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112 Beyond the Basic Arbitration Agreement: Increasing the Speed and Efficiency of Commercial Arbitration

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Peter R. Day

Peter R. Day is the corporate counsel for Mercer Island Arbitration Chambers International in Mercer Island, WA. With wide-ranging experience as a business lawyer, trial lawyer, corporate executive and university educator, Mr. Day serves as a neutral in alternative dispute resolution as needed.

Prior to his work for Mercer Island Arbitration Chambers International, Mr. Day served as chief counsel for two divisions of The Boeing Company, where a substantial part of his responsibility was cost-effective and prompt dispute resolution, using negotiation, informal means of alternative dispute resolution, and formal mediation, arbitration or litigation when necessary.

Mr. Day currently serves on the adjunct faculty at the Seattle University Albers School of Business and Economics, where he teaches business and international law at the MBA and undergraduate level.

Mr. Day received a BA from Yale University and is a graduate of the University of San Francisco School of Law.

Barbara A. Mentz

Barbara A. Mentz is an attorney and arbitrator and currently maintains her own law offices in New York. Ms. Mentz has been a commercial litigator for over 34 years, and has recently retired from Deloitte & Touche USA LLP where she was principal and associate general counsel, having managed all aspects of a wide range of civil litigations and legal matters, including: complex securities class actions, accountants' liability, arbitrations, mediations, regulatory matters involving the Securities and Exchange Commission, the Department of Justice, various State regulatory agencies and the AICPA, employment law matters, risk management, and compliance matters.

Prior to joining Deloitte & Touche, Ms. Mentz worked as a general attorney at CBS, Inc., a partner in Hall, McNichol, Hamilton and Clark, and a litigation associate at Sullivan & Cromwell.

Ms. Mentz has served as the chair, co-arbitrator and arbitrator in arbitrations and, as an advocate, has handled numerous complex, multi-party mediations involving securities class actions and other commercial actions. Ms. Mentz is on the panel of neutral arbitrators of the National Arbitration Forum, the banking, accounting and financial services and employment panels of the International Institute for Conflict Prevention and Resolution, and the roster of neutral arbitrators of the National Futures Association.

Ms. Mentz received a BA from the University of Kansas and graduated magna cum laude from the University of Notre Dame Law School.

Stacie Otte

Stacie Otte is senior legal counsel for Forthright Solutions in Minneapolis, where she educates consumer and commercial financial institutions about the benefits of utilizing alternative dispute resolution and arbitration administered by the National Arbitration Forum.

Ms. Otte brings five years of law firm experience in litigation, arbitration and mediation to Forthright. Previously she was an associate with Dunlap & Ritts, P.A., where she handled all aspects of criminal defense and civil litigation cases and participated in arbitration and mediation proceedings as legal counsel for her clients.

Ms. Otte received a BA from Coe College and is a graduate of Hamline University School of Law.

John Zugschwert

John Zugschwert is senior vice president for Forthright Solutions in Minneapolis, where he leads outreach efforts designed to educate businesses, governmental agencies, and consumers on dispute resolution programs. Specifically, he focuses on the advantages and benefits of utilizing arbitration with the National Arbitration Forum as an alternative to litigation.

Mr. Zugschwert brings 17 years of top-level leadership and strategic communications skills to Forthright. He has worked extensively over his career with Corporate Counsel in the Fortune 1000 on maximizing their ability to use all means available to best represent the interests of their organization, including alternative dispute resolution solutions.

Mr. Zugschwert received a BA from the University of St. Thomas and is a graduate of William Mitchell College of Law.

ACC 2008 SESSION 112 OUTLINE

Beyond the Basic Arbitration Agreement: Increasing the Speed and Efficiency of Commercial Arbitration.

INTRODUCTION – COMMON CONCERNS ABOUT ARBITRATION

1) Time (and expense) to resolution
2) Finality and the right to appeal
3) Compromise (split-the-baby) awards
4) Arbitrator quality and the lack of information about arbitrators
5) Lack of predictability

ARBITRATOR QUALIFICATIONS AND CAPABILITIES

1) Qualities desired in arbitrator
2) Checklist of qualifications of arbitrators for consideration

WHAT WOULD PARTIES LIKE TO KNOW ABOUT THE ARBITRATOR'S APPROACH

1) Traditional judge model as arbitrator versus fact finder model as arbitrator
2) Approach to case management

EXPECTATIONS (INSIDE VERSUS OUTSIDE COUNSEL)

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   a) Managing outside counsel
   b) Active participation in the process
2) Arbitration and risk management

   a) Controlling the range of issues and the scope of relief to be awarded
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CASE MANAGEMENT

1) Initial arbitrator conference – agenda, objectives
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4) Dismissing the frivolous case early
   a) Choose rules that authorize sanctions
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   a) Example arbitration rules
6) Evidentiary issues
   a) Oral versus written testimony
7) Ad hoc versus administered arbitration
8) Regular or streamlined procedures?

CLAUSE DRAFTING:

1) Boilerplate language: The basic elements of an arbitration clause
   a) Agreement to arbitrate
   b) Governing law
   c) Designating an administrator

2) Specificity vs. Flexibility
   a) When to rely on an administrator's rule set?
   b) When to tailor the clause to meet the parties' needs?

3) Keys to Enforceability
   a) Make it mutual
   b) Make it affordable
   c) No limitation on remedies

APPELLATE REVIEW:

1) The aftermath of Hall Street Associates v. Mattel
   a) Appeals within the arbitral process
2) The statutory grounds for vacatur

ACC 2008 SESSION 112 COURSE MATERIALS

Related Materials and Helpful Resources from the ACC Virtual Library
http://search.acc.com/search_html.cfm

ARBITRATION RESOURCES

Arbitration Basics: The Why's, How's and Who's of ADR
http://www.acc.com/resource/v6733

202 Arbitration Basics: The Why's, How's and Who's of ADR
http://www.acc.com/resource/index.php?key=6850

International and Domestic Arbitration of Disputes: Advantages and Disadvantages
http://www.acc.com/resource/v7923

Effective Employment Arbitration Agreements
http://www.acc.com/resource/v7797

Arbitration Clause Checklist for Intellectual Property Matters
http://www.acc.com/resource/v6552

Strategies for Mediation, Arbitration, and Other Forms of Alternative Dispute Resolution
http://www.acc.com/resource/v4848

Advanced Settlement Techniques and the Use of Mediation and Arbitration to Resolve Disputes

http://www.acc.com/resource/v5139

INTERNATIONAL ARBITRATION

Drafting the International Arbitration Clause

http://www.acc.com/resource/v9005

Tools that Create Successful Resolutions in International Arbitration

http://www.acc.com/resource/index.php?key=8490

Going Global – Preparing for Arbitration

http://www.acc.com/resource/v7116

Hands On: The Neutral Zone: A Practical Guide to International Arbitration

http://www.acc.com/resource/v7235

A Fresh Look at ADR: Why International Arbitration?

http://www.acc.com/resource/v1209

ARBITRATION AGREEMENT DRAFTING GUIDE

ALTERNATIVES TO LAWSUITS – BACKGROUND AND DEFINITIONS

Mediation is a process of dispute resolution in which an impartial third party – a mediator – intervenes in a dispute with the consent of the disputing parties and assists them in negotiating a consensual and informed agreement. In mediation, the decision-making authority rests not with the mediator but with the parties themselves. The role of the mediator involves assisting the disputants in defining and clarifying issues, reducing obstacles to communication, exploring possible solutions, and reaching a mutually satisfactory agreement.

Arbitration is a process where disputing parties submit their disputes to a private, neutral third party arbitrator or panel of arbitrators, who renders a final decision. Parties are entitled to the same substantive remedies available in court, but in a forum that is faster, less expensive, less formal, and less destructive to the parties' relationship than the lawsuit system.

In the 1995 *Allied-Bruce Terminix* case,[1] the U.S. Supreme Court recognized arbitration's benefits:

- Arbitration is less expensive than litigation;
- Arbitration has simpler rules;
- Arbitration minimizes hostility;
- Arbitration does not disrupt business dealings among the parties; and
- Arbitration is more flexible in scheduling.

Binding arbitration refers to arbitration producing a final and binding decision that can be reviewed only under the limited grounds permitted by the Federal Arbitration Act ("FAA") and state arbitration acts. *Non-binding arbitration* does not produce a final and binding outcome and usually gives the non-prevailing party the right to elect a trial *de novo* in court.

Mediation followed by arbitration allows parties to attempt to resolve their dispute through mediation, and if any issues remain unresolved after the mediation process, these issues are resolved through arbitration. To ensure neutrality of the arbitrator, the same person acting as mediator should generally not act as arbitrator. In this way, the decision maker only hears what is presented into evidence during arbitration.

Other ADR methods such as early neutral evaluation, summary jury trial and moderated settlement conference exist, but are much less prevalent than arbitration and mediation.

INTRODUCTION

The most effective way for parties to make sure that disputes will be arbitrated rather than litigated is by agreeing to do so before disputes arise. It is highly unlikely that parties will agree to use arbitration after a dispute arises. At that stage, one party or the other will perceive that litigation offers some strategic advantage, an advantage they will not choose to relinquish by agreeing to use ADR. Moreover, the relationship between the parties may already be strained by the substantive dispute, making it less likely that they would agree to procedural alternatives such as arbitration.

Fortunately, properly drafted pre-dispute agreements to arbitrate are overwhelmingly endorsed by reviewing courts. This arbitration agreement drafting guide is designed to assist parties in drafting arbitration agreements that will not only be enforced by reviewing courts but also help accomplish parties' risk management, cost-savings, and efficiency objectives.

ARBITRATION AGREEMENTS ARE CONTRACTS

All enforceable contracts include: (1) an offer, (2) an acceptance of that offer, and (3) consideration. The form these elements take may be as varied as the parties involved, but they all must be present when the contract is formed.

These same principles apply to arbitration agreements, because arbitration agreements are themselves contracts. Parties agree to arbitrate future or present claims by becoming parties to arbitration agreements. No one can be forced to submit their claims to arbitration *unless they have agreed to do so*.

The FAA is clear on this issue:

> *A written provision in any…contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*[2]

A valid arbitration agreement can take many forms and can be created in many contexts. Two businesses can agree in a commercial contract to resolve future legal disputes by arbitration. A bank that extends credit to a customer may include an arbitration agreement in the terms of the credit agreement. An arbitration agreement may be presented to a patient as part of the healthcare admissions process. A merchant may include important contract terms in the packaging of its product. Or software firms may include an ADR clause in licensing agreements.

STARTING POINT FOR ARBITRATION AGREEMENTS

The following language provides a starting point for parties who want to resolve their disputes through binding arbitration. Annotations are provided explaining the practical and legal relevance of each element of the agreement.

The parties understand that they would have had a right or opportunity to litigate disputes through a court and to have a judge or jury decide their case, but they choose to have any disputes resolved through arbitration.[3]

We agree that any claim or dispute between us,[4] and any claim by either of us against any agent, employee, successor, or assign of the other, including, to the full extent permitted by applicable law, third parties who are not signatories to this agreement,[5] whether related to this agreement or otherwise, including past, present, and future claims and disputes, and including any dispute as to the validity or applicability of this arbitration clause,[6] shall be resolved by binding arbitration administered by the National Arbitration Forum under the *Code of Procedure* in effect when the claim is filed.[7] The *Code of Procedure* and other information, including a fee schedule, may be obtained from the National Arbitration Forum website (www.adrforum.com) or by calling 800-474-2371.[8] Claims may be filed with the National Arbitration Forum in either of the following ways: (1) online at www.adrforum.com; or (2) via U.S. mail to P.O. Box 50191, Minneapolis, MN 55405-0191.

We are entering into this arbitration agreement in connection with a transaction involving interstate commerce.[9] Accordingly, this arbitration agreement and any proceedings thereunder shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. Any award by the arbitrator(s) may be entered as a judgment in any court having jurisdiction.[10]

IMPORTANT DRAFTING CONSIDERATIONS

The language above is merely a starting point for drafting an arbitration agreement. Standing alone, it constitutes a binding arbitration agreement because it adequately expresses the parties' intent to submit all disputes to binding arbitration.

However, additional language may be necessary for parties to take full advantage of the efficacy and efficiency of binding arbitration, especially within the context of a specific industry or type of dispute. Drafters should therefore note the important considerations which are explained throughout the remainder of this drafting guide.

INDUSTRY-SPECIFIC CONSIDERATIONS

Drafters of arbitration agreements should take into account important elements which are unique to certain industries or types of disputes. Our dispute resolution professionals have industry-specific expertise that will enable them to assist you in developing an ADR program that is tailored to your industry. Their expertise encompasses the following industries:

- Healthcare
- Education Lending
- Telecommunications
- Secured Lending
- Consumer Finance
- Equipment Leasing
- Construction
- Insurance
- Employment

To discuss the use of ADR in these and other industries, please contact our dispute resolutions professionals by calling 877-655-7755 or emailing advisors@adrforum.com.

OPT-OUT PROVISIONS

The inclusion of an opt-out provision – whereby the non-drafting party has an opportunity to reject the arbitration agreement – gives the non-drafting party a hand in the bargain and thus promotes enforceability. However, an opt-out provision will have weight only if it gives the non-drafting party a "meaningful opportunity"[11] to reject the arbitration agreement.

Our dispute resolutions professionals can assist you in drafting a "meaningful" opt-out provision.

CHOICE OF LAW

Every arbitration agreement should include a provision identifying the law that governs the agreement and all proceedings arising thereunder. In drafting a choice-of-law provision, parties must be careful to distinguish the law that governs the arbitration agreement from the law that governs the underlying transaction.[12] For example, parties may elect Delaware law to govern the transaction while electing the FAA to govern the arbitration agreement.

Our dispute resolution professionals can assist you in drafting choice-of-law provisions that account for this distinction, thus preventing any confusion or uncertainty.

VENUE

An important aspect of any arbitration agreement is the venue provision, which designates the location of the arbitration and of any in-person participatory hearings. The National Arbitration Forum *Code of Procedure* ("*Code of Procedure*") contains a venue rule for consumer arbitration cases that conforms to applicable legal requirements.

Specifically, under Rule 32(A) of the *Code of Procedure*, if a business entity files an arbitration claim against a consumer, any in-person participatory hearings must be held "at a reasonably convenient location within the United States federal judicial district" where the consumer resides. This mandatory venue provision ensures that consumers will have a reasonable opportunity to defend against claims in the arbitral forum, which in turn guards against any argument that the arbitration agreement is unfair and therefore unenforceable.

For all other arbitration agreements, the *Code of Procedure* gives parties unfettered discretion to designate a venue. This flexibility allows parties to select the venue that best meets their needs. To learn more about selecting the proper venue, please contact our dispute resolution professionals by calling 877-655-7755 or emailing advisors@adrforum.com.

LIMITATIONS ON REMEDIES

Remedial limitations generally impede the enforceability of an arbitration agreement, particularly if the agreement limits a consumer's statutory remedies.[13] Limitations on remedies can also be problematic in situations where the potential monetary damages are relatively small. In such a case, a court may conclude that limitations on the availability of attorney fees or other statutory remedies may, as a practical matter, prevent an injured party from bringing any claims.

SECURITY INTERESTS

There are special considerations where the underlying transaction involves security interests. In light of these considerations, parties sometimes exempt certain proceedings from the arbitration agreement.

As a general rule, arbitration should be the sole forum for all disputes because the added efficiency benefits the parties and any exemptions may give rise to enforceability concerns.[14] Nevertheless, most jurisdictions recognize that the unique nature of security interests may require some exemptions.[15]

Our dispute resolution professionals can help you determine the permissibility and necessity of any exemptions.

DETAILED WRITTEN FINDINGS

Some arbitration agreements require the arbitrator to issue detailed findings of fact and conclusions of law in addition to rendering an award. This requirement may result in increased costs to the parties and can sometimes itself trigger costly litigation.[16]

Moreover, where the arbitration agreement names the National Arbitration Forum as the administrator, it is generally unnecessary to require detailed findings because under Rule 37(H) of the *Code of Procedure*, any party may request them within ten days of arbitrator selection.[17]

Our dispute resolution professionals can assist you in gauging the merit and necessity of drafting a detailed written findings requirement.

JUDICIAL REVIEW

Under the FAA and state arbitration acts, arbitration awards are subject to limited review by the courts. Rarely, circumstances lead parties to contract for heightened judicial review. However, some jurisdictions will not honor a contractual provision for heightened review beyond that provided by statute.[18]

To learn whether heightened review is advisable or is available in your jurisdiction, contact our dispute resolutions professionals by calling 877-655-7755 or emailing advisors@adrforum.com.

SEVERABILITY & SURVIVABILITY

As a general rule, every arbitration agreement should have a severability clause that allows the agreement to remain in effect even if some part of the agreement is deemed unenforceable.[19] However, if there is a term of the agreement that is indispensable, parties will want to place express limits on the scope of the severability clause. These limitations on severability are especially important if a party plans to appeal any ruling that the term is unenforceable.[20] The proper form of a severability clause depends entirely on the parties' needs and expectations.

Every arbitration agreement should include a survivability provision whereby the arbitration agreement remains in effect after the underlying contract terminates or expires.

For assistance in drafting a severability clause that is tailored to your needs and expectations, please contact our dispute resolution professionals by calling 877-655-7755 or emailing advisors@adrforum.com.

CONCLUSION

The preceding list is a merely a snapshot of some important considerations. For a thorough, individualized examination of these and other considerations (e.g., confidentiality and arbitrator selection), please contact our dispute resolutions professionals by calling 877-655-7755 or emailing advisors@adrforum.com. They can assist you in harnessing and maximizing the benefits of ADR.

[1] *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995).
[2] 9 U.S.C. § 2.
[3] This statement demonstrates the parties' understanding that they are foregoing their right to a jury trial in favor of the efficiencies of binding arbitration.
[4] This phrase describes the scope of the arbitration agreement. This particular phrasing has the dual advantage of breadth and brevity because the phrase "any claim or dispute" conveys the expansive scope of the arbitration agreement without including the sort of unnecessary detail that may lead to an unfairly narrow interpretation. Many jurisdictions distinguish between "broad" and "narrow" arbitration agreements. *See, e.g., Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224-225 (2nd Cir. 2001). A broad arbitration agreement gives rise to a presumption of arbitrability. *Id.* at 224.
[5] This phrase effectively forecloses any argument that a party's agent, employee, successor, or assign cannot invoke the arbitration agreement because they are not a party to the agreement.
[6] This phrase prevents litigation over the scope of the arbitration agreement by defeating the presumption that "questions of arbitrability" are decided by the court. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) (holding that courts must decide questions of arbitrability unless there is "clear and unmistakable" evidence that the parties intended otherwise).
[7] The latter part of this sentence eliminates the need to draft lengthy provisions pertaining to discovery, arbitrator selection, and other procedural matters by adopting an established set of rules that addresses these matters. The National Arbitration Forum *Code of Procedure* is the optimal set of rules for at least four reasons. First and foremost, the *Code of Procedure* requires arbitrators to "follow the applicable substantive law" and thus dispenses with the traditional notion of arbitration whereby arbitrators may disregard the law in favor of principles of equity and fairness. *Compare* Rule 20(D) of the *Code of Procedure* ("An Arbitrator shall follow the applicable substantive law . . . .") *with* Rule 43 of the American Arbitration Association ("AAA") Commercial Arbitration Rules ("The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable . . . ."). Second, the *Code of Procedure* allows either party to request a reasoned award, whereas other ADR providers require both parties to request a reasoned award. *Compare* Rule 37(H) of the *Code of Procedure with* Rule 42(b) of the AAA Commercial Arbitration Rules. Third, the *Code of Procedure* does not permit any vacancies on an arbitration panel unless all parties agree to proceed, whereas other ADR providers allow arbitration to proceed even if one of the parties objects to a vacancy. *Compare* Rule 23(E) of the *Code of Procedure with* Rule 19(b) of the AAA Commercial Arbitration Rules. Finally, the National Arbitration Forum's fee schedule has been described as a fair allocation of fees and costs. *See Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 95 n. 2 (2000) (Ginsberg, J., concurring in part).
[8] By directing the parties how to obtain a copy of the *Code of Procedure* and fee schedule, this sentence prevents a party challenging the arbitration agreement from arguing that the costs of arbitration were hidden.
[9] The Federal Arbitration Act ("FAA") preempts state laws that limit the use of arbitration, but only if the underlying transaction involves interstate commerce. This stipulation eliminates the need to prove that the transaction involved interstate commerce. *See, e.g., see Pest Management, Inc. v. Langer*, 96 Ark. App. 220 (Ark. Ct. App. 2006), *aff'd*, 2007 WL 538178 (Ark. Feb. 22, 2007). Plus, in some jurisdictions, parties can agree to arbitrate under the FAA even if the underlying transaction does not involve interstate commerce. *See, e.g., Teel v. Beldon Roofing & Remodeling Co.*, No. 04-06-00231-CV, 2007 WL 1200070, at *1 (Tex. App. Apr. 25, 2007).

[10] This langauge should be included because some courts have deemed it necessary for award confirmation under the FAA . *See Varley v. Tarrytown Associates, Inc.*, 477 F.2d 208, 210 (2d Cir. 1973) ("The [FAA] provides that confirmation of an arbitration award is appropriate only where the parties 'in their agreement have agreed that a judgment of the court shall be entered upon the award . . .'"); *but see Harris v. Brooklyn Dressing Corp.*, 560 F.Supp. 940, 941 (S.D.N.Y. 1983) (noting that *Varley* "may be regarded as a dead letter"). In any event, Rule 39(e) of the National Arbitration Forum *Code of Procedure* also paves the way for confirmation by providing that an award "may be confirmed, entered or enforced as a judgment in any court of competent jurisdiction."
[11] *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274 (Ill. 2006).
[12] In *Morgan Keegan & Co., Inc. v. Force*, No. 2006-CA-000311-ME, 2007 WL 1954025 (Ky. Ct. App. July 6, 2007), the arbitration agreement blurred this distinction, and as a result, the court retained jurisdiction over a dispute that would ordinarily be resolved by the arbitrator.
[13] *See, e.g. Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994) (refusing to enforce arbitration agreement that deprived claimant of its right to recover exemplary damages and attorney fees); *Anderson v. Ashby*, 873 So.2d 168, 177 (Ala. 2003) (holding that a cap on damages rendered a lender's arbitration agreement unenforceable); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 682 (Cal. 2000) ("The principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed."); *Alterra Healthcare Corp. v. Bryant*, 937 So.2d 263, 266 (Fla. Dist Ct. App. 2006) (holding that remedial limitations rendered a nursing home's arbitration agreement unenforceable); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 671 (S.C. 2007) (holding that remedial limitations rendered an automobile dealership's arbitration agreement unenforceable).
[14] *See, e.g., Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 172-173 (Wis. 2006).
[15] *See, e.g., Salley v. Option One Mortg. Corp.*, 925 A.2d 115 (Pa. 2007).
[16] For example, in *Demott v. McDonald*, No. 266301, 2007 WL 486750 (Mich. Ct. App. Feb. 15, 2007), the aggrieved party argued, without success, that the court should vacate the arbitrator's award because his rationale was not sufficiently detailed to satisfy the agreement's "reasoned opinion" requirement.
[17] Conversely, under Rule 42 of the Commercial Arbitration Rules of the American Arbitration Association, all parties must request a reasoned award, and the request must precede arbitrator selection.
[18] *See, e.g., Trombetta v. Raymond James Financial Services, Inc.*, 907 A.2d 550, 577 (Pa. Super. Ct. 2006) ("As a matter of law, clauses providing for *de novo* review of arbitration awards will not be enforced in the Commonwealth."); *but see* N.J. Stat. Ann. § 2A:23B-4(c) ("[N]othing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record.").
[19] The following language can be used as a severability clause: "If any part of this arbitration agreement is deemed unenforceable either by the arbitrator(s) or by a court having jurisdiction, that part of the agreement shall be null and severed from the agreement, but the remainder of the agreement shall remain in effect."
[20] Under federal law and the law of most states, a party has a right to an interlocutory appeal from a court order denying a motion to compel arbitration. *See, e.g.,* 9 U.S.C.A. § 16(a)(1)(B). If a court refuses to enforce a non-severable part of an arbitration agreement, the court must issue an order denying arbitration, thus guaranteeing the aggrieved party an immediate appeal. Conversely, if a court refuses to enforce a severable part of an arbitration agreement, the court is likely to sever that part of the agreement and issue an order compelling arbitration, which casts doubt on the availability of an immediate appeal.

ARBITRATION OR *LITIGATION?*

The United States Supreme Court[1] has made clear that employers can mandate arbitration of employment claims—assuming they have a valid arbitration agreement or provision. But most of corporate America has failed to embrace mandatory arbitration of employment disputes.[2] Chief Legal Officers express strong and divergent views about whether arbitration is quicker, less expensive, and lower risk, or whether courts are the more desirable forum, with their established rules, procedures for dispositive motions, and a right of appeal.

Theory aside, how does arbitration practically compare with traditional litigation of employment disputes? Here's our tale[3] of two, real-life, very similar employment discrimination cases. Both cases were filed by former employees terminated for poor performance who were alleging "supervisory sexual harassment" and related tort claims.[4] In both cases, the plaintiff alleged that she had direct evidence of discrimination. Both cases were filed near the same time and defended by the same counsel. In one of the cases, the employer had an arbitration program in place (the "*Arbitrate*" case); but in the other, the employer did not, and found itself in the United States District Court (the "*Litigate*" case). Litigate and Arbitrate proceeded through a jury trial and arbitration hearing, respectively, and in both cases the employer won a total victory. But the journey to this identical destination was short and simple in one case . . . and a long and winding road in the other.[5]

By Joseph M. Freeman and Stanford G. Wilson

A Complaint Is Filed

In *Litigate*, the company is sued in US District Court in Texas in January 2002 by a former employee alleging sexual harassment by a manager and related tort claims. The company selects outside counsel, who investigates the claim, and files an Answer. This initial process takes about 10 days, and costs the company just under $5,000.

Similarly, in *Arbitrate* the company is sued for supervisory sexual harassment in US District Court in Alabama in July 2002. The company immediately faces a difficult choice: proceed with the case in Federal Court where it was filed, or enforce the predispute arbitration agreement signed by the employee when she applied for employment?[6] After careful analysis, the company decides to arbitrate; corporate counsel selects outside counsel, who investigates the claim and files an Answer and a Motion to Compel Arbitration, which is granted by the court. This process takes about a month, and costs the company a little over $5,000.

The Blind Scales of Justice

Fortunately for the company in *Litigate*, the assigned judge could not have been better if handpicked. He is experienced and insists on very formal hearings and proper courtroom decorum. Throughout the case, the judge displays an extensive knowledge of the substantive and procedural law and shows no bias or partiality to either side. Unfortunately, the company's fate is decided by a six-person jury, not the judge.[7]

Unlike the judge in *Litigate*, who is randomly assigned the case, the arbitrator in *Arbitrate* is handpicked by the parties, which is a pivotal virtue of arbitration. The arbitrator chosen in *Arbitrate* was an employment defense litigator prior to leaving private practice, which indicates to the company that he will not be swayed by any sympathetic tales the employee offers and will understand the difficulties faced by the company in proving a negative.[8] Indeed, the company's in-house counsel and trial counsel feel the arbitrator's rulings throughout the case, both favorable and unfavorable, are appropriate. The arbitrator conducts most prehearing conferences by phone conference and encourages very informal and comfortable proceedings. Unlike the judge in *Litigate*, the arbitrator is always available to resolve issues and disputes, and is very familiar with the case. Attorneys for the parties are allowed to contact the arbitrator directly, so long as they do so together.

Representation of Employee

The employee's attorney in *Arbitrate* is an experienced litigator who specializes in employment litigation in Alabama and surrounding states. Similarly, the plaintiff's counsel in *Litigate* is a skilled litigator, with 35 years of experience in civil rights cases in Texas. The skill level and style of these attorneys is very similar, and they are very formidable opponents.

Discovery

The debate rages over whether discovery in arbitration cases is more prolonged, in-depth, and expensive than litigation, with many experts believing that arbitrators fail to control the amount of discovery and punish discovery abuse. In our experience, even though parties normally are entitled to the same vehicles of discovery in arbitration as in litigation, i.e., requests for production, interrogatories, and depositions, arbitrators actually tend to place greater limitations on discovery than the courts. Fortunately, these limitations tend to burden a plaintiff more than a company defending a discrimination claim.

One hitch peculiar to arbitration, however, is the inability to subpoena nonparty witnesses to a deposition. The FAA defines the scope of an arbitrator's subpoena power as limited to the ability to subpoena a party or documents to a hearing, which obviously does not encompass a prehearing deposition. 9 USC § 7. In cases where this is an issue, arbitrators will sometimes convene a "hearing" where they allow the parties to depose a necessary witness. Where this is the only option available, it can be quite expensive for a defending company. This is certainly a factor to consider in weighing whether to arbitrate a particular claim, as in many cases uncooperative witnesses may be key to the defense of a discrimination claim.

But in this tale of two cases, discovery proved to be more difficult and expensive in *Litigate*. In *Litigate*, the company's discovery is met with objections, motions to quash, accusations of harassment and persecution, and refusals to cooperate. This conduct results in numerous motions to compel filed by the company, which the court grants, although it fails to award requested sanctions.

After the company prepares for and begins the plaintiff's deposition, the plaintiff refuses to testify, citing illness and intrusion into her personal business. Despite the judge's favorable discovery rulings, the company spends nearly two years pursuing plaintiff's deposition, her medical records, documents from her subsequent employers, and an independent medical exam of plaintiff. The fees and costs of discovery spiral out of control, topping $100,000. Overall, this round of discovery took nine months.

In contrast, discovery in *Arbitrate* is routine—probably due in part to the nature of discovery in arbitration, and in part to the fact that the *Arbitrate* claimant is represented by competent counsel from the outset. Written discovery is exchanged, and all depositions are taken without incident. At one point, the company files a motion to compel discovery of the former employee's responses to a set of interrogatories and requests for production—another vehicle of litigation available in arbitration—and the motion receives immediate attention. The arbitrator conducts an informal telephonic hearing on the motion and resolves the issue in favor of the company. The parties avail themselves of one short discovery extension to complete the necessary depositions. Overall, discovery in *Arbitrate* takes eight months, and the company spends roughly $31,200 on discovery from start to finish.

Summary Judgment

While no technical rules allow (or disallow) the filing of summary judgment motions in arbitration,[9] most arbitrators allow such motions upon request. Arbitrators are more reluctant to grant summary judgment than most courts, however, citing the need to give the employee her day in court, particularly when arbitration provides a limited right of appeal.

The arbitrator in *Arbitrate* allows a summary judgment filing, using procedures similar to Rule 56 of the Federal Rules of Civil Procedure. Although most claims survive the motion, the summary judgment process forces the employee to reveal all of her crucial evidence and trial strategy to avoid summary judgment.[10] The company is not surprised by the ruling on its motion—indeed, one of the reasons it decides to arbitrate the claim is its suspicion that the employee's claims have enough merit to create a dispute of material fact. The entire summary judgment procedure—drafting of the motion and brief, and receiving a ruling on the motion—takes about three months and costs approximately $22,000.

Meanwhile, drafting a motion in *Litigate* was akin to writing a novel, given the lack of information received from the plaintiff during discovery. Nevertheless, after gathering documents, affidavits, and other material, and after preparing the motion and brief, the company files a motion for summary judgment that complies with the tedious and detailed requirements of the court.[11] The plaintiff, not surprisingly, does not file a timely response to the company's motion and instead suggests an extension of discovery and mediation. The judge orders the parties to attend a mediation, which does not result in settlement and costs the company approximately $8,000 in attorneys' fees, costs, and travel time for its executives.

The court subsequently reopens discovery to resolve a number of discovery disputes and allows the parties to secure all discovery to which they are entitled. This round of discovery is routine and lasts almost nine months, for a total discovery period of eighteen months. Following completion of this discovery, the judge allows the company to file an updated summary judgment motion and then grants as to all claims, except the allegations of sexual harassment of plaintiff by a manager and retaliation for alleged complaints of harassment.

To Settle or Not to Settle

Generally, arbitrating rather than litigating a claim reduces the settlement value of a case. Frequently, plaintiffs and their counsel are more amenable to a radically lowered settlement amount when there is no possibility of a runaway jury. From an employer's standpoint, however, the decision to settle has significant consequences in both arbitration and litigation that go beyond the dollar amount of the settlement. When a claim is, from the company's standpoint, without merit, there is a natural tendency to

Sample Arbitration Clause

AAA's suggested clause:

Any controversy or claim arising out of or relating to this [employment application; employment ADR program; employment contract] shall be settled by arbitration administered by the American Arbitration Association under its National Rules for the Resolution of Employment Disputes and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Another suggested clause:

This Agreement requires you to arbitrate any legal dispute with [name of Company], and its employees, agents, subsidiaries and affiliates (the "Company"), as defined in the Agreement below. The Company will not consider your application unless this Agreement is signed. This Agreement to arbitrate affects your rights to a trial by a jury. You may wish to seek legal advice before signing this Agreement to arbitrate.

let a hearing commence and the company's actions be vindicated. Particularly when a claim is being litigated, the settlement of a claim may leak and cause the public to believe that the company engaged in wrongdoing. Furthermore, settlement may lead to additional claimants hoping for their slice of the pie.

In this tale of two cases, the different forums have little impact on settlement discussions. Although both companies engage in settlement negotiations, neither decides to settle, albeit for different reasons. The employee in *Litigate* radically overvalues her claim, insisting upon hundreds of thousands of dollars. The company is not willing to pay her this high amount, instead chancing a jury trial on the merits.

General Counsel's Corner

MEMORANDUM

TO: Chief Executive Officer
FROM: General Counsel
RE: Reducing Litigation Costs

In response to the Board of Directors' mandate to reduce employment litigation and attorneys' fees, I have concluded that mandatory, pre-dispute arbitration agreements with our employees may protect the company from the excesses of employment litigation. The following provides a starting point for answering whether these arbitration agreements, if enforceable, are in the best interests of our company.

The Advantages of Arbitration

- It may reduce the number of employment claims. Plaintiffs' attorneys are sometimes hesitant to pursue arbitration because they are unfamiliar with the process, and arbitration does not have the leverage of a jury trial.
- It reduces risk. Arbitration can substantially reduce the risk of bloated class actions, runaway jury verdicts, and devastating punitive damage awards.
- It's usually quicker. Arbitration often involves less discovery and pre-trial activity, although the arbitrators, who are paid by the amount of work done on a particular case, are not always anxious for the case to end.
- It can be less expensive. Unlike judges and court administrators, however, arbitrators and arbitration services charge for their services, and companies often bear most of the related costs, such as charges for hearing rooms and court reporters.
- It's private. Arbitration cases generally are not public, which reduces adverse publicity and may reduce the employee's desire to litigate if part of the motivation was publicity.
- The schedule is manageable. The arbitrator and the parties agree upon deadlines and the hearing dates, rather than having a judge schedule and reschedule the case.
- It provides a more predictable result. Arbitrators tend to be more knowledgeable than juries. The parties can choose arbitrators with experience in a particular area of the law to ensure a basic understanding of the issues involved in the dispute. Jurors seldom have relevant backgrounds relating to the dispute.

The Disadvantages of Arbitration

- It can be more expensive than litigation. Writing an enforceable arbitration agreement and proving in court that the agreement is enforceable can be time-consuming. Employers often must initiate judicial proceedings to enforce the arbitration agreement and are required to defend the validity of the arbitration agreement.
- Discovery costs may increase. Arbitrators often ensure "fairness" by allowing more discovery than would otherwise be available in a judicial setting.
- There are no established "rules." The applicable law and rules of evidence may receive only lip-service in arbitration, and the company may face unacceptable rulings on hearsay, attorney-client communications, experts, and opinion testimony.
- Limiting motions are disfavored. It is difficult to eliminate claims through procedures that are routinely available in court, such as motions for summary judgment or motions in limine.
- Preparation for the hearing is costly. Unless the arbitrator reduces or limits the claims through a summary judgment procedure and pre-trial order, the company must prepare witnesses and exhibits on every claim and issue.
- Compromise decisions are common. Although excessive damage awards are rare, arbitrators are prone to "split the baby" and award the employee some relief, often including attorneys' fees and costs.
- There is no right of appeal. Unless the arbitration agreement provides for an appeal, and defines the grounds for an appeal, an arbitrator's decision on the merits is usually final and not subject to review by the courts.

Please call me if you need additional information.

The employee in *Arbitrate* presents a rational settlement demand, which the company feels is reasonable based upon the employee's evidence. Despite these conclusions, however, the company is unwilling to settle because the company has a legitimate chance to win the case. Unlike the judge in *Litigate*, however, the arbitrator pushes strongly for settlement. Indeed, halfway through the arbitration hearing, the arbitrator advises defense counsel that he is leaning toward a mixed motive ruling, and states settlement might be a wise option.[12] The company again refuses to settle and completes the hearing.

A Day in Court (or Not)

As expensive as discovery can be, trial is often worse. This was particularly true in *Litigate*, which was a jury trial. The preparation for this jury trial took weeks of time, including written voir dire, consulting with a jury expert, preparing motions in limine, crafting proposed jury instructions, preparing opening and closing arguments, enlarging exhibits and other graphics, loading presentations into trial software, preparing witnesses to face the jury, preparing a medical expert to refute plaintiff's claim of emotional distress, and carefully selecting a company representative to sit at the counsel table and face the jury.

Trial begins on Monday morning with a time-consuming and stressful jury selection. Opening statements begin that afternoon, followed by plaintiff's testimony, completed the next morning. Plaintiff rests her case at midday on Wednesday, after presenting approximately seven additional witnesses. The company also presents seven witnesses. The presentation of evidence lasts four days, and following closing arguments, the jury finds for the company on all claims.

Preparation for the hearing in *Arbitrate* took less than one-third of the time as *Litigate*'s trial preparation. The parties in *Arbitrate* present a total of 10 witnesses, all in one hearing day which lasted over twelve hours. In this case, like most arbitration cases, the arbitrator does not rule on motions in *limine*, but hears the merits and decides on the admissibility of evidence during the hearing. The arbitrator's dual role as finder of both fact and law can be damaging to both parties, depending on the facts of the case.

For example, in sexual harassment cases, defend-

ACC and Other Extras on . . . ADR

ACC Committees:

More information about these ACC committees is available on ACC Online℠ at *www.acca.com/networks/committee.php*, or you can contact Staff Attorney and Committees Manager Jacqueline Windley at 202.293.4103, ext. 314, or *windley@acca.com*.

- Litigation

***Docket* Articles:**

- Richard Hurford, Eric P. Tuchmann, and Mark Wolf, "Attitude Adjustment: Eight Leading Practices in Building a Dispute-savvy Organization," *ACC Docket* 23, no. 10 (Nov/Dec 2005) 90–103. *www.acca.com/resource/v6475.*

InfoPAKs:

- Alternative Dispute Resolution (2006), *www.acca.com/resource/v4893.*

Leading Practice Profile:

- Conflicts Management Programs: What Companies and Law Firms Are Doing (2003). *www.acca.com/resource/v6298.*

Annual Meeting Materials:

Program material is available from the following courses at ACC's 2005 Annual meeting.

- Arbitration Basics: The Why's, How's, & Who's of ADR, course 202. *www.acca.com/resource/v6850.*
- Advanced Settlement Techniques and the Use of Mediation and Arbitration to Resolve Disputes, course 604. *www.acca.com/resource/v5617.*

Sample Forms and Policies:

Additional form documents are available by searching ACC's Virtual Library℠ at *www.acca.com/resources/vl.*

- Arbitration Clause Checklist for Intellectual Property matters (2005), *www.acca.com/resource/v6552.*
- Dispute Resolution and Choice of Law Provisions (2005), *www.acca.com/resource/v5503.*
- Examples of Arbitration Clauses (2005), *www.acca.com/resource/v5520.*
- Mandatory Mediation and Arbitration Clause (2005), *www.acca.com/resource/v6581.*

ing companies often seek to introduce evidence of the plaintiff's own sexual behavior in the workplace. In a trial, the judge would determine the admissibility of this type of evidence pursuant to Federal Rule of Evidence 412, leaving it to the jury to weigh the evidence if admitted. In an arbitration, the arbitrator examines the evidence to determine its admissibility, then rules on the merits of the case having seen the evidence (regardless of its admissibility). In this scenario, at least, the defending company has an advantage.

The "Final" Decision

In *Litigate*, the jury took only a few hours to render a decision, while in *Arbitrate,* both parties submit post-hearing briefs and wait several weeks for the arbitrator's decision. Although the company spends a few thousand dollars for the preparation and submission of the post-hearing brief, it pays off, as the arbitrator finds for the company on all claims.

One of the great values of arbitration is confidentiality, and that confidentiality is destroyed to some degree when a party seeks to enforce an arbitrator's award in court. Because the *Arbitrate* result was favorable, however, the company seeks and obtains judicial enforcement of the award, including its bill of costs. The employee files no appeal of the arbitral award, as is normally the case, because arbitration awards are very difficult to appeal successfully. Indeed, a successful vacatur of an arbitral award requires proof of fraud, corruption, undue means, partiality, or corruption of the arbitrator; misbehavior of the arbitrator in conducting the hearing or otherwise; proof that the arbitrator exceeded or failed to execute his powers; or manifest disregard of the law by the arbitrator—a difficult hurdle for an appealing party to surmount.

In contrast, the verdict in *Litigate* was appealed to the Court of Appeals for the Fifth Circuit. The company, which has spent years litigating the case to achieve the favorable judgment, now faces another year of expensive litigation to ensure the jury decision is affirmed. The appeal costs over $15,000 and results in a favorable decision for the company in February, 2006. Plaintiff's Motion for Rehearing and Rehearing En Banc are denied in April 2006. As of this writing, the employee is acting pro se and pursuing a writ of certiorari to the United States Supreme Court.

And Your Verdict Is . . . ?

All told, both companies achieve favorable results. In *Arbitrate*, the company spends approximately $100,000 to arbitrate its case, which takes two years for final resolution. In *Litigate*, the company is embroiled in litigation for four years, expending over $300,000 in fees, costs, expenses of litigation, and lost time for executives. While arbitration is not the right forum for every claim, or even for every claim of discrimination, it is the clear winner here.

Employers should consider a valid and enforceable arbitration program that will give the company, at least in most cases, the option of deciding whether the claim is ripe for arbitration or more suited to litigation. With such a program in place, employers should include a mandatory arbitration clause in every application for employment.

The authors thank Elarbee Thompson attorneys Alisa Pittman and Lisa Bauer for their assistance with this article.

Have a comment on this article? Email editorinchief@acca.com.

NOTES

1. The Court has ruled, most recently in *Circuit City v. Adams*, that the Federal Arbitration Act of 1925 (FAA) applies to most employment contracts. 532 US 105 (2001).
2. Statistical studies indicate that employment litigation comprises the largest segment of federal litigation, and the number of suits filed continues to rise. *See* Boyd A. Byers, "Mandatory Arbitration of Employment Disputes," 67 *J. Kan. Bar Ass'n* 18 (1998).
3. Attorneys at the law firm of Elarbee, Thompson, Sapp & Wilson, LLP represented the corporate defendants in both *Arbitrate* and *Litigate*. While Mr. Freeman jointly authored this tale of two cases, neither Mr. Freeman nor Cox Communications Inc. (nor any of its related entities) was involved in the matters referred to herein as *Arbitrate* and *Litigate*.
4. In the litigation case, the claims included allegations of sexual harassment, discrimination, and retaliation under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e (Title VII), intentional infliction of emotional distress, and punitive damages. In the arbitration matter, the claims included allegations of pregnancy discrimination and harassment and punitive damages.
5. While *Arbitrate* and *Litigate* are filed in different states, the substantive federal law applicable to the two matters is substantially similar.
6. Plaintiffs' counsel seldom abide by arbitration agreements entered into by their clients, preferring federal court, even though the Supreme Court insists that arbitration is just a change in forum which should reach the exact same results. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 26 (1991) ("In these cases we recognized that 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 US 614, 628 (1985)).
7. A summary judgment motion could not dispose of all of the claims in *Litigate*, due to alleged direct evidence of discrimination and retaliation.
8. Employment disputes are typically decided by a single arbitrator due to cost considerations, though sometimes an arbitration is conducted by a panel of three arbitrators. Most employers using a third-party dispute resolution service, such as the American Arbitration Association ("the AAA"), to facilitate employment-related arbitrations are provided with a panel of potential arbitrators from which the parties alternately strike the potential arbitrators until only one remains.
9. The newest version of the AAA's Employment Arbitration Rules, effective July 1, 2006, provides that an "arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case." *See* Rule 27 of the AAA's Employment Arbitration Rules.
10. The arbitrator dismissed the employee's claim for punitive damages.
11. While the summary disposition procedure typically used in arbitrations mimics that dictated by Federal Rule of Civil Procedure 56, the local rules of most federal courts add sometimes onerous procedural requirements. For example, nearly all courts require the filing of a separate motion for summary judgment in addition to the memorandum of law. Some require a separate filing setting out the parties' contended material facts, to which a separate response is required. In arbitrations, in contrast, a single brief may be submitted.
12. With a mixed motive ruling, the plaintiff in *Arbitrate* would receive no damages, but the company would have to pay her attorney's fees and costs. See *Desert Palace, Inc. v. Costa*, 539 US 90 (2003).

ACC International Resources on . . . ADR

- Blake, Cassels & Grayden, LLP, "Litigation and Dispute Resolution in Canada," (2006), *www.acca.com/resource/v6707.*
- Checklist for drafting the international arbitration clause (2005), *www.acca.com/resource/v7011.*
- "Doing Business Abroad but Resolving Disputes on Neutral Turf: A Practical Guide to International Arbitration," program materials for course 603 at ACC's 2005 Annual Meeting. *www.acca.com/resource/v6898.*
- "International Arbitration: Bestriding the Narrow World," (2006), a Global Counsel Article. *www.acca.com/resource/v7144.*
- "The Neutral Zone: A Practical Guide to International Arbitration," *ACC Docket* 24, no. 6 (June 2006): 68–74. *www.acca.com/resource/v7235.*
- PLC Cross-border Dispute Resolution Handbook (2005/06), available via *www.acca.com/practice/global.php.*

Beyond the Stock Arbitration Clause

Tailoring Arbitration to Match Business Needs and Commercial Realities

Everything you know about arbitration is wrong. Well, perhaps not everything, and perhaps not entirely wrong. It is more defensible to assert that corporate counsel today have become a little too comfortable with their understanding of a stereotyped or default view of arbitration. This understanding holds that arbitration is an option that can be turned-on or turned-off when contracts are being negotiated and drafted. And the mechanism to be used when turning arbitration on or off is the inclusion of a stock or standard arbitration clause into an agreement.

By Phil Ytterberg

This article aims to encourage corporate counsel to take a more nuanced view of dispute resolution using contractual arbitration. The Federal Arbitration Act (FAA) prescribes no particular method of arbitration. The FAA, at its core, simply ensures that written arbitration agreements are enforced like any other contract term. While some formalities are required, there is nothing magical about your stock arbitration clause. In fact, the appearance of that stock arbitration clause in the next draft contract that crosses your desk may represent a missed opportunity.

While the possibilities for customizing arbitration provisions are literally endless, it may be worthwhile to start with some questions based upon significant recent developments in the law and practice of arbitration: Can parties contract for expanded judicial review of arbitration awards (for errors of law, for example)? How are disputes over allegedly trademark infringing internet domain names resolved? Where are the emerging regional centers for international arbitration? What kinds of declaratory or injunctive relief are potentially available in arbitration? What types of arbitration programs are state governments and agencies creating? Can property-based remedies be effectively awarded in arbitration?

Substantive responses—if not definitive answers—to these questions appear below, but these questions are intended to be suggestive of possibilities rather than prescriptive. The point is that arbitration agreements can be customized to meet the specific requirements imposed by different contracting situations and business realities. Form contracts that could potentially result in a large number of relatively low value disputes may require an arbitration agreement that calls for a very cost- and time-efficient method of arbitration. Contracts involving highly technical matters may benefit from an arbitration agreement that calls for an arbitrator possessing certain specific technical expertise. Internet-based agreements might benefit from arbitration terms that contemplate dispute resolution procedures that use internet capabilities. Again, these are just examples.

Arbitration is evolving from a one-size fits all approach embodied by stock arbitration language to customized programs that meet particular business needs and accommodate specific commercial contexts and realities. This article updates corporate counsel on developments in the areas of contractual arbitration, internet/ecommerce dispute resolution, international, and government arbitration to illustrate some of the capabilities of arbitration that can be tailored for particular commercial circumstances.

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Internet Dispute Resolution

It should be no surprise that emerging business practices, and even business models, that leverage the internet have implications for dispute resolution. One of the best examples of emerging online business practices and the dispute resolution method that has emerged to meet the resulting challenges is internet domain name dispute resolution administered under the auspices of the Internet Commission for Assigned Names and Numbers (ICANN).

Domain names have become valuable assets. They act as unique identifiers on the internet for corporations and their products and services. In addition, these names allow internet users to easily find and communicate with trademark holders. Improper domain name usage can take several different forms. "Cybersquatting" is the act of registering and using a domain name with bad faith intent to profit from the goodwill of the trademark of another. Bad faith can take the form of directing web traffic to a competitor or planning to sell the domain name to the trademark holder for a profit. "Typosquatting" is a form of cybersquatting that involves registering a domain name that contains a misspelling, or typo, of someone else's trademarked term and using that domain name with the bad faith intent to profit from it.

The first form, cybersquatting, can bestow the harm it visits upon trademark holders, and can occur suddenly and unexpectedly. In order to allow trademark holders to resolve these disputes quickly and efficiently, ICANN created arbitration-based dispute resolution programs in which domain registrants agree to participate when they register new domain names. The most common example is the Uniform Dispute Resolution Policy (UDRP) which governs disputes related to the .com and several other top level domains. Under the UDRP, aggrieved trademark holders can file complaints with one of three ICANN-approved dispute resolution providers.

This domain name dispute resolution system has proven to be a good match to the unique challenges posed by cybersquatting. The National Arbitration Forum is the largest administrator of these claims in North America. At the FORUM, parties can see resolution of a domain name dispute in less than 50 days from the date the dispute is filed. Claims can be filed online and the cost is as little as $1,300 in arbitration fees exclusive of the parties' own legal fees. Claims are resolved under established policies by arbitrators selected from a panel of over 150 intellectual property experts with trademark, copyright, and ecommerce experience.

One other emerging class of disputes related to online business practices is the phenomenon known as "click fraud." Click fraud occurs in pay per click online advertising networks and involves the automated imitation of a legitimate web user clicking on an online advertisement. Each of these fraudulent clicks results in a payment from the advertiser to the online advertising network (e.g., Google's AdWords or Yahoo! Search Marketing) a portion of which is passed on to the publisher of the webpage displaying the ads, but the fraudulent clicks produce no benefit to the advertiser.

Both Google and Yahoo! have recently settled class action lawsuits filed by advertisers accusing the companies of failing to effectively combat click fraud on their online advertising networks. Unfortunately, fraudulent clicks can be very difficult to detect and the industry has yet to settle on an acceptable solution to the problem. One possibility is the creation of an internet dispute resolution mechanism including specific procedural rules governing scope of disputes that is tailored to provide a forum for all of the parties—media companies, advertising networks and advertisers, and experts—to resolve these disputes. The ICANN model of bringing regulators, domain registrars, and domain registrants together may provide a helpful model for the click fraud problem.

Recent Internet Domain Name Decisions of Note

Williams-Sonoma, Inc. v. Kurt Fees c/o K Fees

Complainant, Williams-Sonoma, Inc., filed a claim against Respondent, Kurt Fees c/o K Fees, regarding the *potterybarn.org* domain name. The panel found the disputed domain name confusingly similar to Complainant's THE POTTERY BARN and POTTERY BARN marks, originally registered with the USPTO in 1951 and 1996, respectively, as the disputed domain name simply removed the space between the words and appended the generic top-level domain ".org" to Complainant's mark. The panel determined that Respondent was not commonly known by the *potterybarn.org* domain name, was not using it in connection with a bona fide offering of goods or services, and Respondent attempted to sell the domain name registration to Complainant for more than $10,000. Accordingly, the panel found that Respondent failed to establish rights to or legitimate interests in the disputed domain name. The panel also found that, despite the use of a disclaimer on Respondent's website notifying internet users that the *potterybarn.org* domain name was not associated with Complainant, Respondent had registered and used the domain name in bad faith by attempting to sell the domain name registration to Complainant for such a high sum, as well as by providing links to third-party websites. Complainant's request for a transfer of the disputed domain name was granted. *Williams-Sonoma, Inc. v. Fees*, FA 937704 (Nat. Arb. Forum Apr. 25, 2007).

Disney Enterprises, Inc. v. Dayanand Kamble

Complainant, Disney Enterprises, Inc., brought a UDRP claim against Respondent, Dayanand Kamble, seeking the transfer of the *disneycomics.com* domain name registration. The panel found that despite the addition of the generic term "comics" and the generic top-level domain ".com," the disputed domain name was obviously confusingly similar to Complainant's famous DISNEY mark. The panel also found that Respondent lacked rights and legitimate interests in the disputed domain name, as Respondent used the *disneycomics.com* domain name to host a website displaying various hyperlinks, some of which contained marks in which Complainant held rights. Moreover, the panel determined that Respondent registered and used the disputed domain name in bad faith due to the fame of Complainant's mark, Respondent's profiting from use of the mark, and Respondent's knowledge of Complainant's mark. Accordingly, the panel ordered the transfer of the *disneycomics.com* domain name from Respondent to Complainant. *Disney Enters., Inc. v. Kamble*, FA 918556 (Nat. Arb. Forum Mar. 27, 2007).

New York Yankees Partnership d/b/a The New York Yankees Baseball Club v. Covanta Corporation

Complainant, New York Yankees Partnership d/b/a The New York Yankees Baseball Club, commenced an action against Respondent, Covanta Corporation, for the *nyyankees.com* domain name. Complainant holds a trademark registration for the NEW YORK YANKEES mark and the panel found the disputed domain name was confusingly similar to Complainant's mark because it contained a commonly abbreviated version of "New York" combined with "Yankees." The panel also declined to find rights or legitimate interests for Respondent because the disputed domain name resolved to a website that featured hyperlinks to third-party websites offering tickets and merchandise in competition with Complainant. Additionally, the panel found bad faith registration and use, as it found that Respondent was using the *nyyankees.com* domain name for its own commercial benefit. The disputed domain name was accordingly transferred from Respondent to Complainant. *New York Yankees P'ship v. Covanta Corp.*, FA 803277 (Nov. 14, 2006).

Woods v. Whitsan Bay Golf Shop

Professional golfer Eldrick "Tiger" Woods, Complainant, commenced an action against Whitsan Bay Golf Shop, Respondent, regarding Respondent's registration of the *tigerwoodscoursedesign.com* domain name. In its response, Respondent stated that its plan for the domain name was to operate an unofficial nonprofit tribute website listing and showing the golf courses that Complainant designs in the future. Respondent also expressed a willingness to transfer the disputed domain name to Complainant in exchange for memorabilia signed by Complainant. The panel held that Respondent's *tigerwoodscoursedesign.com* domain name was confusingly similar to Complainant's TIGER WOODS mark, as the addition of the terms "course" and "design" to the mark alluded to Complainant's success as a professional golfer and the likelihood of Complainant to design golf courses in the future. Moreover, because Respondent offered to transfer the disputed domain name registration, the panel found that Respondent did not seek to retain the domain name. Accordingly, the panel ordered the transfer of the *tigerwoodscoursedesign.com* domain name registration. *Woods v. Whitsan Bay Golf Shop*, FA 772886 (Nat. Arb. Forum Sept. 26, 2006).

Finally, internet dispute resolution should by no means be viewed as providing solutions only to disputes that arise online. The availability of professionally administered online filing and online (oral and document-based) hearings make arbitral proceedings more efficient and less expensive. These efficiencies enable access to a viable and economically rational arbitral forum for large classes of disputes that arise over relatively small amounts of damages. Parties who become familiar with internet dispute resolution procedures can build them into arbitration agreements that govern even relatively small and routine transactions.

International Arbitration

Counsel at corporations that operate internationally are by now familiar with the particular benefits of arbitration with respect to the realities of the international commercial environment. These are primarily the benefits of cost-effectiveness, comparative timeliness, confidentiality, party autonomy/flexibility, autonomy of the agreement, and finality. Parties can choose the law which applies to their contract. Issued awards are confidential unless otherwise agreed, an enormous benefit to commercial entities concerned with the potentially negative press associated with litigation. And arbitration awards issued are given finality by the New York Convention, provided the parties are nationals of a country which is a signatory to the New York Convention.

The real success story of international arbitration is one of tailoring. Given the necessary framework in the form of the New York Convention and the Federal Arbitration Act (in the United States) as well as international arbitral institutions and international law firms with sophisticated arbitration practice groups, parties engaging in international transactions have available the necessary tools from which they can craft dispute resolution agreements that meet their needs.

Two recent trends in international arbitration are elaborating on the existing framework and increasing the tools that are available to parties drafting international commercial agreements. The first is the introduction of international capabilities, through the use of partnerships and other recently-launched initiatives, within domestic US dispute resolution administrators. The second is the emergence of major regional arbitration centers that now offer a legitimate alternative to the traditional incumbent international arbitration centers.

Alliances

Beginning in the middle to late 1990's, domestic arbitration administrator the American Arbitration Association (AAA) launched its International Centre for Dispute Resolution (ICDR) division. The AAA's approach with ICDR has been to formally partner with local arbitration administrators in locations around the world. At last count, ICDR has partnered with over 60 arbitration institutes in 43 countries.

More recently, the FORUM formalized a partnership with Lawyers Associated Worldwide (LAW). LAW is an international association of independent law firms and the alliance will expand the FORUM's worldwide panel of neutrals by adding qualified attorneys from LAW member firms. LAW currently has 87 such member firms in 47 countries.

Finally, JAMS recently released international mediation and arbitration rules and formed the JAMS International Arbitration Committee (JIAC) to deal with the challenges associated with administering international arbitrations. JAMS also recently announced a strategic alliance with the Hong Kong International Arbitration Centre (HKIAC).

Regional Centers

The traditional centers of international commercial arbitration are the International Court of Arbitration (ICA),

Recent Judicial Decisions Approving of Nonmonetary Relief Awarded in Arbitration

- *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 Fed. Appx. 39, 2006 WL 278393 (4th Cir. 2006) (holding that parties may seek judicial confirmation of an arbitration award granting temporary injunctive relief).
- *Duke v. Graham*, 158 P.3d 540 (Utah 2007) (holding that arbitrators have authority to remove members of a limited liability company under the state's LLC statute).
- *Invista North America, S.a.r.l. v. Rhodia Polyamide Intermediates S.A.S.*, — F.Supp.2d —, 2007 WL 2230273 (D.D.C. Aug. 6, 2007) ("Thus, if an arbitral tribunal finds that the named inventors of a patent should be corrected, the tribunal can order the parties to petition the director to change inventorship. Furthermore, should the parties fail to petition the director, a court could convert the tribunal's award into a judgment and order the director to change the inventorship of the patent. Therefore, the Court finds that arbitration may provide the appropriate relief to resolve Section 256 inventorship claims)".
- *Wisconsin Auto Title Loans, Inc. v. Jones*, 696 N.W.2d 214, 220 n. 3 (Wis. Ct. App. 2005), affd, 714 N.W.2d 155 (Wis. 2006) (noting "[t]he argument might be made that the legislature has run afoul of the Federal Arbitration Act by exempting a certain class of cases [ie, replevin actions] from arbitration").

Sample ADR Contract Language

The parties understand that they would have had a right or opportunity to litigate disputes through a court and to have a judge or jury decide their case, but they choose to have any disputes resolved through arbitration.[1]

We agree that any claim or dispute between us,[2] and any claim by either of us against any agent, employee, successor, or assign of the other, including, to the full extent permitted by applicable law, third parties who are not signatories to this agreement,[3] whether related to this agreement or otherwise, including past, present, and future claims and disputes, and including any dispute as to the validity or applicability of this arbitration clause,[4] shall be resolved by binding arbitration administered by the National Arbitration Forum under the *Code of Procedure* in effect when the claim is filed.[5]

The *Code of Procedure* and other information, including a fee schedule, may be obtained from the National Arbitration Forum website (*www.adrforum.com*) or by calling 800-474-2371.[6] Claims may be filed with the National Arbitration Forum in either of the following ways: (1) online at *www.adrforum.com*; or (2) via US mail to P.O. Box 50191, Minneapolis, MN 55405-0191.

We are entering into this arbitration agreement in connection with a transaction involving interstate commerce.[7] Accordingly, this arbitration agreement, and any proceedings thereunder, shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. Any award by the arbitrator(s) may be entered as a judgment in any court having jurisdiction.[8]

NOTES

1. This statement demonstrates the parties' understanding that they are foregoing their right to a jury trial in favor of the efficiencies of binding arbitration.
2. This phrase describes the scope of the arbitration agreement. This particular phrasing has the dual advantage of breadth and brevity because the phrase "any claim or dispute" conveys the expansive scope of the arbitration agreement without including the sort of unnecessary detail that may lead to an unfairly narrow interpretation. Many jurisdictions distinguish between "broad" and "narrow" arbitration agreements. See, e.g., *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224-225 (2nd Cir. 2001). A broad arbitration agreement gives rise to a presumption of arbitrability. *Id.* at 224.
3. This phrase effectively forecloses any argument that a party's agent, employee, successor, or assign cannot invoke the arbitration agreement because they are not a party to the agreement.
4. This phrase prevents litigation over the scope of the arbitration agreement by defeating the presumption that "questions of arbitrability" are decided by the court. See *First Options of Chicago, Inc. v. Kaplan*, 514 US 938, 944-45 (1995) (holding that courts must decide questions of arbitrability unless there is "clear and unmistakable" evidence that the parties intended otherwise).
5. The latter part of this sentence eliminates the need to draft lengthy provisions pertaining to discovery, arbitrator selection, and other procedural matters by adopting an established set of rules that addresses these matters. The National Arbitration Forum *Code of Procedure* is the optimal set of rules for at least four reasons. First and foremost, the *Code of Procedure* requires arbitrators to "follow the applicable substantive law" and thus dispenses with the traditional notion of arbitration whereby arbitrators may disregard the law in favor of principles of equity and fairness. Compare Rule 20(D) of the *Code of Procedure* ("An Arbitrator shall follow the applicable substantive law . . . .") with Rule 43 of the American Arbitration Association ("AAA") Commercial Arbitration Rules ("The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable . . . ."). Second, the *Code of Procedure* allows either party to request a reasoned award, whereas other ADR providers require both parties to request a reasoned award. Compare Rule 37(H) of the *Code of Procedure with* Rule 42(b) of the AAA Commercial Arbitration Rules. Third, the *Code of Procedure* does not permit any vacancies on an arbitration panel unless all parties agree to proceed, whereas other ADR providers allow arbitration to proceed even if one of the parties objects to a vacancy. Compare Rule 23(E) of the *Code of Procedure with* Rule 19(b) of the AAA Commercial Arbitration Rules. Finally, the National Arbitration Forum's fee schedule has been described as a fair allocation of fees and costs. See *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 95 n. 2 (2000) (Ginsberg, J., concurring in part).
6. By directing the parties how to obtain a copy of the *Code of Procedure* and fee schedule, this sentence prevents a party challenging the arbitration agreement from arguing that the costs of arbitration were hidden.
7. The Federal Arbitration Act (FAA) preempts state laws that limit the use of arbitration, but only if the underlying transaction involves interstate commerce. This stipulation eliminates the need to prove that the transaction involved interstate commerce. See, e.g., *Pest Management, Inc. v. Langer*, 96 Ark. App. 220 (Ark. Ct. App. 2006), *aff'd*, 2007 WL 538178 (Ark. Feb. 22, 2007). Plus, in some jurisdictions, parties can agree to arbitrate under the FAA even if the underlying transaction does not involve interstate commerce. See, e.g., *Teel v. Beldon Roofing & Remodeling Co.*, No. 04-06-00231-CV, 2007 WL 1200070, at *1 (Tex. App. Apr. 25, 2007).
8. This langauge should be included because some courts have deemed it necessary for award confirmation under the FAA . See *Varley v. Tarrytown Associates, Inc.*, 477 F.2d 208, 210 (2d Cir. 1973) ("The [FAA] provides that confirmation of an arbitration award is appropriate only where the parties 'in their agreement have agreed that a judgment of the court shall be entered upon the award . . .'"); *but see Harris v. Brooklyn Dressing Corp.*, 560 F.Supp. 940, 941 (S.D.N.Y. 1983) (noting that *Varley* "may be regarded as a dead letter"). In any event, Rule 39(e) of the National Arbitration Forum *Code of Procedure* also paves the way for confirmation by providing that an award "may be confirmed, entered or enforced as a judgment

headquartered in France, which is the arbitration body of the International Chamber of Commerce, and the London Court of International Arbitration (LCIA). Both organizations have roots that go back decades and maintain a truly international reach. More recently, regional arbitration centers have taken on increasing prominence, especially those located in China and Singapore. These and other regional centers should be seriously considered by parties drafting international commercial agreements.

The completion of these regional arbitration centers may also mean that international business partners will harbor increasing expectations that arbitration agreements will call for arbitrations to be administered regionally instead of through the incumbent international centers.

It is also important to point out that emerging relationships among dispute resolution institutions and between these institutions and international law firm alliances suggest an entirely new model for corporate counsel to use when planning and managing international arbitrations. The default approach has been to engage a prominent international law firm in order to represent the corporation in arbitration in one of the traditional arbitration centers. In the future, corporate counsel should consider arbitrating regionally and retaining international counsel through referrals or through an international alliance of independent law firms.

As with internet dispute resolution, new developments in international arbitration have increased the possibilities beyond a stock arbitration clause naming a standard international administrator. In-house counsel should remain informed about international initiatives maintained by domestic US arbitration administrators and also be aware of the increasing availability of regional arbitration centers and technologies for remote access to dispute resolution. These developments have the potential to increase the efficiency of international arbitration and make arbitration increasingly available for different stripes of international disputes.

Government-ADR

For corporate counsel versed in granting the right to arbitrate and imposing the duty to arbitrate via contract, the idea of an arbitration obligation imposed by statute or by regulation may sound strange. In fact, there has been a recent trend toward public-private partnerships where states sponsor arbitration programs of various types to address industry-specific challenges. The typical policy drivers leading states in this direction are the identification of a relatively large pool of prospective disputes, which are somewhat similar in nature, that involve relatively small damages, and that have the potential to bog down the court system.

The insurance and healthcare sectors have seen the most development in this area, both because of the large number of insurance-related disputes and the extent of regulatory authority that states exercise over the business of insurance. The classic example of government-sponsored arbitration occurs in no-fault automobile insurance states where states such as New Jersey, New York, and Minnesota have created arbitration systems in order to resolve payment disputes that arise between healthcare providers that have treated personal injuries and the insurance companies.

The size and efficiency of these programs is impressive. For example, the New Jersey No-Fault Personal Injury Protection (PIP) arbitration program administered by the National Arbitration Forum employs 42 full-time arbitrators and received just over 10,000 filed claims just for the second quarter of 2007. Slightly more than one-half of these cases settle before reaching an arbitration hearing, but most of the remainder go to an arbitration hearing and result in an award. The average award size is approximately $5,000 (inclusive of attorneys fees and to be offset by applicable deductables and other payments) while typical filing fees are only $225 per party. It is clear that the program is economically viable for the parties and that the state has successfully removed a significant number of relatively routine cases from their court dockets.

The other area in which government-sponsored arbitration is likely to grow is in payment disputes between healthcare providers and health insurers. The state of New Jersey has already implemented an arbitration program to resolve these disputes and the California Department of Managed Health Care has issued proposed regulations that would create a similar regime.

Major Regional Centers for International Arbitration

- The European Court of Arbitration, headquartered in Strasbourg
- The Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa (OHADA)
- Gulf Cooperation Council (GCC) Commercial Arbitration Centre, based in Bahrain
- China International Economic and Trade Arbitration Commission (CIETAC)
- The Commercial Arbitration and Mediation Center for the Americas (CAMCA), a joint creation of the AAA, two Canadian arbitration centres, and the Mexico City National Chamber of Commerce
- Hong Kong International Arbitration Centre (HKIAC), whose alliance with JAMS was mentioned above
- Singapore International Arbitration Center (SIAC)

Contractual Arbitration

Arbitration is simultaneously—and sometimes paradoxically—a creature of contract as well an analogue to existing judicial systems. By now, corporate counsel are completely comfortable with the fact that arbitration can be invoked by contract. We need to become more aware of the potential benefits of customizing arbitration clauses in various respects in order to meet the demands of the disputes that arise in the businesses we serve. The possibilities are practically endless. Major considerations should include arbitrator qualifications and expertise, hearing types and the use of technology (as discussed in the internet dispute resolution section above), and limitations on the types or extent of permitted discovery.

One arbitration customization option that is currently the subject of controversy is the availability of more searching appellate review of arbitration awards upon the election of the parties. For example, parties may decide to draft an arbitration agreement provision calling for de novo judicial review for errors of law contained in an arbitration award. Other formulations that go beyond the permitted grounds for vacating an award under the Federal Arbitration Act are also possible.

Courts have taken fundamentally divergent approaches to this question of expanded judicial review. The Ninth Circuit determined that, however parties chose to design the arbitration process that decides their disputes, the standard of judicial review cannot be customized:

> *Private parties have no authority to dictate the manner in which the federal courts conduct judicial proceedings. That power is reserved to Congress—and when Congress is silent on the issue, the courts govern themselves. Here, because Congress has determined that federal courts are to review arbitration awards only for certain errors, the parties are powerless to select a different standard of review.... Private parties may design an arbitration process as they wish, but once an award is final for the purposes of the arbitration process, Congress has determined how the federal courts are to treat that award. We hold that the contractual provisions in this case providing for federal court review on grounds other than those set forth in the Federal Arbitration Act are invalid and severable.*[1]

Other courts presented with the same issue have analyzed the same issue much more from the perspective of arbitration as creature of contract:

> *In this case, however, the parties contractually agreed to permit expanded review of the arbitration award by the federal courts. Specifically, their contract details that "[t]he arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal." Such a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract.... Because these parties contractually agreed to expand judicial review, their contractual provision supplements the FAAs default standard of review and allows for de novo review of issues of law embodied in the arbitration award.*[2]

The Supreme Court of the United States has recently grated a certiorari to a case presenting this issue, and it

Seven Points to Remember When Tailoring Your Arbitration Agreement

- Include arbitration and other ADR in your risk management planning. Continually ask yourself and outside counsel if arbitration is appropriate in various situations.
- Be very precise when drafting choice of law language. Clearly designate the body of law that governs the arbitration agreement (typically, the FAA) and the body of law that governs the substantive portions of the agreement.
- Think about finality. In many cases, finality is valued by all parties above the availability of expansive appellate review. In such cases, reasoned awards and detailed written findings are not necessary. If expansive judicial review is important, then plan for it by requiring a reasoned award and authorizing a reviewing court to conduct such a review (if the jurisdiction in question permits expansive review).
- Conduct due diligence on arbitration rules and fee schedules before you name them in your agreement. The rules differ across administrators in material respects (e.g., arbitrator powers, procedural options, and fees).
- Take advantage of opportunities to customize that are provided in the arbitration rules. For example, after the claim is filed, parties may able to choose the number of arbitrators that will hear the case, the qualifications and of the arbitrator(s), the type of hearings that are conducted, the type of award that is issued, etc.
- Instead of a standard arbitration clause, keep a library of arbitration agreement customizations that can be deployed in any given contract based upon specific requirements and commercial context.
- Seek out arbitration agreement drafting advice from arbitration administrators and other experts. The FORUM's "Arbitration Agreement Drafting Guide" is available at *www.adrforum.com/guide.*

is possible that attorneys interested in customizing the standard of review of an arbitration award will be doing so with much clearer guidance in the near future.[3]

While some courts have been disapproving of contractual efforts to expand appellate review of arbitration awards, jurisprudence on almost all other arbitration related issues has been encouraging of parties' efforts to tailor arbitration to meet their desired ends. Prime examples of this continuing trend are illustrated by some recent cases upholding the availability of non-monetary remedies in arbitration. Although arbitration's roots are largely commercial and the concept of an award is traditionally envisioned to encompass monetary relief, there is nothing in the Federal Arbitration Act and nothing in the federal common law of arbitration that prevents parties from seeking declaratory and injunctive relief, property-based and possessory remedies, or state and federal statutory remedies, among other possible remedies.

As a final note on tailoring arbitration proceedings through contract drafting, it is important to remember that the contractual election of a body of arbitration rules is also an exercise in contract drafting. The elected rules become incorporated into the arbitration agreement, which means that not only is initial due diligence a requirement, but it is also important to track material changes in elected arbitration rules over time. And different sets of arbitration rules can vary in ways that are important to corporate attorneys, such as are whether the arbitrators are bound to apply the substantive law, what evidentiary rules are in place, and how much discovery is permitted and under what standard.

Include All Your Legal Options

Precisely because the possibilities for tailoring arbitration agreements are endless, it is impossible to anticipate the provisions that would be most helpful in any given commercial setting. However, the *Taking Action* sidebar lists seven key considerations that should provide an excellent starting point. The underlying message, however, is more pervasive: Think about arbitration in a more nuanced way and include it in your business and risk management planning.

Have a comment on this article? Email editorinchief@acc.com.

Notes

1. *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 1003 (9th Cir. 2003).
2. *Syncor Intern. Corp. v. McLeland*, 120 F.3d 262 (Table), 1997 WL 452245, *6 (4th Cir. 1997) (citing *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996-97 (5th Cir.1995).
3. See, *Hall Street Associates, L.L.C. v. Mattel, Inc.*, Nos. 05-35721, 05-35906, 2006 WL 2193411 (9th Cir. Aug, 1, 2006), *cert. granted*, 127 S.Ct. 2875 (2007).

ACC Extras on… Arbitration

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- *Tools That Create Successful Resolutions in International Arbitration (2007).* International arbitration is a popular and well-known method of dispute resolution among in-house attorneys. What is not so well known are the tools and tactics needed to create successful resolutions. Read on and find the key facts of international arbitration. *www.acc.com/resource/v8490*
- *A Tale of Two Cases: Arbitration or Litigation?* (2006). Employment discrimination got you all mixed up? Here we present two, real-life cases both filed by former employees terminated for poor performance near the same time and defended by the same counsel. See how even though both cases resulted in total victory for the employer, the different approaches of arbitration and litigation made one short and sweet and the other long and complicated. *www.acc.com/resource/v7582*

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Consumer Protection, Class Proceedings, and Arbitration Clauses (2007). This paper describes how Canadian courts have treated arbitration clauses in class proceedings litigation involving consumer claims. Recent legislative initiatives to protect consumers are also addressed. *www.acc.com/resource/v8660*

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"MANIFEST DISREGARD OF THE LAW" AFTER *HALL STREET*

Prior to the United States Supreme Court's recent holding in *Hall Street Associates, LLC, v. Mattel*, 128 S.Ct. 1396 (2008), most courts recognized "manifest disregard of the law" as a narrow, extra-statutory ground for vacating an arbitration award under the Federal Arbitration Act ("FAA"). The *Hall Street* holding – namely, that the FAA's statutory grounds for vacatur are exclusive – has cast doubt on whether manifest disregard of the law remains a valid basis for vacatur. Several courts have already grappled with the issue, with some concluding that "manifest disregard" is dead letter and others concluding that manifest disregard is a statutory derivative and thus remains a basis for vacatur under the FAA. A sample of these decisions is categorized below.

Court decisions holding that "manifest disregard of the law" is no longer a valid basis for vacatur under the FAA.

- *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F.Supp.2d 993 (D. Minn. 2008)
- *Robert Lewis Rosen Assocs., Ltd. v. Webb*, No. 07 Civ. 11403, 2008 WL 2662015 (S.D.N.Y. July 7, 2008)
- *ALS & Assocs., Inc. v. AGM Marine Constructors, Inc.*, No. Civ. A. 06-10088-EFH, 2008 WL 2230770 (D. Mass. June 2, 2008)

Court decisions holding that "manifest disregard of the law" is derived from Section 10 of the FAA and thus remains a valid basis for vacatur.

- *Joseph Stevens & Co., Inc. v. Cikanek*, No. 08 C 706, 2008 WL 2705445 (N.D. Ill. July 9, 2008)
- *Mastec N. Am., Inc. v. MSE Power Sys., Inc.*, No. 1:08-CV-168, 2008 WL 2704912 (N.D.N.Y. July 8, 2008)
- *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 349 (N.Y. Sup. Ct. 2008).

Court decisions that recognize "manifest disregard of the law" as a basis for vacatur derived from a court's inherent powers.

- *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Securities, Inc.*, No. Civ. A. 3603-CC, 2008 WL 28551163 (Del. Ch. Ct. July 24, 2008)

Court decisions that examine the issue but do not reach a definitive conclusion.

- *Halliburton Energy Servs., Inc. v. NL Inds.*, 553 F.Supp.2d 733, 753 (S.D. Tex. 2008)

***Hall Street Associates v. Mattel* – Supreme Court Holds That FAA Grounds for Vacatur Are Exclusive**

The United States Supreme Court has held that the statutory grounds for vacating or modifying an arbitration award under the Federal Arbitration Act (FAA) are exclusive. Accordingly, parties cannot obtain heightened judicial review under the FAA by drafting an arbitration agreement that supplements the statutory grounds for vacatur. However, the Court allowed for the possibility that heightened review of arbitration awards may be available outside of the FAA.

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, No. 06-989, 2008 WL 762537 (Mar. 25, 2008), Mattel leased a manufacturing site from Hall Street. Following the discovery of environmental contamination, Mattel notified Hall Street of its intent to terminate the lease.

Hall Street subsequently filed a lawsuit, contesting Mattel's termination of the lease and seeking indemnification for clean-up costs. After the district court resolved the termination issue in Mattel's favor, the parties agreed to submit the indemnification dispute to arbitration under an agreement providing that "[t]he Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."

The arbitrator decided the indemnification dispute in Mattel's favor based on his conclusion that the Oregon Drinking Water Quality Act is not an environmental law. Hall Street filed a motion to vacate the award, arguing that the arbitrator's conclusion of law was erroneous. The district court vacated the award and remanded the matter to the arbitrator.

On remand, the arbitrator issued an award in Hall Street's favor. The district court upheld the substance of the second award, but on appeal, the Ninth Circuit Court of Appeals held that the arbitration agreement's provision for judicial review for errors of law was unenforceable based on the Ninth Circuit's *en banc* decision in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003).

The Supreme Court granted certiorari "to decide whether the grounds for vacatur and modification provided by §§ 10 and 11 of the FAA are exclusive." As the Court noted, there has been a circuit split on this issue.

Hall Street raised two essential arguments in support of its position that the FAA grounds for vacatur/modification are not exclusive. First, Hall Street pointed out that "manifest disregard of the law" – widely regarded as basis for vacatur – is not among the statutory grounds. In rejecting this argument, the Court suggested, without directly stating, that "manifest disregard" fits within the statutory framework as an instance of either arbitrator misconduct or an arbitrator exceeding their powers.

Second, Hall relied on the freedom of contract principles underlying the FAA in arguing for the enforceability of the agreement's judicial review provision. The Court rejected this argument on the basis that freedom of contract can not override the statutory text. Specifically, the Court reasoned that the language of section 9 – requiring award confirmation "unless the award is vacated, modified, or corrected *as prescribed* in sections 10 and 11" – "carries no hint of flexibility." Similarly, the Court relied on the principle of *ejusdem generis* in concluding that vacatur under the FAA requires something more egregious than legal error.

Based on the statutory language, the Court held that sections 10 and 11 "provide the FAA's exclusive grounds for expedited vacatur and modification." However, the Court allowed for the possibility that some authority outside the FAA could pave the way heightened judicial review. Since this issue was not addressed by the lower courts, the Court remanded the case with instructions to address the availability of heightened review under the case management authority derived from Rule 16 of the Federal Rules of Civil Procedure.

There were two dissenting opinions. Justice Stevens authored a dissenting opinion, joined by Justice Kennedy, stating that sections 10 and 11 "are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties' 'valid, irrevocable and enforceable' agreements to arbitrate their disputes subject to judicial review for errors of law." Justice Breyer authored a dissenting opinion concluding that remand was unnecessary since all of the justices agreed that the FAA does not entirely foreclose the judicial review called for by the parties' agreement.

The Court's decision leaves behind an important question: Setting aside the "manifest disregard" standard, which some courts have already pigeonholed into the FAA, *see, e.g., U.S. ex rel. Watkins v. AIT Worldwide Logistics, Inc.*, 441 F.Supp.2d 762 (E.D. Va. 2006), what is the status of other vacatur grounds that courts have treated as non-statutory?

For example, under the FAA, can a court vacate an arbitration award on the ground that it violates public policy? The answer, of course, turns on whether public policy fits within the statutory framework of the FAA. *Cf. K.R. Swerdfeger Construction, Inc. v. Board of Regents*, 142 P.3d 962, 967 (N.M. Ct. App. 2006) ("Our case law does not support KRSC's argument that broad notions of public policy inform the determination of whether arbitrators 'exceeded their powers' within the meaning of [the UAA].")

In a similar vein, the Court's decision leaves room for parties to guard against legal error so long as they do so within the statutory framework of the FAA. Specifically, parties can guard against legal error by agreeing that the arbitrator must follow the law a la Rule 20(D) of the National Arbitration Forum *Code of Procedure*.

That way, if the arbitrator disregards or misapplies the law, the award is subject to vacatur on the ground that the arbitrator exceeded his powers. *See, e.g., KeyClick Outsourcing, Inc. v. Ochsner Health Plan, Inc.*, 946 So.2d 174 (La. Ct. App. 2006) (finding that arbitrator exceeded his powers by misapplying the law where the arbitration

agreement provided that "[t]he arbitrator shall have no authority to make material errors of law"). Judge Posner recently distinguished this method of obtaining heightened review from the one at issue in the *Mattel* case. *See* *Edstrom Industries, Inc. v. Companion Life Insurance Co.*, 516 F.3d 546, 550 (7th Cir. 2008) ("The question in our case is different [from the question in *Mattel*]. It is whether the arbitrator can be directed to apply specific substantive norms and held to the application.").