The Quick Primer on Arbitration for New Attorneys

By Serena K. Lee

For those attorneys who had exposure to arbitration in law school, the basics of the process is quite simple: arbitration is a non-judicial process[1] that is often created by contract law whereby parties agree to a private adjudication process in which an arbitrator or a panel of arbitrators will hear the relevant facts of a case and render a decision, which is binding on the parties. The prevailing party can have the arbitral award affirmed in a court of original jurisdiction. Parties seeking to modify or vacate an arbitral award have very limited grounds to do so,[2] and successful challenges are rare.[3] Given the practical finality of the process, new attorneys should be very mindful that there are differences in the arbitration process and that, unlike the rules of the court, the procedural differences can significantly impact one's case.

New attorneys may find themselves before an arbitrator (or arbitrators) well before they ever find themselves before a jury or a judge, especially those who practice international law, labor or employment law, or smaller commercial disputes, where many business owners will opt to include an arbitration clause as part of their dispute resolution process.

In this new series to be continued within the Young Lawyers Committee's quarterly e-newsletter, we will address the various stages of arbitration for our new attorney members. The purpose of this series is to provide new attorneys with an introduction to the issues related to arbitration and to encourage additional research and thought.

"A Creature of Contract"

Be aware of what the arbitration language states in the contract. We have all heard of the adage in law school that arbitration is a "creature of contract" and indeed, its creation as a dispute resolution process is based on contract law. Legislators have shown great reluctance to modify the original language of the Federal Arbitration Act (FAA),[4] though there have been some recent attempts by legislators to address concerns related to mandatory arbitration clauses in consumer contracts and pre-dispute employment contracts.[5]

Because arbitration is created by contract, all parties must abide by the language of the contract, including how the arbitration must be administered. For instance, if the contract states that the arbitration must be concluded within a certain time after the demand for arbitration is filed, then the parties, the arbitrator(s) and the administrating agency (such as the American Arbitration Association or JAMS) must abide by that contract term.

Read through the arbitration clause very carefully – the language can be very brief and generic (e.g., "All claims and controversies arising from this contract shall be settled in binding arbitration in the State of Washington using Washington state law."), a boilerplate clause from a major arbitration provider,[6] or highly detailed and customized for a particular company or client. Such clauses may name specific arbitrators that must be used, choice of law, locale of arbitration, language that the arbitration must be conducted in, specific limitations on the types of controversies exempt from the arbitration clause, and so forth. As a rule of thumb, the contract language is given the most weight by the arbitrator(s) in determining scope and authority of the

arbitral process, then procedural and substantive matters are decided by the arbitrator based on state law and the FAA as well as customary industry practices (such as in complicated construction disputes) if there is no guiding language in the contract.

From reviewing some contracts, it becomes evident that the dispute resolution clause was copied and pasted as an afterthought by drafters anxious to finalize a deal. A commercial contract may inadvertently call for the arbitration to proceed under the AAA construction rules (rather than the intended commercial rules); the clause may refer to an organization no longer in business when the demand for arbitration is filed. Be mindful that the arbitration service provider or the ad hoc arbitrator will refer to the contract first to determine its jurisdiction and scope – if there are any ambiguity or conflict in the dispute resolution clause, it may result in a costly and frustrating delay.

There have been instances when parties to a dispute can agree, post-dispute, to modify the dispute resolution clause – for instance, extending the time when an arbitrator must be appointed after the filing of a demand for arbitration – but this requires mutual agreement from all parties, which can be difficult to obtain after the demand has already been filed. A good principle to practice is to extend professional courtesy to your adversary – their cooperation may determine how quickly and efficiently your arbitration proceeds in the first instance.

Who is administering the arbitration?

The arbitration clause may be very explicit as to who the demand for arbitration should be filed with[7] or simply state that the parties have the duty to arbitrate disputes and the attorneys are often left to the task of identifying and appointing an arbitrator. Parties can also opt to either submit to an arbitral organization post-dispute (called a "submission") by mutual agreement, or mutually agree to opt out of a named arbitration administrator and either select another organization or go "ad hoc" by mutually selecting a third party arbitrator. The pros and cons of an administered versus ad hoc arbitration will be discussed in a future article.

If your arbitration is being administered by a third party organization, the largest arbitration organizations include:

- American Arbitration Association (AAA), www.adr.org: Established in 1926, the AAA is a non-profit organization and the largest ADR provider in the world, with offices in several countries and over 7,000 arbitrators and mediators who are full time neutrals, practicing attorneys and professionals (such as accountants, engineers, architects, etc.).

- CPR Institute of Dispute Resolution (CPR), http://www.cpradr.org: CPR was formed in 1979 to "bring together Corporate Counsel and their firms to find ways to lower the cost of litigation" and today maintains a roster of arbitrators who are legal counsels and business executives to address commercial disputes.

- Federal Mediation and Conciliation Services (FMCS), http://www.fmcs.gov/internet: A federal program created in 1947 to provide a preapproved list of labor arbitrators for employers and unions in dispute. Unlike other arbitration organizations that provide administrative support (e.g., a case manager to assist parties in assembling a

list of potential arbitrators, conducting a conflicts check of the arbitrator prior to appointment, scheduling hearings, handling billing, etc.), the FMCS is primarily a "list only" service, whereby parties can request a list of arbitrators with specific subject matter expertise (e.g., public safety for a labor dispute involving a police officer dismissed after a shooting incident) and the parties are tasked with agreeing to one of the arbitrators on the list.

- JAMS (www.jamsadr.com/): Founded in 1979, JAMS is the largest private arbitration service provider in the United States, with over 300 arbitrators, the majority of which are retired judges though they have attorneys who are still in practice.

Each of these organizations maintain a list of arbitrators – some of whom have exclusive agreements or can take cases on an ad hoc basis – and may publish procedural rules and fees for their services. Research and understand the organization's rules carefully – they may vary in many substantial ways, including how long an arbitrator must issue an award after the formal closing of a hearing, what the payment process is to ensure timely payment of services prior to the first hearing date, whether a construction respondent has the right to collect photos of the worksite as a matter of right, etc. Some organizations, such as the AAA, has different rules for different types of cases – for instance, the rules of the International Center of Dispute Resolution (ICDR), the international division of the AAA, provides for interim emergency relief in international disputes.[8]

There are, of course, numerous quality regional and local arbitration and mediation service providers across the country – contact your local bar or conduct a quick online search for a list. Based on the amount in controversy in the dispute, it may make sense for all parties to opt for an ad hoc arbitrator to save on the cost of the administrative fees charged by some of the larger service providers but be aware that ad hoc arbitration requires both experienced counsel as well as an arbitrator who has the experience to act as an administrator without compromising his or her role as the neutral decision maker (i.e., how will the issue of non-payment by one party affect the arbitrators' ability to serve and will that result in an impasse or protracted delay by one party?).

The Young Lawyers Committee continues to provide summaries on various aspects of the arbitration and mediation process. If any new attorneys wish to either address or have answered any questions related to arbitration or mediation, we encourage our members to reach out to the Committee. Future questions and answers will be posted on our upcoming new Committee website and Committee e-newsletter.

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[1] There are also many instances of arbitral proceedings that are mandated by statute or as part of the judicial system, such as a mandatory arbitration program for matters whereby only monetary claims under a certain amount are sought.

[2] To understand more comprehensively the grounds to vacate an arbitral award, refer to your state arbitration statutes or refer to the Federal Arbitration Act, 9 U.S.C. §§ 9-11. As a general rule of thumb, a district court must confirm an arbitration award unless: (a) it was procured by corruption, fraud, or undue means; or (b) the arbitrators were guilty of misconduct or exceeded their powers.

[3] For an interesting examination of the success rate and grounds for vacating an arbitral award, see Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005 at 23.

[4] The Federal Arbitration Act (Pub.L.68-401, 43 Stat. 83) was enacted on February 12, 1925, and codified at 9 U.S.C. § 1.

[5] See the Fairness in Arbitration Act of 2011, http://www.gpo.gov/fdsys/pkg/BILLS-112s987is/pdf/BILLS-112s987is.pdf.

[6] E.g., "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 [including the Optional Rules for Emergency Measures of Protection], and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 7, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540.

[7] E.g., "In the event a dispute shall arise between the parties to this [contract, lease, etc.], it is hereby agreed that the dispute shall be referred to [one of the following choices: (1) designate a specific USA&M office or alternate service by agreement of the parties; (2) provide a method of selecting the arbitrator and situs of the hearing, such as "from the county wherein the manufacturing plant is located"; or for multi-jurisdictional disputes (3) insert "a USA&M office to be designated by USA&M National Headquarters"] for arbitration in accordance with the applicable United States Arbitration and Mediation Rules of Arbitration. The arbitrator's decision shall be final and legally binding and judgment may be entered thereon." United States Arbitration & Mediation, *Arbitration Clause*, http://usam.com/services/arb_clause.shtml

[8] See Int'l Ctr. of Dispute Resolution R. 37, http://bit.ly/12uFQ1n (providing for Emergency Measures of Protection).