TWISTS AND TURNS ALONG THE ROAD TO ARBITRATION

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Arbitration is supposed to lead to decreased cost and a more rapid resolution of disputes than standard litigation. Litigation suffers from notorious problems: dilatory motions, interminable discovery with discovery disputes and expensive pre-trial wrangling. Every litigant is painfully aware that these detours drain the litigation budget. Unfortunately, the arbitration highway is not always straight which increases expense and delays the final determination of the dispute. Two bends in the road are (1) the preliminary issue of whether dispute is required to be arbitrated and (2) how pre-hearing discovery is managed.

Arbitrability.

Not every dispute between the parties is the subject of arbitration. Someone must decide whether the dispute is properly before a panel of arbitrators or belongs in the courthouse. The issue typically arises when one party has initiated a lawsuit and the other seeks to compel arbitration under an agreement which contains an arbitration clause. One party will assert that the nature of the dispute is within the intended scope of the arbitration clause, thus depriving the court of subject matter jurisdiction; the other party will assert that the arbitration clause does not cover the dispute at issue. Frequently, the underlying issue is not where the trial will be held, but whether an arbitrator, judge or jury (generally not available in arbitration) will determine the outcome.

The focus has now shifted from dispute resolution to procedural puzzle-solving. What will be decided about arbitration versus litigation? How will that issue be decided, and by whom will the ruling be made?

What will be decided about arbitration? If the arbitration clause is "broad" in its language (*e.g.*, the parties agree that all disputes between them, past, present and future, shall be determined by binding arbitration), then there is little argument that any dispute is excluded from arbitration. A clause is which is characterized as linguistically "narrow" (*e.g.*, disputes arising from the performance or breach of the contract dated July 1, 2014 will be arbitrated) indicates a limited scope of arbitration such that any other dispute is excluded from the operation of the arbitration clause as a justiciable controversy for a court. To make matters worse, there is the inevitable "hybrid" clause somewhere between these two poles.[1]

[1] *See Cummings v. FedEx Ground Package System, Inc*., 404 F.3d 1258, 1261 (10th Cir. 2005) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" [and the] court should classify a particular arbitration clause as either broad or narrow and determine whether the dispute is over an issue that is on its face within the purview of the clause); *Chelsea Family Pharmacy, PLLC v. Medco Health Solutions Inc*. 567 F.3d 1191, 1196 (10th Cir. 2009); *Dusold v. Porta-John Corp*., 807 P.2d 526, 530 (Ariz. App. 1990) (". . . [I]n order for the dispute to be characterized as arising out of, or relating to the subject matter of the contract, and thus subject to arbitration, it must, at the very least, raise some issue the resolution of which requires a reference to or construction of some portion of the contract itself.")

It is suggested that there is a better test, avoiding linguistic nuances: if the determination of the dispute does not rely in any way on the subject matter or provisions of the agreement which contains the arbitration clause, it is outside the scope of the arbitration clause.[2]

Who decides? The issue of arbitrability, the range of issues to be determined by arbitration, can be decided by a court or by the arbitrators. Rule 7 of the American Arbitration Association's Commercial Rules provides that arbitrability is determined by the arbitrator. The mere incorporation by reference of the AAA Rules moves the decision point from the court in which the motion to compel arbitration has been filed to the arbitrator.[3] This may be an unintended consequence of adopting the Commercial Rules wholesale.

If this is not desirable, Rule 7 should be specifically excluded from operation by the terms of the arbitration clause itself. It seems tautologous to have an arbitrator decide the question of arbitrability, but it will be speedier, although one could posit a bias in favor of arbitration if decided by someone in the industry. Perhaps a special arbitrator, empowered only to decide arbitrabilty but not the merits of the case would be an alternative approach.

Where is the question decided? If a motion to compel arbitration is filed by one of the parties, it may not have been filed in the correct forum. Federal courts require that a motion to compel arbitration be filed in the judicial district where the arbitration is to occur because a federal court in one district does not, as a matter of venue, have the power to compel arbitration in another judicial district. Consequently, a motion to compel arbitration under a contract which requires arbitration in New York should be filed in the proper federal courts for New York, not a different court in which a lawsuit may be pending.[4]

Moreover, to make matters more interesting, it is possible that although a motion to compel is improperly filed where the action is pending, such that the federal court is not legally authorized to compel arbitration, that court is, nevertheless, authorized to deny the motion to compel Arbitration.[5]

Most arbitration clauses do not address this procedural puzzle and much cost and expense will be incurred in solving it. Therefore, consideration of this issue should be made in drafting

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[2] *Dusold, supra; Rosen v. Mega Bloks, Inc*. 2007 WL 1958968 (S.D.N.Y. 2007); *Radware Ltd. v. F5 Networks, Inc*. 2013 WL 6773799 at *2 (N.D. Cal. 2013); 1 M. Domke, *The Law and Practice of Commercial Arbitration* §15:6 (rev. ed. 1993).

[3] *See, Contec Corp. v. Rem Solution Co.,* 398 F.3d. 205, 208 (2nd Cir. 2005); *Terminix International v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Clarium Capital Management LLC v. Choudhury*, 2009 WL 331588 at *5-6 (N.D. Cal. 2009) (incorporation of AAA Rules in arbitration agreement is clear and unmistakable evidence of the parties' intent to delegate the issue of arbitrability to the arbitrator); *Ajamian v. Cantor L.P*., 137 Cal. 3d. 773, 787-788 (2012).

[4] *Ansari v. Qwest Communications Corp*., 414 F.3d 1214, 1219-20 (10th Cir. 2005) ("[W]here the parties' agree to arbitrate in a particular forum, only a district court in that forum has authority to compel arbitration under §4" [of the Federal Arbitration Act]).

[5] *Image Software Inc. v. Reynolds and Reynolds Co.*, 459 F.3d 1044, 1054-55 (10th Cir. 2006)

the arbitration clause to avoid the issue where possible. The following is suggested for your consideration:

> Notwithstanding any provision of the rules any arbitral agency or tribunal to the contrary, the issues of arbitrability and the scope of arbitration shall be forthwith decided by one neutral as a special arbitrator, who shall not act in any other dispute between the parties, selected by the agreement of the parties within 30 days after service of the demand for arbitration, in default of which either party may proceed to any court of competent jurisdiction with the appointment of arbitrator pursuant to the provisions of the Uniform Arbitration Act as extant in that jurisdiction or any other statute of similar purport therein.

This is a special arbitration provision to eliminate the procedural difficulties described above.

Discovery

Lawyers, like physicians, are always sensitive to the possibility of missing facts or documents in their diagnosis and management of the case, and hence, will seek broad discovery in an excess of caution.

The Federal Rules of Civil Procedure provide for broad discovery as to all information which is either related to the action or which is likely to result in discoverable information.[6] The breadth of this discovery, while not unlimited, certainly feels that way to many litigants. This is particularly true in the case of electronically stored information ("ESI"). Thousands of e-mails and many gigabytes of documents can be vacuumed from a litigant's computer system. The ESI may go far beyond the facts necessary to resolve the actual dispute between the parties. An entire industry is devoted to the management of ESI and it is imperative that the parties recognize that discovery should be limited to the facts and issues directly related to the actual dispute.

A tailored discovery order in arbitration, limited to the focus of the dispute is necessary. The arbitrator is not bound by the Federal Rules of Civil Procedure or their discovery provisions and can use common sense with the guidance of counsel to achieve effective discovery without trolling for terabytes of documents. Suggested language is as follows:

> The parties are entitled to discovery of documents, including ESI, and the disclosure of all persons who may have knowledge of the factual issues relating to the arbitrable disputes. Initially, each party will be permitted to take no more than three depositions, except for good cause shown. The parties, in concert with the

[6] F.R.C.P. 26(b): "*Scope in General.* Unless otherwise limited by court order the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

> arbitrator, shall determine the scope of discovery based upon the nature of the claims and issues in dispute. The final determination of discovery matters shall be made by the arbitrator.[7]

Tailoring discovery to the facts, circumstances and legal issues of the case is best done early in the proceedings, subject to modification for good cause as circumstances arise. The purpose of limiting discovery is to reduce the cost, time and scope of discovery while harvesting what is necessary for the resolution of the actual disputes to be decided.

CONCLUSION

Arbitration should not be conflated with litigation. All too often lawyers expect arbitration to be simply litigation without an official judge. They expect it to be a trial with all of the pre-trial trappings appurtenant to a court action. The active participation of the litigants and their counsel, with decisions ultimately resting in the hands of a savvy arbitrator, can reduce the twists, turns and expense of arbitration and increase its efficiency over typical litigation.

Therefore, it is suggested that "standard" arbitration clauses be abandoned, or, at the very least, enhanced by additional provisions allowing for special arbitration as to the issue arbitrability and streamlined discovery.

A well-managed arbitration can indeed save a great deal of time and money, but it should not be taken for granted; it takes work from the inception of the arbitration clause through the end of the proceedings.

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[7] *See* Rule 22 of the Commercial Rules of Arbitration of the American Arbitration Association, which provides for the authority of the arbitrator to manage "any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute. . . ." Note that Rule 22 does not specifically authorize the taking of deposition or pre-trial discovery other than an exchange of documents and ESI.