Appeals court ruling chips at arbitration

By Claire Bushey August 03, 2016

A legal spat between CBRE and a onetime client that subleased space to Groupon may end up denting the private arbitration system, which many businesses prefer as a cheaper, more discreet alternative to the courts.

CBRE has been **wrangling with Bankers Life & Casualty Insurance** since August 2012 over $4.5 million in commissions tied to Bankers Life's 2011 move to the East Loop, with Groupon taking over the company's space at 600 W. Chicago Ave. The dispute started in private arbitration and spilled into federal court nearly two years ago. Last week, the 7th Circuit Court of Appeals ruled that the three-person arbitration panel "exceeded its authority" when it handed victory to the Los Angeles-based real estate services firm and that the district court that ratified the arbitrators' decision "let them get away with it."

The arbitrators erred in relying on information outside CBRE's original contract with Bankers Life, **wrote Judge Richard Posner.** CBRE had struck a deal to find the insurance company new office space **so Groupon, which is headquartered at 600 W. Chicago, could expand.** Bankers Life only wanted to move if it could save at least $7 million; CBRE's cost-benefit analysis saying it could save $6.9 million was wrong, since it did not account for $3.1 million in tenant-improvement costs that Bankers Life agreed to. But the arbitrators found that a disclaimer attached to the analysis spared CBRE from owing the $3.1 million claimed by Bankers Life.

"The arbitrators' role was to interpret the agreement, not additions to it by one party without the consent of the other," Posner wrote. "Instead (CBRE) snuck the disclaimer into documents that had not been agreed upon by the parties. It was like Mr. A agreeing in writing to pay Mr. B $10, and B responding (with hand held out, and palm open): 'I have changed $10 to $20.' "

But even as Posner, one of the stars of American jurisprudence, reversed the decision, Judge Diane Sykes argued in her dissent that disregarding the panel's decision, "however much we might disagree with the arbitrators' reasoning," undercut the companies' agreement to use arbitration in the first place.

Companies choose to settle disputes in private arbitration to avoid the delay, expense and public exposure of litigation, said Pamela Kentra, a professor at Chicago-Kent College of Law who supervises the school's Mediation/Alternative Dispute Resolution Clinic. In this case, they turned to one of the industry giants, Irvine, Calif.-based Judicial Arbitration and Mediation Services. Usually courts can only set aside arbitration awards when there is clear favoritism for one party or a "gross mistake of fact or law."

Posner's opinion broadens the definition of "gross mistake," Kentra said. He delves into the facts and law of the case, "which is usually that bright line that courts say, 'No, no. You're not allowed to do that.' "

"Posner is chipping away a little bit from businesses' ability to insulate themselves from the court system," she said.

Meanwhile, Stephen Novack, the lawyer for Bankers Life, applauded the court's ruling, while CBRE pledged to continue fighting the "opportunistic attempt" by its former client "to profit at CBRE's expense." Spokesman Mark Thomton said in a statement that CBRE would seek a hearing before all the 7th Circuit's active judges.

Unless the 7th Circuit agrees to the full hearing, which is rare, the case will return to a lower court. Presumably the 7th Circuit's decision also will affect District Court Judge Harry Leinenweber's ruling that Bankers Life must pay $1.4 million to CBRE's attorneys, Gould & Ratner.