutes describe only improprieties to which the parties did not consent to when they agreed to resolve their disputes outside the judicial system. See *Cook County v. American Federation of State, County & Municipal Employees, District Council 31, Local 3315, AFL-CIO*, 294 Ill. App. 3d 985, 988-89, 691 N.E.2d 777, 780 (1998) ("the fact that a court is convinced [the arbitrator] committed serious error does not suffice to overturn the arbitrator's decision"); *Flexible Manufacturing Systems v. Super Products Corp.*, 86 F. 3d 96, 100 (7th Cir. 1996) (mistake is not grounds for vacating an award and judicial intervention will be denied unless the award reveals that the arbitrator deliberately disregarded the law); *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987) (by making a contract with an arbitration clause the parties agreed to be bound by the arbitrators' interpretation of the contract and will not be heard to complain merely because the arbitrators' interpretation is a misinterpretation); *IDS Life*, 266 F.3d at 651 (indicating a perceived or actual "inconsistency" between the arbitrators' legal conclusions and the relief awarded does not render the award defective).

¶ 7 Furthermore, in the event arbitrators explain their reasoning for an award, it is not reviewable. *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 385 (5th Cir. 2004); *Eljer Manufacturing*, 14 F.3d at 1254 (an arbitration panel is not required to explain the rationale for its decision, as imposing this requirement would serve only to cause delay and expense).

¶ 8 Soverain alleged that the arbitration panel exceeded its authority by disregarding the contract language and creating a compromise award. It is to be presumed, however, that the arbitration panel did not exceed its authority. *International Ass'n of Firefighters, Local No. 37 v. City of Springfield*, 378 Ill. App. 3d 1078, 1081, 883 N.E.2d 590, 592 (2008)When addressing a matter of contract interpretation, we do not consider whether the arbitrators reached the correct

interpretation of the parties' contract. "Because the parties have contracted to have their disputes settled by an arbitrator, rather than by a judge, it is the arbitrator's view of the meaning of the contract that the parties have agreed to accept." *Central Management Services*, 173 Ill. 2d at 304, 671 N.E.2d at 672. It would be inappropriate for a court to overrule a construction merely because its reading of the contract differed from that of the arbitrator. *Board of Education of the City of Chicago v. Chicago Teachers Union, Local No. 1*, 86 Ill. 2d 469, 478, 427 N.E.2d 1199, 1202 (1981) ("Because the arbitrator's decision was bargained for, the courts would have no business overruling the arbitrator's interpretation even if they disagreed."); *Galasso v. KNS Companies, Inc.*, 364 Ill. App. 3d 124, 130, 845 N.E.2d 857, 862 (2006) (even when a court strongly disagrees with an arbitrator's contract interpretation, it is not empowered to disturb an arbitration award on that basis). A court may vacate an award only if "all fair and reasonable minds would agree that the construction of the contract made by the arbitrator was not possible under a fair interpretation of the contract." (Internal quotation marks omitted.) *Rauh*, 143 Ill. 2d at 391-92, 574 N.E.2d at 643. In addition, where there is ambiguity in a contract with an arbitration clause, an arbitrator, not a court, is authorized to interpret the ambiguity. *Nagle v. Nadelhoffer, Nagle, Kuh, Mitchell, Moss & Saloga, P.C.*, 244 Ill. App. 3d 920, 930, 613 N.E.2d 331, 338 (1993). If the contract is susceptible to more than one reasonable interpretation and the arbitrator acts in good faith, "the award is deemed conclusive upon the parties." *City of Springfield*, 378 Ill. App. 3d at 1081, 883 N.E.2d at 592; see also *Garver*, 76 Ill. 2d at 10, 389 N.E.2d at 1184.

¶ 9 These legal principles frame our review of the $1.5 million award against Soverain. The relevant facts are undisputed. Soverain purchased a portfolio of software patents from a bankruptcy proceeding and retained Jones Day in 2004 to enforce those patents against major

internet retailers. A suit against The Gap, Inc. and Amazon was successful, with Gap settling a year into the suit and Amazon settling just prior to trial for $40 million. Nevertheless, Soverain disputed Jones Day's fees, because the amount substantially exceeded the firm's estimates. The parties reached a compromise, executed a new contract in 2005, which was superseded by an agreement signed in 2006, which was superseded by another agreement signed in 2007. The 2007 version identified 17 possible targets of litigation, and grouped those into three separate suits, identified as Lawsuit A, Lawsuit B, and Lawsuit C. In Lawsuit A, Jones Day was to sue up to 10 companies.

¶ 10 According to Section 2(A)(i) of the 2007 agreement, Soverain was to pay the law firm 80% of fees and 100% of all reasonable expenses invoiced, with 20% of fees being "deferred" and not due when invoiced. However, in section 2(A)(iv), the parties agreed that the amount of fees Soverain could defer was capped at either $8 or $10 million, depending upon the status of Lawsuits A, B, and C. Soverain and Jones Day would later dispute whether the $8 million cap or $10 million cap was in effect. Section 2(A)(iv) stated:

> "The following additional terms apply to the Lawsuits:
>
> (1) [If Lawsuit B is not filed], an $8 million cap applies, and section 2(A)(iv)(4) herein becomes effective if or when that cap is exceeded in Lawsuit A and any Declaratory Judgment Actions.
>
> * * *
>
> (4) If the applicable cap is exceeded in any of the Lawsuits *** the Company shall have 30 days to reduce the balance to the capped amount or the representation will immediately terminate at Law Firm's option pursuant to section [2(E)] herein. "

¶ 11 In addition, upon "success" in Lawsuit A, Jones Day was entitled to "all deferred fees"

(the 20%) and an additional contingency fee premium of 5% to 15% depending on when Lawsuit A settled or terminated. Whether "success" occurred and triggered Soverain's payment obligation would become a point of contention.

¶ 12 Also relevant is section 2(B), which indicated the firm would electronically bill the client on a monthly basis, and that unless the client disputed the bill within 30 days, the entire bill would be "final" and "promptly" paid within 30 days of becoming "final." Stated another way, section 2(B) indicated all fee billings were deemed approved and owed within 60 days from receipt of invoices if not objected to within 30 days from receipt of invoices. Soverain and Jones Day also agreed they would "attempt to resolve any billing questions, if possible, within 10 business days of being notified of the question."

¶ 13 Five defendants were named in Lawsuit A, four of whom settled before trial, and a jury found defendant Newegg liable to Soverain in 2010 and awarded $2.5 million in damages. The award, however, was far less than the $32 million which Soverain had anticipated when it entered into the 2007 fee agreement and was far less than Jones Day had billed for its services on Lawsuit A. Nevertheless, Jones Day deemed the favorable award a "success." "Success" was defined in the contract as "recovery of a settlement or award in excess of [a calculated amount]," the details of which are irrelevant here. Jones Day sent a letter to Soverain declaring "success" in the Newegg suit and seeking deferred fees totaling $9.9 million as of July 2010. The firm also wrote, "we note that the $8 million cap on deferred fees provided under Section 2(A)(iv)(1) of the agreement has been exceeded." However, Newegg appealed the judgment in favor of Soverain and Soverain told Jones Day that it was premature to declare "success" in Lawsuit A until the litigation concluded.

¶ 14 Months passed without a resolution of the fee dispute, despite correspondence, emails,

and a meeting. In October 2010, Jones Day wrote to say that its deferred fees totaled $10.1 million (exceeding even the $10 million cap that Soverain contended was in effect) and that the law firm intended to file for mediation if it was not paid. Later in October 2010, Jones Day sent a termination letter and demanded mediation or arbitration, and in November 2010, Jones Day sent a second termination letter.

¶ 15 Section 2(E) of the 2007 fee agreement was entitled "Termination" and consisted of two subsections. The first subsection addressed Soverain's grounds for terminating its relationship with the law firm, and the second subsection, Section 2(E)(ii), addressed the firm's grounds for terminating the relationship, stating:

> "Law Firm may terminate its representation of the Company in the event of: (1) material breach by the Company of its agreements; (2) [newly discovered information that makes it impossible in the Law Firm's professional judgment to continue the representation], (3) *the applicable cap is exceeded pursuant to section 2(A)(iv) herein* [(emphasis supplied)] or (4) a situation arises that could lead to a legal conflict or violation of the canons of ethics or code of professional responsibility should the Law Firm continue the representation. Law Firm agrees to provide reasonable notice to the Company prior to such termination, to provide time for the Company to retain new counsel. Law Firm agrees to cooperate with any new counsel hired by the Company in transitioning the Lawsuit without charge. In event of termination due to sub-sections (1), (2) and (4) above, Law Firm shall be entitled to [100% of expenses and a *quantum meruit* share of any lawsuit proceeds]. In the event of termination due to sub-section (3) above, Law Firm shall be entitled to payment of unpaid fees and out-of-pocket expenses but shall forfeit its right to its contingency fee and any *quantum meruit* share of the Net

Revenues."

¶ 16 Jones Day next successfully petitioned, over Soverain's objection, to withdraw as counsel in federal district court, the court of appeals, and the United States Patent and Trademark Office.

¶ 17 Soverain transitioned to representation from the law firm Quinn Emmanuel, which was already familiar with Soverain's patent claims and strategy, because the firm had assisted with matters where Jones Day had a conflict. Quinn Emmanuel filed a patent infringement suit against Victoria's Secret and Avon Products, Inc. concerning some of the same Soverain patents that were at issue in the Newegg case and also took over defending the Newegg verdict on appeal. Soverain initially prevailed in the Victoria's Secret litigation, but after the Newegg judgment was reversed on appeal, the Victoria's Secret judgment was also reversed.

¶ 18 Meanwhile, Jones Day was still demanding roughly $10 million from Soverain. Jones Day filed for arbitration, contending Soverain was in breach of the fee agreement because the client failed to pay its outstanding balance within 60 days of the verdict in Lawsuit A and failed to reduce the outstanding balance of deferred fees to the $8 million cap within 30 days of the verdict in Lawsuit A. Soverain counterclaimed, contending Jones Day had withdrawn when it had no contractual right to do so, the renegotiation of the fee agreement in 2007 had been in the interests of Jones Day only, and that the disappointing results of the patent litigation were a product of the law firm's self-serving litigation strategy, or its withdrawal, advice, or lack of advice. Soverain contended the law firm breached the contract, its fiduciary duty, and legal ethics; and committed legal malpractice.

¶ 19 What was primarily a breach of contract dispute could not be resolved from the face of the fee agreement. A tripartite panel heard two weeks of testimony from 17 fact and expert

witnesses and considered extensive post-hearing briefs.

¶ 20 After deliberations, the panel resolved the first issue in Soverain's favor. The panel found that Soverain did not breach the 2007 agreement by refusing to pay the fees up to the $8 million cap shortly after the Newegg verdict in 2010, since "success" would not be apparent until much later, when the litigation was complete, and that in any event, the reversal on appeal made clear that the Newegg suit was not a "success." The panel indicated that although it agreed with Soverain that deferred fees below the $8 million cap were not due unless "success" occurred, there was "a lack of clarity" and "ambiguity" in the relevant contract language, which the panel had resolved by considering two things. First, the testimony of "those who were involved in the negotiation of the 2007 agreement and seemed to have the clearest first-hand understanding of its terms." Second, the economic implications of the parties' interpretations, given that under Soverain's reading, litigation success would provide revenue to pay the fees, and that under Jones Day's reading, the firm would be fully compensated but the client "would be left with a substantial net loss." Ultimately, because there was no "success," Jones Day was not entitled to the deferred fees under the $8 million cap. The panel also said Jones Day breached the agreement by terminating for nonpayment of fees under the $8 million cap, prior to the parties' ability to determine whether those fees were due.

¶ 21 The panel then addressed the second primary issue and determined that Jones Day was contractually entitled to the deferred amount of fees that exceeded the $8 million cap and which Jones Day had demanded for months before quitting and filing for arbitration. Although the panel did not expressly state Soverain had breached its obligation in 2010 to reduce the unpaid fees down to the $8 million cap, this finding is implicit in the panel's determination that Soverain was liable for fees that were not dependent upon "success" in the Newegg litigation. According

to the fee agreement, if not objected to, those particular fees were due "promptly" and within 60 days of being invoiced, regardless of the status of Lawsuit A. The panel noted that Jones Day had made written demand in mid 2010 for all of the deferred fees, and expressly requested the amount which exceeded the cap. The panel noted, "This was the beginning of Jones Day taking a hard line to collect all of the asserted unpaid fees (about $10 million at that point)." In addition, Soverain had offered to reduce the unpaid deferred fees to the $8 million cap, in order to keep Jones Day on the case, "even though [Soverain] believed the cap should be $10 million because of Jones Day's failure to proceed with Lawsuit B." The panel said Jones Day "should have accepted the offer." Although Jones Day sought a total of about $10 million on its contract claims, the arbitrators indicated some of the fee evidence was equivocal. The arbitrators calculated that the undisputed amount of fees in excess of the $8 million cap was $1.5 million and awarded that amount.

¶ 22 The arbitrators denied all of Soverain's counterclaims either on their face and/or because they resulted in no apparent loss. Thus, although Soverain contended the law firm should forfeit its fees and pay millions in damages for acting in its own best interests to the detriment of its client, the arbitrators found the allegations and proof of impropriety and harm to be lacking. The panel specified, "Soverain showed itself to be able and sophisticated enough to protect its interests and it also had the aid of independent counsel in drafting and negotiating the 2006 and 2007 agreements with Jones Day." In addition, Soverain failed to prove that the Newegg appeal would have gone in Soverain's favor if Jones Day had pursued certain strategy in the trial court proceedings or remained on the appeal, and Soverain failed to show that filing Lawsuits B and C would have been cost-effective or profitable for Soverain. Furthermore, "Jones Day came to believe its right to terminate and did do so in a way to not materially damage Soverain through

the manner of withdrawal."

¶ 23 The panel specified that it was finding in favor of Jones Day's single count complaint for breach of contract, to the extent the firm was seeking fees above the $8 million cap; and that it was rejecting all of Soverain's counterclaims and its request to shift its arbitration expenses onto Jones Day. (The parties' costs included $37,631 charged by the American Arbitration Association and $255,364 charged by the arbitrators.)

¶ 24 The parties then cross-petitioned in the trial court, where Soverain persuaded the court that the only relevant language was in section 2(E)(ii) of the "Termination" clause, and that the award did not fit within that single section of the contract and must be vacated in accordance with *Shearson Lehman* and *Spencer*. *Shearson Lehman Brothers, Inc. v. Hedrich*, 266 Ill. App. 3d 24, 639 N.E.2d 228 (1994); *Spencer v. Ryland Group, Inc.*, 372 Ill. App. 3d 200, 865 N.E.2d 301 (2007). The trial court determined that because Jones Day was not entitled to terminate under any of the language in section 2(E)(ii) and had breached the contract by withdrawing, there was no contract language which entitled Jones Day to an award of attorney fees. Accordingly to the trial court, "A review of the Award shows that the calculations have no basis in any provision of the agreement."

¶ 25 Jones Day contends on appeal, however, that the arbitrators exercised their authority to interpret the contract and enter an award on that basis. We agree with Jones Day. There is an apparent ambiguity in the contract as to Jones Day's entitlement to compensation upon its termination, and in our opinion, the arbitrators made a good faith effort in interpreting and enforcing the terms of the parties' agreement. There is no contract language requiring the arbitrators to limit their consideration to the Termination clause or indicating that when the relationship ended, Jones Day forfeited its right to collect deferred fees specified in other clauses

of the agreement. Furthermore, the arbitrators remarked on the ambiguity in the compensation language and specified the need to resort to parol evidence and that the "[e]conomic rationales for both parties [were] also considered as aids to understanding the 2007 agreement." Because we can determine a contractual basis for the award, it is inappropriate for us to determine whether the arbitrators' interpretation was correct as a matter of law.

¶ 26 According to the arbitrators, section 2(A)(iv)(4), which obligated Soverain to keep the deferred fees capped at $8 million, was in effect regardless of the status of Lawsuit A and regardless of whether the additional compensation clauses in section 2(E)(ii) were triggered by termination of the attorney-client relationship. Contracts are to be read as a whole, with all provisions examined and given effect. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371, 875 N.E.2d 1082, 1090 (2007) ("a contract must be considered as a whole, and all of the provisions, rather than an isolated part, should be examined and harmonized"). For purposes of contract interpretation, " '[i]ntent is ascertained, not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract *** as a whole.' " *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 324 (Minn. 2003) (quoting *Republic Nat'l Life Insurance Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979)). As we noted above, the panel impliedly found that Soverain did breach its contractual obligation to timely pay fees which exceeded the $8 million cap, which were fees that were not tied to "success," the status of any lawsuit, or whether Jones Day was still representing Soverain. The panel did not confine its analysis to the Termination clause, and there was no reason for the trial court to have limited its analysis to that single paragraph of the lengthy agreement which was in effect for the last three years of the parties' attorney-client

relationship.

¶ 27 Moreover, Soverain has never contended that it did not owe those fees. According to the contract, Soverain was entitled to 30 days to object to any invoiced amounts, and another 30 days to pay the finalized figures. There is no indication, however, that Soverain ever challenged any invoice. Instead, Soverain initially contended the deferred fees were subject to a $10 million cap instead of the $8 million cap. Later, in order to keep Jones Day on the Newegg appeal, Soverain offered to reduce the unpaid fees to the $8 million cap while working with Jones Day to resolve the disagreement as to whether the cap was $8 or $10 million, and to pay Jones Day's regular hourly rates going forward. These responses were additional concessions that Jones Day's charges were justified and that only the timing of Soverain's payment of the over-the-cap amount was disputed. By that point, however, the parties' ability to work together had deteriorated to the point that Jones Day preferred to withdraw instead of maintaining the relationship and prolonging the fee dispute. In the trial and appellate courts, Soverain has argued that it was improper for the arbitrators to award fees to the only party found to be in breach of the agreement, which, again, is not an argument that the legal fees that were invoiced were unwarranted.

¶ 28 It is clear from the arbitration award that the $1.5 million award was based on a thorough contemplation of the parties' crossclaims alleging breach of the 2007 agreement and expressly based on an interpretation of the 2007 agreement which the panel noted suffered from "a lack of clarity." Because we can follow the " 'interpretative route' " which the panel took through the 2007 agreement, "it is not our place to determine whether [the panel's] interpretation was correct as a matter of law." *Prostyakov*, 513 F.3d at 725. A reviewing court is not authorized to scrutinize the arbitration panel's reasoning to determine whether it is correct, only to determine

whether the panel was actually interpreting and enforcing the contract. The record indicates the arbitration panel reached its interpretation and award after conducting an extensive hearing, assessing the credibility of numerous witnesses, and considering the parties' evidence and arguments, which was the proper role of the panel. An arbitration award may be disturbed only when "*all* fair and reasonable minds would agree that the construction of the contract made by the arbitrator was not possible under a fair interpretation of the contract." (Emphasis added.) *Garver*, 76 Ill. 2d at 9-10, 389 N.E.2d at 1184. Applying this fundamental rule of contract interpretation and the deferential standard of review that governs arbitration matters, we cannot say that the arbitrators' award was not based on the contract and should be vacated.

¶ 29 This was not an instance like *Shearson Lehman* or *Spencer* in which the arbitration panel created a compromise award from whole cloth instead of applying the terms of the parties' own agreement. *Shearson Lehman*, 266 Ill. App. 3d 24, 639 N.E.2d 228; *Spencer*, 372 Ill. App. 3d 200, 865 N.E.2d at 309. In *Shearson Lehman*, arbitrators reached seemingly inconsistent conclusions about the two claims at issue. *Shearson Lehman*, 266 Ill. App. 3d at 26, 639 N.E.2d at 230-321. The plaintiffs were employees of a Chicago securities brokerage firm who complained they had not been receiving their full year-end bonuses and that their employer wrongfully discharged them in retaliation for threatening to take the matter to arbitration. *Shearson Lehman*, 266 Ill. App. 3d at 25, 639 N.E.2d at 230. The firings occurred about a year before the three employees would have vested under the company's deferred compensation plan, so they asked the panel to declare them vested in the plan. *Shearson Lehman*, 266 Ill. App. 3d at 26, 639 N.E.2d at 231. All employees were to be paid an amount equal to their contributions to the plan, but vested employees also received an additional 11% annual compounded interest, while "unvested" employees received only an additional 5%. *Shearson Lehman*, 266 Ill. App. 3d

at 26, 639 N.E.2d at 231. The arbitrators rejected the claim that the three former employees had been wrongfully discharged, but then awarded damages on the claim alleging the wrongful (premature) discharge meant they were fully vested. *Shearson Lehman*, 266 Ill. App. 3d at 26, 639 N.E.2d at 230-321. We reiterate that inconsistency between the arbitrators' legal conclusions and award is not grounds to vacate an award (*IDS Life*, 266 F.2d at 651); however, in this instance, the amount awarded was less than the amount owed if the employees were fully vested but more than the amount owed if the employees were not fully vested (*Shearson Lehman*, 266 Ill. App. 3d at 26-27, 639 N.E.2d at 231). The in-between award was neither 5% nor 11% and "was clearly not based upon the precise and unambiguous mathematical formulas" found in the parties' contract for determining deferred compensation. *Shearson Lehman*, 266 Ill. App. 3d at 29, 639 N.E.2d at 232. The contract interpretation was, therefore, not a "reasonably possible one" and plainly not "grounded in the parties' contract." *Shearson Lehman*, 266 Ill. App. 3d at 26, 639 N.E.2d at 232. The arbitrators had "impermissibly ignored the unambiguous contract language and implemented their own notion of what would be reasonable and fair." *Shearson Lehman*, 266 Ill. App. 3d at 29, 639 N.E.2d at 233. "The ultimate award must be 'grounded on the parties' contract' and arbitrators do not have authority to ignore plain language and alter the agreement." *Shearson Lehman*, 266 Ill. App. 3d at 29, 639 N.E.2d at 232 (quoting *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187-88 (8th Cir. 1988)). Accordingly, the reviewing court vacated the monetary award that had been entered in "excess of [the panel's] authority" and replaced it with an amount that included 5% interest. *Shearson Lehman*, 266 Ill. App. 3d at 31, 639 N.E.2d at 234.

¶ 30 In the other case Soverain has relied on, *Spencer*, the plaintiff contracted to buy a new townhouse in Lockport, Illinois, and tendered $6000 earnest money which the home builder later

kept when it declared her to be in default of the sales agreement. *Spencer*, 372 Ill. App. 3d at 201, 865 N.E.2d at 303. The sales agreement included an arbitration clause which required the non-prevailing party to pay the prevailing party's reasonable costs and attorney's fees. *Spencer*, 372 Ill. App. 3d at 201, 865 N.E.2d at 303. At the conclusion of the proceedings, the arbitrator awarded the would-be homebuyer the return of her $6000 earnest money, and increased the award by her costs, but no more, in disregard of the clear contract language which entitled the prevailing party to both costs *and* attorney fees. *Spencer*, 372 Ill. App. 3d at 201, 865 N.E.2d at 303. The reviewing court deemed the contract language regarding the expenses of arbitration to be a clear and unambiguous "all-or-nothing provision." *Spencer*, 372 Ill. App. 3d at 206, 865 N.E.2d at 307. "Either one prevails and therefore becomes entitled to fees, as well as costs, or does not prevail and is therefore not entitled to either costs of fees. Under this sales agreement, there is no basis whatsoever upon which to provide for the one without also providing for the other." *Spencer*, 372 Ill. App. 3d at 206, 865 N.E.2d at 307. "Thus, the award shows on its face that the arbitrator was not attempting to follow the sales agreement, but was simply imposing his own compromise arbitrarily, without the semblance of contractual authorization." *Spencer*, 372 Ill. App. 3d at 206, 865 N.E.2d at 307. The court reversed and remanded the matter for recalculation based on the plain language of the parties' agreement. *Spencer*, 372 Ill. App. 3d at 208, 865 N.E.2d at 309.

¶ 31 The present case bears no resemblance to *Shearson Lehman* or *Spencer* because the arbitrators did not disregard the contract at issue and exceed their authority to resolve the parties' dispute. *Shearson Lehman*, 266 Ill. App. 3d 24, 639 N.E.2d 228; *Spencer*, 372 Ill. App. 3d 200, 865 N.E.2d 301. Instead, the $1.5 million award to Jones Day is traceable to contract language which was not contingent upon "success" in Lawsuit A, to an implicit finding that Soverain

breached its obligation to honor the $8 million cap on deferred fees, and to the undisputed fact that fees exceeding the cap had been invoiced and objected to. Furthermore, Soverain concedes that the award is grounded on the parties' contract when Soverain argues the award is not based on the Termination clause (section 2(E)), but on "an entirely different provision of the 2007 Agreement" that "describes the applicable cap on deferred fees." Soverain persuaded the trial court that the Termination clause was the only relevant language, but contractual ambiguities are to be resolved by the arbitrators, not the courts. *Nagle*, 244 Ill. App. 3d at 930, 613 N.E.2d 331. While it may have seemed logical to the trial court to limit a post-termination award to the Termination clause, the trial court was not authorized to review the logic of the award. The parties bargained for alternative dispute resolution and cannot use the courts to second guess the arbitrators' reasoning. *Central Management Services*, 173 Ill. 2d at 305, 671 N.E.2d at 672 (by contracting to have disputes settled by arbitration, rather than the courts, parties agree to accept the arbitrators' view of the meaning of their contract); *Board of Education*, 86 Ill. 2d at 478, 427 N.E.2d at 1202 ("Because the arbitrator's decision was bargained for, the courts would have no business overruling the arbitrator's interpretation even if they disagreed."); *Galasso*, 364 Ill. App. 3d at 130, 845 N.E.2d at 862 (even when a court strongly disagrees with an arbitrator's contract interpretation, it is not empowered to disturb an arbitration award on that basis). If a contract is susceptible to more than one reasonable interpretation, as this fee agreement was, and the arbitrator panel acts in good faith, then the arbitrators' decision is conclusive of the parties' rights. *City of Springfield*, 378 Ill. App. 3d at 1081, 883 N.E.2d at 592. The trial court disagreed with the arbitration panel's interpretation, but a court must not impose its own view in place of an award which is grounded on the parties' contract. We find that the trial court did not have a sound basis to vacate the award. Accordingly, we reverse the ruling of the trial court and affirm

the arbitral award as written.

¶ 32 Reversed.