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UNITED STATES: Why the "Sunday" case does not impact on international arbitration

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The former chief judge of New York State's highest court and chair of the New York International Arbitration Centre, **Judith Kaye**, and **Anibal Sabater**, partner at Norton Rose Fulbright in New York, take issue with reports that the recent judgment of the Supreme Court of the State of New York in *Ruth Bauer v Irving Bauer et al* means that parties who arbitrate on a Sunday in New York risk their award being set aside.

Saint Thomas Church, Fifth Avenue, New York

Pondering in disbelief her arrival into Wonderland, Alice tells herself: "How queer everything is today. And yesterday things went on just as usual. I wonder if I've changed in the night?" In the wake of recent reports regarding the *Bauer* judgment, has the New York arbitration landscape changed in the night? The answer is no. Practically speaking, the *Bauer* judgment will have no bearing on international arbitrations seated in New York.

In *Bauer*, the Supreme Court of the State of New York annulled a domestic arbitration award on the basis of four independent grounds. Three of those grounds are perfectly reasonable and unsurprising, and the fourth — that the tribunal held a hearing on a Sunday — is irrelevant for international practitioners.

The facts of the *Bauer* case are unusual. In a nutshell, the arbitration concerned the distribution of over US$40 million in monies, real estate, and other rights and assets of the deceased Gertrude Bauer. The parties to the dispute were the deceased's children. The Bauer siblings agreed that the dispute would be resolved by three arbitrators who should apply the Jewish Torah Law or compromise principles. Once impanelled, the arbitrators heard the case during several days, including 13 January 2013 (a Sunday).

Eventually, a final award was issued and the prevailing Bauer sibling applied to have it confirmed. Other siblings filed a cross-motion to vacate the award. It fell to **Justice Edgar Walker**, of the Supreme Court of the State of New York, County of

Kings (Brooklyn) to adjudicate both the motion to confirm and the cross-motion to vacate the award.

A clarification is needed here, especially for non-US practitioners. Despite what its name may suggest, the New York Supreme Court is not the highest judicial tribunal in the state. Instead, it is the first instance, or trial-level, court of general jurisdiction in the state's court system — and there is a branch of the New York Supreme Court in each of New York State's 62 counties, with appeals available to two levels of higher courts.

On 16 June, Justice Walker set aside the *Bauer* award, first and foremost because it adjudicated a matter that New York case law has repeatedly declared non-arbitrable — namely, the distribution of a deceased's estate. This ruling will resonate with practitioners from both common and civil law jurisdictions, used to strict legal prohibitions on arbitrating matters involving wills, inheritance and the distribution of estates.

The remainder of Justice Walker's three-page decision lays out additional reasons supporting annulment: that the award provided for the cancellation of liens and mortgages involving third parties (a remedy "beyond the authority of the arbitrators"); that the award imposed lawyers' fees if any party brought an unsuccessful action to reverse the award (a remedy that was not expressly authorised by the underlying arbitration agreement); and lastly, that the arbitrators had held at least one hearing on a Sunday, the Christian Sabbath.

Actually, Section 5 of the New York Judiciary Law, which governs the operation and activities of the State's courts, prohibits those courts from being open or transacting any business on Sunday. Justice Walker held that this prohibition applied also to the arbitration conducted in *Bauer*. That is debatable in the context of purely domestic arbitrations. But for international arbitration cases, the relevant statute is the Federal Arbitration Act — which is strongly pro-arbitration and preempts any inconsistent state law (see, for example, the United States Supreme Court's decision in the 1984 case of *Southland Corporation v Keating*, indicating, among other things, that the Federal Arbitration Act establishes "a national policy favouring arbitration" and that, when the act applies, a state law cannot be used to override an arbitration clause.)

As unfortunate confirmation that "dog-bites-man" is not as newsworthy as "man-bites-dog," some media were quick to report on this "Sunday annulment," suggesting that New York had become an unpredictable seat of arbitration. Clearly it has not.

Cases referenced

Ruth Bauer v. Irving Bauer, et al., Supreme Court of Kings County, New York (June 16, 2014)

Southland Corporation v Keating, 465 U.S. 1 (1984))