IS THERE PERIL IN SEEKING PRIVATE JUSTICE THROUGH ARBITRATION – AND FOR WHOM?

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The Rise of Private Justice

The New York Times

“Arbitration Everywhere, Stacking the Deck of Justice” 10/31/15
“Privatization of the Justice System” 11/1/15

Franchising is no exception
Survey

- Counsel/Participant in arbitration?
- Drafted or accepted an arbitration clause in an agreement?
- Tried to avoid an arbitration clause?
-Appealed an arbitration award?
- Served as an arbitrator?
The Hand We Are Dealt

• Efficient, confidential, reliable?

OR

• Slow, expensive, unreliable?
Contents of the Arbitration Clause
Broad or Narrow?

“... any controversy or claim arising out of or relating to this Agreement”

“...any dispute between the parties arising out of or relating to this Agreement”

Determines who the parties can be – signators, guarantors, association, controlling persons, mandatory or optional
Other Common Provisions

• Class waivers

• Carve-out for intellectual property protection

• Direct negotiation or mediation as a precondition

• A designated arbitration service provider and rules

• Confidentiality
The Do-Over Clause

If the arbitrator awards either party damages in excess of $100,000, then the party who has been held liable will have the right to a de novo hearing on the merits by commencing an action in a court of competent jurisdiction, in which the party receiving the award will not have the right to introduce the arbitrator’s decision, and the arbitrator’s findings will be of no force and effect.
The Arbitration Process Can Vary Dramatically

• The designated arbitration service and rules
• Agreed modifications, in contract or later
• Arbitrator selection
Costs of Private Justice

• Filing Fees – AAA $750 - $10,000; JAMS $1200 (2 party)
• Administration/Case Management Fees – Sometimes 12%
• Professional Fees -- $300 – $1000 per hour per arbitrator
• Cancellation/Postponement Fees

What happens if a party won’t (or can’t) pay?
Tillman v. Tillman, 825 F.3d 1069 (9th Cir. 2016)
How to Invoke an Arbitration Clause

Filing a demand

Web form: Parties, Nature of Dispute, Relief Sought, Arbitration agreement, Fee

Answer: A strategic call – silence or a submission

May need to obtain the assistance of the courts
2005-2014

1704 federal motions to compel arbitration in class actions
Moving to Compel Arbitration

Timing of the Motion

• After removal and before movant might be deemed to have waived arbitration rights

• **Watch out** for waiver by litigation

  *Martin, et al. v. Yasuda, 829 F.3d 1118 (9th Cir. July 21, 2016).*
Legal Grounds -- § 3 of the FAA

If satisfied that the issue involved is covered by the arbitration agreement, the court *shall* stay the matter until the arbitration is held.

- Agreement
- Covers the dispute (resolve doubts in favor of arbitration)
- Request a stay (not appealable) or dismissal (appealable)
Potential Challenges and When to Bring Them

• Fraudulent inducement
  – Prima Paint – must be inducement of the agreement to arbitrate, not the overall agreement

• Arbitration clause is defective in some way
  – Violates public policy

• Arbitration clause is unconscionable in some way
  – But watch federal pre-emption (AT&T v. Concepcion and DirectTV v. Imburgia)
    – Try state courts (NJ - Altalese v. U.S. Legal Servs. Group)

• Waiver
Moving to Compel Individual or Class Treatment

Legal standard: “A party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010)

Who decides this “gateway” issue?

Split among the Circuits
How Does Class or Representative Arbitration Work?

Three steps:

1) Clause construction
2) Class certification
3) Then merits

Not Confidential!
Alternatives to Class Arbitration

Individual claims

– Test case (agreed or not)
– Collateral estoppel
Association Arbitration or Litigation

Need a broad arbitration clause

*Stolt-Nielsen* applies – arbitration is a matter of contract

Does the clause contemplate the arbitration of this type of claim?
The Practical Application of Slide 5: Broad or Narrow Arbitration Clause?

“...any controversy or claim arising out of or relating to this Agreement”

“...any dispute between the parties arising out of or relating to this Agreement”
Associational Standing

U.S. Supreme Court:

• Members would otherwise have standing to sue in their own right
• The interests at stake are “germane” to association’s purpose
• Claim can be decided, and relief afforded, without participation of individual members as parties
Limited Rights of Review

“[C]onvincing a court of an arbitrator’s error – even his grave error – is not enough. So long as the arbitrator was ‘arguably construing the contract – and this one was – a court may not correct his mistakes under § 10(a)(4) . . . . The potential for those mistakes is the price of agreeing to arbitration . . . .’ The arbitrator’s construction holds, however good, bad, or ugly.”

Oxford Health; Stolt-Nielsen
Statutory Grounds for Appeal

(1) award procured by corruption or fraud

(2) evident partiality or corruption on the part of an arbitrator

(3) arbitrators’ misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear material evidence ... or any other misbehavior prejudicing the rights of a party

(4) arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award was not made.

9 USC § 10(a)(emphasis supplied)
Varying the Grounds for Appeal

• Try “manifest disregard for the law” – if arbitrator is “fully aware of the existence of a clearly defined governing legal principle, but refuse[s] to apply it, in effect, ignoring it.”
  – A “judicial gloss” accepted in some Circuits (Second, Third, partially Ninth)
  – Not accepted in others (Seventh)
• Try state court standards
• Contract language may not help you. “[P]arties may not contractually expand the grounds or nature of judicial review.” The statutory grounds are “exclusive.” (Hall Street; Concepcion)
• Or pay more for an appeal within the arbitration service structure
Timing An Appeal to the District Court

- Need jurisdiction
- Timing requirements can be a trap
  - FAA requires motion to vacate, modify or correct within 3 months
  - Date of delivery counts as Day 1
Why Seek to Vacate or Confirm?

Once judgment is entered confirming an award, it “shall have the same force and effect, in all respects, as ... a judgment in an action.” FAA § 13

Practical Effects:

• Ability to enforce the judgment
• Preclusive effect – res judicata, collateral estoppel
• Eliminates confidentiality restraints for the Award
Practical Advice for Proceedings

• Arbitrator selection is key – more power than a federal judge
• Many excellent arbitrators
• Many horror stories
• How to find out?
Investigating a Potential Arbitrator

What to test for?

Substantive positions

Willingness to delve into issues

Close connections to adversary or firm

Implicit bias / Ego
Arbitrator Mindset

“Bullet-proofing an Award”

“Disarming a Potential Challenger”

“The Bullet-Proof Vest”

“Kevlar Full Body Armor”

• Put in terms of avoiding unintended consequences but suggesting that the losing party is the arbitrator’s adversary

• Like prosecutors who tout their win/loss record
Where to look

- AAA/JAMS docket, for class actions
- Legal Databases – Pacer, Lexis, Westlaw
- Internet
- Grapevine
Preparing Your Proof

• Discovery rules – study and consider changing them

  Example: R-22. Pre-Hearing Exchange and Production of Information

• International skepticism about “American-style discovery”

  ICC: “Consider whether requests for production of documents are genuinely necessary.”
Obtaining Evidence from Third Parties
(Evaluate early the witnesses you need)

• **Cost effective**: agreed testimony, by video or Facetime
• **More costly**: Subpoenas for documents or testimony
  – Eighth and Sixth Circuits (subpoenas in advance)
  – Second Circuit (the emerging consensus of “no”)
  – Fourth Circuit compromise (if “special need”)
• **Most costly**: an “early hearing”
Dispositive Motions?

Competing concerns: not hearing relevant evidence/efficiency

FAA ground for reversal, Section 10(a)(3):
“...where the arbitrators were guilty of misconduct in ... refusing to hear evidence pertinent and material to the controversy....”

AAA R. 23: “The arbitrator shall have the authority to issue any orders necessary to ... achieve a fair, efficient and economical resolution of the case....”
Conducting the Hearing Itself

• Direct/Cross
• Live or video
• Exhibit handling
• Electronic displays for arguments and exhibits
• Closing arguments, briefs or both?
R-39. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.
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QUESTIONS AND COMMENTS?