

Arbitrator's Discretion to Consider Issues

In *Couch Investments, LLC v. Peverieri*, 270 Or App 233 (April 1, 2015) (petition for review filed May 1, 2015), the Oregon Court of Appeals considered a stipulated agreement by the parties to arbitrate the claims asserted in two pending lawsuits. The stipulation provided, in part: "The only issue to be resolved through arbitration" was whether the plaintiff landlords or the defendant tenant was liable for the costs of storm water drainage improvements required by the Oregon DEQ. The stipulation further provided that all other claims raised in the pleadings would be dismissed with prejudice. In his award, the arbitrator determined that the landlords were responsible for the costs but went on to decide the amount of the costs and ordered that the landlords should deposit the necessary funds in the trust account of the tenant's lawyer and that the tenant would supervise the construction work.

The landlords filed a petition to vacate the award in the circuit court. The landlords contended that the arbitrator should not have decided the amount of the costs or that the funds should be deposited by the landlords into the trust account of the tenant's lawyer because the only issue to be arbitrated was which party was to be responsible for the costs. The landlords argued that the arbitrator had decided issues not submitted to the arbitration and that the order should be vacated pursuant to ORS 36.705(1)(d) because the arbitrator had exceeded his powers.

The trial court denied the petition to vacate, and the court of appeals affirmed. The court of appeals relied on ORS 36.695(3), which per-

mits an arbitrator to "order such remedies as the arbitrator considers just and appropriate." The court held that ORS 36.610(1) provides that ORS 36.695(3) is limited only if there is a specific agreement to "waive" or "vary the effect" of ORS 36.695(3). The arbitrator's decision as to the amount of the costs and his order that the landlords deposit that amount in the trust account of the tenant's lawyer were remedies that were part of enforcing his decision and not rulings on new issues that exceeded the arbitrator's authority. Applying contract interpretation principles, the court held that the provision in the stipulation that the only issue to be arbitrated "was which party was responsible for the costs" was not sufficiently clear to waive or vary ORS 36.695(3).

ORS 36.610(1) applies to any "agreement to arbitrate or arbitration proceeding" that includes a waiver or agreement to "vary the effect" of ORS 36.600 to 36.740 inclusive, not just ORS 36.695(3). [Note: The Federal Arbitration Act may control certain issues if a transaction involves interstate commerce. *Industra/Matrix Joint Venture v. Pope & Talbot, Inc.*, 341 OR 321 (2006).] While *Couch Investments* may have particular importance in a situation where there is an agreement to arbitrate a limited issue or to limit the powers of the arbitrators, it may impact other types of provisions in pre-dispute and post-dispute arbitration agreements, such as provisional remedies, arbitrator selection, treatment of arbitrator conflicts, hearing procedures, and the form of the award. So long as *Couch Invest-*

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ments remains the law, parties to arbitration agreements and arbitration proceedings may want to make explicit reference to any provision of ORS 36.600 to 36.740 that they are agreeing to waive or vary if there is risk of a later claim of ambiguity.

GARY BERNE

STOLL STOLL BERNE LOKTING SHLACHTER P.C. LAWYERS