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Arbitration Update

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Ninth Circuit Interprets Arbitration Clause to Require Arbitration of Claims and Counterclaims in Separate Fora: In its September 2010 decision in *Polimaster Ltd. v. RAE Systems, Inc.*, 623 F.3d 832 (9th Cir. 2010), the Ninth Circuit grappled with the interpretation of a clause providing for arbitration at the “defendant’s site.” The Ninth Circuit’s holding that the respondent’s counterclaims needed to be arbitrated in a different location than the claimant’s claims is a reminder of the importance of drafting thorough, clear and explicit arbitration clauses.

Polimaster, a designer and manufacturer of radiation monitoring instruments based in Belarus, and Na & Se, a corporation based in Cyprus, had entered into a license and a contract with RAE, a Delaware corporation with its principal place of business in California. The contract stated, “The Parties shall exert the best efforts to settle up any disputes by means of negotiations, and in case of failure to reach an agreement the disputes shall be settled by arbitration at the defendant’s site.” The license contained similar language. Neither agreement specified procedural rules for the arbitration. When Polimaster commenced a JAMS arbitration against RAE in the United States, RAE answered and asserted counterclaims.

Polimaster asked the arbitrator to dismiss the counterclaims, arguing that the counterclaims had to be arbitrated in Belarus—the defendant’s site. The arbitrator refused, holding that the language of the contract and license did not expressly provide where counterclaims would be pursued. The arbitrator looked to the Federal Rules of Civil Procedure, the California Rules of Civil Procedure and the JAMS Rules regarding counterclaims for guidance regarding where the counterclaims should be heard. The arbitrator ultimately held that principles of fairness required that RAE’s counterclaims be arbitrated in the same venue as the claims. The arbitration of both the claims and counterclaims proceeded in the United States and the award was subsequently entered and confirmed by the district court.

Polimaster asked the Ninth Circuit to vacate the arbitration award under the New York Convention, arguing that the parties’ agreements did not allow for the counterclaims to be arbitrated in the United States. The court held that the use of the term “disputes” in the arbitration clause included claims and counterclaims. The court also held that, under the arbitration clause, Polimaster was the “defendant” as to RAE’s counterclaims. As a result, the court ruled that the arbitration of the counterclaims needed to take place in Belarus. The court rejected RAE’s claim that the agreement was ambiguous and the dissent’s claim that the term “defendant’s site” only referred to a single location. The Ninth Circuit recognized that its result would not promote efficiency and would require separate proceedings, but explained that its paramount concern was enforcing the parties’ contract.