Arbitration Basics and Strategic Considerations
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Strategic Considerations

Arbitration is widely heralded as more efficient and less expensive than litigation. However, as this paper will explore, that may not be the case unless care is taken to avoid certain pitfalls. In the court system, parties have a road map as there are rules of procedure, rules of evidence and case law. In arbitration, however, the “rules” and the “law” to be applied are largely left up to the parties so long as they are consistent with the Federal Arbitration Act. While allowing flexibility, this also sets up potential problems. But first a bit of context.

I Arbitration Is a Creature of Contract

The underpinning of arbitration in the United States -- and around the world, for that matter -- is the principle of freedom of contract. As the Supreme Court has said, arbitration agreements are on an “equal footing with all other contracts.” Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006). Furthermore, an arbitration clause is severable from the contract as a whole. Thus, the challenge to the enforceability of the contract in Buckeye was to be resolved by an arbitrator despite the claim the contract was illegal and void ab initio. This was true even though the claim was brought in state court.

Arbitration Legislation in the United States and Worldwide.

The FAA

The principal source of arbitration legislation in the United States is the Federal Arbitration Act (FAA). The FAA consists of three chapters: The first chapter regulates the making of arbitration agreements and enforcement of awards. The second implements the New York Convention, an international treaty which was implemented by Congress in 1970 and applies to all foreign arbitration agreements notwithstanding the nature of the subject matter of the dispute or the citizenship of the parties. The third chapter implements the Panama Convention, which seeks to harmonize the arbitral process and enforcement of foreign awards on a regional basis. Unlike the New York Convention, the Panama Convention only applies to commercial transactions. The Panama Convention also provides procedural rules that serve as a default if the parties fail to specify procedures to govern the arbitration.

While the controlling federal law, the FAA does not preclude the application of state arbitration law so long as there are no inconsistencies with the FAA. See Volt Info. Scis., Inc. v. Bd. of Trs.of Leland Stanford Jr. Univ., 489 U.S. 468, 477 (1988) (the FAA contains no express preemption provision and does not reflect Congress’ intent to occupy the entire field of arbitration). Thus, state arbitration law still has a vital role in resolving many disputes. State law has also been the basis for a significant number of challenges to the arbitrability of contracts. See e.g., Buckeye, supra.

U.S. Arbitration Fora and Rules

While the FAA governs arbitration in the United States, it does not provide the rules for the administration of the arbitral proceeding. The most commonly used arbitration rules in the United States are promulgated by the American Arbitration Association (AAA), a not-for-profit, public service organization that offers an array of dispute resolution services, education and training, as well as specialized publications. Parties can provide for AAA arbitration by inserting the following clause in their contracts: 
Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

See, https://www.adr.org/Clauses

AAA Commercial Rule 7 further provides that the arbitrator(s) have the power to rule on jurisdiction, including any objections regarding the existence, scope or validity of the arbitration agreement. The arbitrators also may determine the existence or validity of a contract containing an arbitration clause independent of the other terms, which decision shall not alone invalidate the arbitration clause.

AAA has rules for commercial cases, construction cases, consumer cases, labor cases, employment cases and international cases. See, https://www.adr.org/Rules. The different rules have been promulgated in recognition of the distinct characteristics of different types of disputes. For example, the employment rules proved that the employer, not the employee, shall bear the brunt of the cost of an arbitral proceeding. The AAA Employment Rules provide:

Under the Employment/Workplace Fee Schedule, the employee’s or individual’s fee is capped at $300, unless the clause provides that the employee or individual pay less. The employer or company pays the arbitrator’s compensation unless the employee or individual, post dispute, voluntarily elects to pay a portion of the arbitrator’s compensation. Arbitrator compensation and administrative fees are not subject to reallocation by the arbitrator except upon the arbitrator’s determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.

See, https://www.adr.org/employment

Other institutions offering arbitration fora and rules are: The Institute for Conflict Prevention and Resolutions (CPR), which is headquartered in New York; JAMS, which is headquartered in California; NAM (National Arbitration and Mediation), which is headquartered in New York; and The Financial Industry Regulatory Authority (FINRA), which operates the largest dispute resolution forum in the securities industry. Each of these offers a set of rules and procedures that parties may incorporate into their arbitration agreements. Each also maintains panels of qualified neutrals with specific professional expertise from which parties may select their arbitrators.

Outside of these institutions, other sets of rules for the procedural aspects of arbitration are the Uniform Arbitration Act (UAA) and the Revised Uniform Arbitration Act (RUAA). The first was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), commonly known as the Uniform Law Commission in 1955 and revised in 2000. See Meyerson, The Revised Uniform Arbitration Act Fifteen Years Later, 71 Dispute Resolution Journal 1 (2016). The UAA or RUAA apply when adopted by a state and incorporated by the parties into an arbitration agreement. Each fills the procedural void of the FAA.

A comparison of the RUAA to the rules of AAA, for example, demonstrates the former is far more detailed and formalistic. Id. The RUAA prohibits parties from varying some aspects of its provisions. Id. at 9-11. Also, unlike AAA’s rules, the RUAA provides that a court decides whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. Id. at 12. Parties, however, may vary this outcome in advance of a dispute by adopting the RUAA and incorporating the AAA rules into the agreement. Id. at 12-13.

Thus, the takeaway for practitioners is know the rules and plan for the outcome that is desired. There may be instances where a party wants a court to decide whether an agreement to arbitrate exists or
a controversy is subject to an agreement to arbitrate. Then again, more often, the parties desire an arbitrator to decide these issues.

**International Arbitration Fora and Rules**

International arbitration often is conducted under the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law, which was adopted by the United Nations General Assembly in 1966 to harmonize international arbitration among nations. UNCITRAL contains a set of provisions addressing many of the issues that may arise under an arbitration agreement that does not incorporate a complete set of private or institutional rules. UNCITRAL has also promulgated Arbitration Rules that were initially adopted in 1976 and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions. See [http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html).

Another set of rules that are widely used for international transactions are those of the International Chamber of Commerce (ICC). See, [https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration). These rules govern cases submitted to the ICC’s International Court of Arbitration and were most recently updated in 2017. The ICC was founded after WWI when no world system governed trade and today functions as an advocate for international trade and a source of dispute resolution and training. See, [https://iccwbo.org](https://iccwbo.org).

While the referenced institutions and rules are not exhaustive, they are illustrative of the smorgasbord from which the parties may choose. A key strategic consideration when drafting an arbitration agreement is determining what institution and set of rules may be more advantageous or provide greater certainty as to outcome.

**II Advantages and Disadvantages of Arbitration**

Arbitration is widely touted to have advantages over litigation in the United States. The following are among its perceived benefits:

- Greater speed and efficiency
- Privacy and confidentiality in that the proceedings are closed to the public.
- Ability to select decision makers with expertise.
- The ability to select the rules governing the proceeding.
- More limited discovery than litigation.
- Avoiding potentially hostile home courts, judges and/or juries.
- More limited grounds for challenging awards than appeal of judgments.
- Greater likelihood of recovering attorney’s fees and costs.


Notably, the same factors that are perceived as advantages also may be perceived as disadvantages. For example, a losing party likely would prefer a wider scope of judicial review than is provided for arbitration awards. Also, in high value cases with significant discovery, the efficiency aspects of arbitration are not as great. And in big stakes cases, parties may seek court intervention, which
slows down the process. *Id.* Additionally, arbitration has been used to limit the leverage of class actions, particularly in the context of consumer agreements. See *e.g.* DIRECTTV, Inc. v. Imburgia, 136 S.Ct. 463 (2015). The limitation of class actions is seen by some consumer advocates as an unwarranted check on the ability to bring accountability to corporate misconduct. Also, some perceived advantages may be illusory.

**Expense**

Lesser expense is often cited as a benefit of arbitration. However, arbitration may not be less expensive than litigation. And, if the expense appears greater than litigation, that may be a basis for having the proceeding dismissed by a court. Consider *Green Tree Financial Corporation Alabama v. Randolph*, 531 U.S. 79, 92 (2000) (where the Supreme Court acknowledged that a party may be able to invalidate an arbitration agreement on the basis that arbitration would be prohibitively expensive). In that case, the court did not, in fact, dismiss the proceeding but put the burden of demonstrating the costs on the party seeking to dismiss the proceeding.

In the wake of *Green Tree*, courts determine the issue of financial ability to arbitrate on a case by case basis. They consider the arbitration fees, the potential cost difference between arbitration and litigation and the party’s ability to pay. Counsel representing an individual inventor or other small entity may want to attack the arbitration agreement on these grounds. The arbitration of an intellectual property case with its complexity of the issues and demand for experts may be every bit – if not more -- expensive than litigation.

**Confidentiality**

Confidentiality is also frequently cited as a benefit of arbitration. However, the parties must be vigilant to preserve confidentiality, particularly in the process of having a court confirm an award. See *e.g.* XPO Intermodal V. American President Lines, 2017 U.S. Dist. LEXIS 176820 (D.D.C. Oct. 16) (motion to file arbitration proceeding documents under seal denied).

“The court sees no reason to seal the entire petition or any portion of this memorandum opinion and order … [or] the exhibits in their entirety simply because they contain or refer to confidential information.” *Id.* “[T]he parties mutual desire for confidentiality, without more, does not justify the sealing of the entire substantive record of the case.”

Thus, to preserve confidentiality, the parties must do more than merely enter into a confidentiality agreement. In seeking confirmation of an award, to preserve confidentiality of trade secrets or other confidential information, the parties must explain to the court why the privacy and proprietary interests in the case outweigh the general presumption of the public’s right to access. Parties need to determine what really needs to be kept confidential and then shield only the most sensitive information via redaction. By taking the time to be precise, parties will have a greater likelihood of preserving confidentiality when seeking court confirmation of an arbitral award.

**III Arbitration Procedural Issues**

**Determining Arbitrability of a Dispute.**

Perhaps the primary preliminary consideration is an arbitral tribunal’s ability to hear the parties’ dispute. The discussion *supra* answers this question in part. The ICC which governs many international agreements puts the question of arbitrability to the arbitrator(s), as does AAA. On the other hand,
agreements in the United States drawing upon the UAA or the RUAA, leave the question of arbitrability to the courts unless specified otherwise. Under applicable case law, courts do not presume the parties intended to arbitrate arbitrability unless there is “clear and unmistakable” evidence. See First Options of Chicago v. Kaplan, 514 U.S. 938, 948, 985 (1995). Therefore, a key consideration in drafting or reviewing an arbitration agreement is who determines arbitrability. Depending on the nature of a dispute and a party’s position, there may be a preference for where this determination is made.

**Determining Choice of Law in an Arbitration Agreement.**

A misstep lawyers often make when considering arbitration agreements is to assume the FAA is a procedural statute that only applies to transactions that are obviously interstate in nature. *Id.* This is a mistake. The Supreme Court determined in Allied-Bruce Terminix Cos. V. Dobson, 513 U.S. 265, 273-74 (1995) that the “involving commerce” language of the FAA has the full reach of the U.S. Constitution’s Commerce Clause and applies to any activity “within the flow of interstate commerce.” Consequently, in 2018, few party relationships and few contracts escape the preemption of the FAA.

The federal preemption of the FAA is counterintuitive. As discussed supra, an arbitration agreement is a contract. Generally, in the United States, parties are free to choose the applicability of a particular state law to their contract. Consequently, where the parties have stipulated that a specific state law governs an agreement, it does. Not so with arbitration agreements. See, Trantina, What Law Applies to an Agreement to Arbitrate, Dispute Resolution Magazine, 29 (Fall 2015). With few exceptions, the state law specified in an arbitration agreement is entirely preempted by the FAA. *Id.* Moreover, the arbitration provision in a contract is treated under the FAA as a separate agreement of the parties. So, unless specifically stated otherwise, a general choice-of-law provision does not apply to the agreement to arbitrate, while it may govern other substantive issues of the contract. *Id.* This is an important strategic consideration as the law applicable to the arbitration agreement often determines the dispute’s outcome.

**Summary Proceedings in Arbitration.**

The congressional reports underpinning the FAA demonstrate its establishment to avoid the “delay and expense of litigation.” Wilko v. Swan, 346 U.S. 427, 432 (1953) (“[t]he United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation.”) One of the chief causes of delay in civil litigation is the summary judgment process. So, does the election of arbitration over litigation avoid summary judgment?

Probably not. An arbitrator has the authority to choose procedures to best effect the parties’ arbitration agreement. In Weirton Medical Center v. Community Health Systems, 2017 U.S. Dist. LEXIS 203725 (N.D.W.Va. Dec. 12, 2017), the court denied the claimant’s motion to vacate an arbitration award entered by summary disposition. The arbitration agreement did not “expressly” permit summary disposition, but neither did it prohibit it. The agreement invoked the 2009 AAA rules for large, commercial cases. Those rules then, and still, permit the filing of a dispositive motion “if the arbitrator determines the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.” Rule 33, AAA Commercial Rules https://www.adr.org/sites/default/files/commercial_rules.pdf. Thus, arbitrators frequently have the ability to decide cases short of a full-blown evidentiary hearing.

A party who wishes to avoid summary proceedings may do so if the other side consents in the arbitration agreement to a plain and express ban. But that may mean the parties have an evidentiary hearing just to find out if there are real issues in the case. See, Sherrock v. DaimlerChrysler Motors, 2008 U.S. App. LEXIS 282 at *13. Such a scenario hardly avoids the delay and expense of litigation.
Evidence and Disclosures.

Under the FAA, an arbitrator can compel a party or non-party to attend and testify during an arbitral proceeding. The arbitrator can also compel the production of documents for the proceeding. 9 U.S.C. § 7 (2018). Witnesses so summoned are to be paid the same as witness before masters in the U.S. courts. Any person so summoned who fails to appear may be compelled by the district court and punished by contempt. Id. Thus, the FAA clearly provides substantial tools for arbitrators to obtain evidence to decide controversies brought to an arbitral tribunal.

However, questions remain whether the arbitrator’s authority to compel witness attendance and document production extends to pre-hearing discovery from nonparties. This is not a matter of agreement among federal courts. For example, arbitrators in the Second Circuit – as opposed to the Fourth and Eighth – are not empowered to compel pre-hearing discovery. See, Cheng and Peck, supra at 14. When allowed, the rationale is that prehearing production of voluminous material will further the goal of a full and fair hearing before the arbitration panel. Thus, in Meadows Indemnity Company, Ltd. v. Nutmeg Ins. Co., 157 F.R.D. 42 (M.D. Tenn. 1994), the court agreed that a non-party could be compelled to produce documents for inspection and copying by the requesting party prior to the hearing.

The scope of disclosure in arbitration is controlled by the agreement between the parties. This agreement may be in the arbitration agreement itself or in a written document entered in anticipation of the arbitration. Parties may also adopt an established body of rules.

For example, CPR has developed a protocol on documents and disclosure of witnesses in commercial arbitration. “The practices recommended deal with ways in which reasonable limitations may be placed on disclosure and efficiencies gained in the presentation of witness testimony in arbitration hearings.” See https://www.cpradr.org/resource-center/protocols-guidelines/protocol-on-disclosure-of-documents-presentation-of-witnesses-in-commercial-arbitration.

The CPR Protocol has two purposes:
The first is to assist the arbitrators in CPR or other tribunals (hereinafter “the arbitrators” or “the tribunal”) in carrying out their responsibilities under Rule 11 of the CPR Rules by setting out general principles for dealing with requests for the disclosure of documents and electronic information and for establishing procedures for the testimony of witnesses. The second purpose is to afford to the parties to an arbitration agreement the opportunity to adopt, before or after a dispute arises, certain modes of dealing with the disclosure of documents and the presentation of witnesses. Id.

CPR offers parties three schedules from which to select varying degrees of disclosure. The schedules cover electronic evidence, experts, forms of witness testimony, hearings and other matters in formats ranging from the very simple to more complex. Id.

Thus, the scope of discovery in judicial and arbitral proceedings may be vastly different. When parties commence litigation in the United States, the rules of federal and state civil practice default to time consuming discovery and disclosure obligations particularly regarding electronically stored information. See, Cheng and Peck, supra at 14. In contrast, arbitrators are increasingly trying to find ways to minimize the costs associated with electronic discovery and to limit discovery to critical issues.

Interim Measures in Arbitration.
Arbitral tribunals may grant interim relief ranging from temporary injunctions to orders placing funds in escrow. Generally, arbitral relief is enforced by U.S. courts. Along the spectrum of interim measures are orders:

- Securing assets or evidence pending the arbitration;
- Preventing a party from terminating or breaching an agreement;
- Protecting against the disclosure of trade secrets or sensitive information; and
- Generally stopping a party from engaging in activities that could frustrate the arbitral process. *Id.*

Parties typically provide for interim measures in their agreement. Interim, provisional and conservatory relief in aid of arbitration may be provided by: the arbitral tribunal, an “emergency arbitrator” appointed by an administering body; or a federal or state court. *See, Interim, Provisional and Conservatory Measures in U.S. Arbitration,* Resource ID: 0-587-9225 , Practical Law (2017 Thomson Reuters)

Parties generally can apply either to a court or the arbitration forum for interim relief. *Id.* Parties should consider applying to the court when:

- The arbitral tribunal has not yet been constituted, and therefore cannot yet act. In these cases, unless the applicable arbitral rules contain emergency arbitrator provisions, an application to the court is necessary.
- The party seeking interim relief needs judicial compulsion. Although arbitrators can impose negative consequences on parties (for example, drawing adverse inferences if a party does not produce evidence), they have no ability to make a party carry out their orders and no power that can be applied to non-parties.
- The party needs ex parte relief. Under most institutional rules, a party seeking emergency measures of protection must notify the other parties (see AAA Rule 38(b) …). Notice of the application gives the party an opportunity to dissipate the evidence or assets that are the subject of the application. By the time the tribunal makes an order, it can be too late. By contrast, federal courts and most state courts (for example, California and New York) permit an applicant to proceed without notice in urgent cases. This usually happens where an attachment of assets is sought.
- The matter is urgent and the arbitrator does not act timely or does not provide an adequate remedy (see section 8 of the RUAA). Absent a showing of urgency, under the RUAA parties may seek relief only from the arbitrator after the arbitrator is appointed and is authorized and able to act.

However, an arbitrator may not have the power to grant the interim relief sought. For example, arbitrators may not have the authority to appoint a receiver (compare *Stone v. Theatrical Inv. Corp.*, 64 F. Supp. 3d 527, 540 (S.D.N.Y. 2014), reconsideration denied, 80 F. Supp. 3d 505 (S.D.N.Y. 2015) (arbitrator has the power to appoint receiver as part of a final award) with *Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C.*, 839 A.2d 52, 57-58 (N.J. Super. Ct. App. Div. 2003) and *Pursuit Capital Mgmt., LLC v. Claridge Assocs., LLC*, No. 654301/12 (Sup. Ct. N.Y. Co. Mar. 21, 2013) (w-002-9127) (arbitrators may not appoint a receiver as a provisional remedy)) *Id.*
Parties should consider applying to the arbitral tribunal for interim relief when:

- The tribunal has been constituted and is available on short notice.
- The applicant is satisfied that the other party will respect orders issued by the tribunal.
- The federal or state courts at the place of arbitration are reluctant to grant provisional remedies in aid of arbitration (see, for example, *Smart Techs. ULC v. Rapt Touch Ireland Ltd*, 2016 WL 3871179 (N.D. Cal. July 15, 2016) (declining to entertain motion for preliminary injunction in aid of arbitration in view of availability of emergency arbitrator); and *A & C Disc. Pharmacy, L.L.C. v. Caremark, L.L.C.*, 2016 WL 3476970, at *6 (N.D. Tex. June 27, 2016) (declining motion on the ground that the arbitrator, not the court, should rule on who has the primary power to decide whether the request for preliminary relief is arbitrable)).
- The parties’ agreement or the applicable institutional rules empower the arbitral tribunal to grant broader interim relief than would be available in court (see, for example, *CE Int’l Res. Holdings LLC v. S.A. Minerals Ltd. Pship*, 2012 WL 6178236, at *3-*5 (S.D.N.Y. Dec. 10, 2012) (asset freeze) and *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003) (pre-award security)).

Appealing an Arbitration Award.

There is no right to appeal an arbitration award in the ordinary sense. However, arbitration awards may be set aside on limited grounds. Section 10 of the FAA provides an award may be set aside where:

- The award was procured by fraud, corruption or undue means.
- There was evident partiality or corruption in or among any of the arbitrators.
- The arbitrators were guilty of misconduct in refusing to postpone the hearing on sufficient cause shown, or in refusing to hear relevant and material evidence or any other misbehavior that prejudiced the rights of any party.
- The arbitrators exceeded their powers or so imperfectly performed that a mutual, final and definite award was not made.


The Supreme Court has suggested that an arbitral award potentially may be set aside for “manifest disregard of the law” See, *Stolt-Neilsen S.A. v. Animal Feeds Int’l Corp*, 559 U.S. 130 (2010). However, courts have determined that so-called “manifest disregard” is not a basis for a court to reject an arbitral award under the FAA unless the award in effect directs the parties to violate the law. See e.g., *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281 (7th Cir. 2011); *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001). Consequently, there are very few grounds on which an arbitration award can be vacated.

A way around this legal limitation is present in the contractual nature of arbitration itself. It is possible to craft into the arbitration agreement itself an appellate provision that requires another panel of arbitrators to review the award. See, Forer,*Appealing an Arbitration Award – to Court or to an Arbitral Tribunal*, The Legal Intelligencer (Oct, 23, 2017).

But be careful. Under the “complete arbitration rule” a federal district court is precluded from review of an arbitration until all issues are finally decided by the arbitrators. See e.g. *Pub. Serv. Elec. &
Gas Co. v. Sys. Council U-2, Int'l Bhd. of Elec. Workers, AFL-CIO, 703 F.2d 68 (3d Cir. 1983). There, the question was whether the district court had jurisdiction to vacate a liability determination by an arbitration panel in bifurcated proceedings under the Labor Management Relations Act (“LMRA”). The Third Circuit held that, “[r]eview of the decision at this stage would disrupt and delay the arbitration process and could result in piecemeal litigation.” Id. at 70. So, an arbitration, must be complete before court review and confirmation is possible. And if a review procedure is specified in the arbitration agreement, only upon completion of that process is court review possible.

Correcting an Arbitral Award.

A court may modify or correct a domestic arbitral award: (a) where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award; (b) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; and (c) where the award is imperfect in matter of form not affecting the merits of the controversy. See 9 U.S.C. § 11. The court may also modify and correct an award to effect the intent of the award and to promote justice between the parties.

Enforcing an Arbitral Award.

The FAA, 9 U.S.C. § 9, provides that domestic awards may be confirmed “[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration.” See Qorvis Commun., LLC v. Wilson, 549 F.3d 303, 311 (4th Cir. 2008). In Oorvis, an employee challenged entry of judgment on an arbitration award on the grounds that the parties’ agreement did not contain the statutory language. The court however inferred that entry of judgment on the award was warranted from the agreement’s language calling for arbitration and the employee’s participation in court ordered arbitration.

In order to enter judgment on an award, the court must have the power to do so. Personal jurisdiction, proper venue and subject matter jurisdiction must be established to successfully confirm an award. 9 U.S.C. §§ 204, 302. Generally, a petition to confirm may be filed in any court specified in the agreement or where the arbitral award was made.

IV Arbitrators

Number and Qualifications.

In the United States there are no formal requirements for the number of arbitrators, their qualifications or their manner of selection. See, Cheng and Peck, supra at 11. Parties frequently agree on their selection in advance, in the arbitration agreement, or by invoking institutional rules such as AAA which contain arbitral selection procedures. A common scenario is for there to be a three-judge panel with each party appointing an individual arbitrator, who then appoint a chairperson. In the event the parties fail to provide for the appointment of an arbitrator, U.S. courts are authorized to appoint a tribunal pursuant to the FAA. 9 U.S.C. § 5.

Independence and Impartiality.

The FAA does not require arbitrators to be independent or impartial. Such questions are typically left to the parties’ agreement or to chosen arbitral rules. However, the FAA permits vacatur of an award where there was evident partiality or corruption in the arbitrators. 9 U.S.C. §10(a) (2). Because of the
potential for vacatur of an award based on arbitrator partiality, arbitrators’ disclosures have become increasingly important.

The classic formulation of the disclosure rule is found in Cannon II of the Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA 1977) ("the Code"): "An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias."

AAA Commercial Arbitration Rule 19 is similar and requires disclosure of:
1. any direct or indirect financial or personal interest in the outcome of the arbitration, or
2. any existing or past relationship with the parties or counsel, or
3. any other facts reasonably likely to affect the impartiality of the arbitrator.

The “interest” that must be disclosed as defined by the Code is any "direct or indirect financial or personal interest in the outcome of the arbitration." The obligation to disclose relationships is more complex. Consequently, it has fostered more vacatur litigation. The Code sets the general rule that disclosure extends to existing or past financial, business, professional, family or social relationships which might reasonably create an appearance of partiality or bias.

The issue of bias is itself distinct. Cannon II of the Code requires disclosure of interests or relationships which might create an appearance of partiality or bias. However, there is no specific requirement in the Code for disclosure of bias as a separate subject. AAA Rule 19 does identify bias as a separate disclosure item. Bias may exist for reasons other than interest or relationships.

Notably a party appointed arbitrator is still subject to a duty of disclosure so that the other party might have some insight into the arbitrator’s involvement. However, the non-neutral arbitrator is not subject to disqualification based on the matter disclosed. See e.g. http://corporate.findlaw.com/litigation-disputes/what-is-an-arbitrator-s-duty-of-disclosure.html.

Conclusion

As discussed, arbitration may be more efficient and less expensive than litigation. But that largely depends on avoidance of pitfalls that can drive up the cost. While the court system, has an established road map through the rules of procedure, rules of evidence and case law, arbitration does not. In arbitration, the “rules” and the “law” to be applied are largely left up to the parties so long as they are consistent with the Federal Arbitration Act.

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