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MEDIATION NEWS

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Drafting Arbitration Clauses: Part I (General Commercial Matters)

Arbitration is traditionally a product of contractual agreement. There are a few exceptions where arbitration is the product of judicial rules (Court Annexed Arbitration) or statutory provisions (Arbitration of condominium disputes). Often, a simple sentence or two in a contractual agreement can be sufficient to constitute a binding arbitration agreement. An example of such a "vanilla" clause is the following:

> Any issue or dispute arising out of or relating to this agreement shall be resolved by binding arbitration in accordance with the arbitration rules of the (insert: DPR, AAA, JAMS, ICDR) and judgment on any award issued by the arbitrator may be entered and enforced by any court having jurisdiction thereof.

The arbitration process can be tailored, customized and adapted to address and fit the needs of specific industries and to accommodate the special circumstances and desires of the parties. Generally, courts will enforce arbitration provisions where such provisions are the product of a contractual agreement and such contract is not void or voidable because of principles of general contract law such as lack of consideration, fraud or duress. In tailoring and customizing an arbitration provision, there is an opportunity to draft provisions that favor one party versus another. Such opportunity can be overdone and will run the risk of being

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To accomplish great things, we must not only act, but also dream; not only plan, but also believe.
~Anatole France

The first step to getting the things you want out of life is this: Decide what you want.
~Ben Stein

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stricken by a court on grounds such as unconscionability and violation of public policy.

Here are some things to consider in the drafting of an efficient, practical and enforceable arbitration clause:

1. Scope of Claims: Consider expanding the "arising out of or relating to this agreement" clause to include tort and statutory claims and disputes and/or "all claims between the parties".

2. Identify and adopt the arbitration statute that will govern the arbitration: Generally, the choice will be between the Federal Arbitration Act (FAA) or state arbitration acts. While the FAA does not apply to contracts involving transportation workers and state public sector collective bargaining relationships, its scope is potentially very broad. The FAA applies to contracts "evidencing a transaction involving commerce". The term "involving commerce" has been broadly interpreted by the U.S. Supreme Court in Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995) and is the functional equivalent of "affecting commerce." The FAA encompasses a wider range of transactions than those actually "in commerce" or "within the flow of interstate commerce" and application of the FAA isn't defeated just because there isn't a "*substantial effect*" on interstate commerce. Instead, the commerce clause's power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if, in the aggregate, the activity in question would represent a "general practice . . . subject to federal control." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56–57 (2003).

Parties may elect to bound be bound by a state arbitration statute. To do so, parties must clearly manifest their intent in their contractual agreement. See, "The Revised

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Cinnie Noble

You Say You Want a Resolution?
Arthur Pressman

Quotes

And in today already walks tomorrow.

My interest is in the future because I am going to spend the rest of my life there.

The service we render others is the rent we pay for our room on the earth.

There is a destiny that makes us brothers, none goes his way alone. All that we send into the lives of others comes back into our

Uniform Arbitration Act Fifteen Years Later" Bruce Meyerson, Dispute Resolution Journal, 2016. As of 2019, 23 states plus the District of Columbia have adopted the Revised Uniform Arbitration Act (RUAA). Hawaii's version is contained in HRS Ch. 658A. Interestingly, major state jurisdictions (California, New York, Illinois and Texas) have not.

The RUAA has attempted to address many specific areas not expressly addressed in the FAA or in the predecessor Uniform Arbitration Act that was promulgated in the 1950s. In doing so, the RUAA has made the arbitration process more like litigation with motions practice and nearly full civil procedure discovery. Some key changes contained in the RUAA include:

- As can be done in judicial proceedings, full discovery, depositions, subpoenas may be authorized by the arbitrator. (Section 17).
- Broader grounds to vacate arbitration awards. In addition to the pre-existing grounds for vacature (corruption, fraud, evident partiality, exceeding authority, failing to consider all material evidence, etc.), an arbitrator's conduct of a hearing "so as to prejudice substantially the rights of a party" has been added as grounds for vacature. (Section 23).
- Punitive damages, awardable if authorized by law in a civil action. Similarly, reasonable attorney's fees, expenses, arbitration fees and expenses may be awarded. Arbitrator empowered to award such remedies as are just and appropriate. (Section 21).
- Expanded grounds for appeals provided. (Section 28). (This increases the potential for abuse and delay in the arbitration process).
- Interim relief and provisional remedies may be ordered by the Court prior to appointment of an arbitrator and by the arbitrator after appointment. (Section 8).

- Consolidations of separate arbitration matters may be ordered by the Court unless the agreement prohibits consolidation. (Section 10). Arbitrator must disclose any facts that a reasonable person would consider likely to affect impartiality. The duty to disclose is a continuing duty. Lack of disclosure may be grounds for vacating an arbitration award. (Section 12).
- Arbitrators are afforded immunity from civil liability to the same extent as a judge of a court. An arbitrator or arbitration organization representative may not be compelled to testify or produce records except with regard to vacature of an award for fraud, corruption, evident partiality or prejudicial misconduct. (Section 14).
- Many but not all provisions of the RUAA may be waived. (Section 4). (Thus, arbitration agreements may be customized to a great extent, presenting a drafting opportunity and challenge).

Sample Language to elect RUAA jurisdiction.

The parties agree that all matters in controversy between the parties are subject to this agreement and to Hawaii Revised Statutes Chapter 658A, the Revised Uniform Arbitration Act or RUAA.

Sample Language to elect FAA jurisdiction.

The Parties agree that this Agreement evidences a transaction involving interstate commerce and that the enforcement of this arbitration provision and the confirmation of any award issued to either party by reason of an arbitration conducted pursuant to this arbitration provision shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1 et, seq.

3. Adopt a set of arbitration rules that will be applicable to the dispute. Statutory provisions and arbitration common law can be augmented by the adoption of specific arbitration rules promulgated by alternative dispute agencies such as Dispute Prevention & Resolution, Inc. (DPR), American Arbitration Association (AAA), JAMS and the International Center for Dispute Resolution (ICDR), among others. Before adopting a set of supplementary rules, one should review and become familiar with such rules to make sure that such rules fit the needs of the parties.

4. Provide clear notice and indicia of voluntary consent to the adoption of the arbitration agreement. Clearly set forth the agreement to arbitrate. Consider using prominent sized fonts, bold lettering and/or offset paragraphs requiring separate initials or signature reflecting assent.

5. Note that arbitration results in a waiver of jury or court trial and is subject to limited grounds of appeal.

6. Provide for arbitrator selection. The adoption of agency rules (DPR, AAA, JAMS, ICDR, etc.) will include processes for the selection of the arbitrator(s) and include provisions designed to address arbitrator challenges or a party's failure or refusal to participate in the arbitrator selection process. Determine whether the parties wish to have a single arbitrator or a panel of arbitrators. Parties can, of course, identify and designate specific individual(s) to serve as their arbitrator(s). Where parties determine that the size or nature of disputes calls for the appointment of a panel of arbitrators (usually three), parties may set forth the desired experience and specific qualifications that they wish the arbitrators to possess. In a two party dispute, if parties wish to provide for

each party to appoint an arbitrator with the two appointed arbitrators to appoint the third arbitrator, the parties should specify whether their individually appointed arbitrators are to be deemed party appointed non-neutral arbitrators or whether all three arbitrators are to be deemed neutral arbitrators.

7. Provide for the extent of desired discovery. Discovery is an important area of permissible customization of the arbitration process. Parties can specify and limit the extent, number and nature of permissible discovery. This allows parties to control and limit the potential costs of discovery. Parties may specify, for example, the extent of document production (including e-discovery), whether party and/or non-party witness depositions may be taken and the nature of permitted expert discovery

8. Provide reasonable and realistic time parameters for the arbitration process. One advantage of arbitration is its potential to provide adjudication of disputes more quickly than judicial litigation. Parties can take into account their individual and business needs and adopt such time frames for the completion of discovery and for the conduct and conclusion of the arbitration process that fit their circumstances.

9. Class action. If class action relief is desired, it must be expressly provided for in the arbitration agreement. The U.S. Supreme Court has ruled that class actions will not be permitted where the arbitration agreement is silent (*Stolt-Nielsen S.A.v. Animal Feeds Int'l Corp.*, 559 US 662 (2010) or ambiguous (*Lamps Plus, Inc. v. Varela*, 587 U.S. ___ (2019))

10. Consider defining and limiting the scope of the arbitrator's authority. Set forth whether the parties wish to limit the arbitrator's

authority to award consequential damages or punitive damages. Determine whether parties want the arbitrator to be authorized to award attorney's fees, expert fees, arbitration administration fees and costs to the prevailing party.

11. Consider including time and cost savings process agreements. If party circumstances could benefit from agreements for expedited and time savings procedures, parties can consider including provisions such as requiring (a) pre-filing of all direct testimony, (b) time limits on cross-examination of witnesses, (c) pre-filing of written expert witness reports, (d) hot-tubbing of expert witnesses and (e) limiting times for direct presentation of evidence (chess clock agreements), etc.

12. Choice of law and choice of venue. Parties can also agree to choice of law and choice of venue provisions.

13. Contractual limitation periods. Arbitration agreements may provide for contractually agreed upon reasonable time limitations for the assertion of claims. This is an unsettled area of law. Where time limitations appear to be unreasonable, courts may invalidate such provisions on unconscionability or public policy grounds.

14. Include pre-arbitration conflict management steps. Because mediation has proven to be so successful in the resolution of civil and legal disputes (generally, three out of four litigated cases are resolved in mediation), consider including a requirement that parties attempt good faith mediation before proceeding with arbitration. In the same vein, sometimes a provision requiring the participation of party principals (executives or senior decision makers) in direct negotiations with the assistance of a mediator can also be

beneficial. If you include such additional conflict management steps. Address them clearly in separate paragraphs to avoid confusion with arbitration.

Note: The next issue (July 2019) of this newsletter will address special considerations for the drafting of arbitration clauses for employment contracts. Those considerations will also be pertinent to other sensitive situations involving adhesive contracts and contracts prepared by parties with superior bargaining power.

MAY 2019

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Mediation in the News

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