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The Nuts and Bolts of Compelling Arbitration

Gilda R. Turitz – March 2, 2017

At the outset of a controversy, whether suit has been filed or not, the question of arbitration may arise. The prosecuting or defending attorney needs to address up front whether the parties must or should arbitrate, rather than pursue claims in court, and what is in the best interests of her client. When litigation involves one or more contracts with arbitration clauses, a first step is to understand the nuts and bolts of whether arbitration can be compelled, for what claims, and against which parties or nonparties.

An obligation to arbitrate results from the parties' contractual agreement to determine the matters in dispute through a binding process before a panel or single arbitrator, as an alternative to court litigation. In general, parties to an arbitration will have very limited bases to set aside the final award, and there is no right of appeal (unless optional appellate arbitration rules are agreed to). In addition, prehearing discovery will generally be much more limited than in court. Nevertheless, arbitration is a flexible process that, when well managed, can be very cost effective and expeditious to resolve disputes with finality.

Is There a Valid Arbitration Agreement?

The first question for counsel will be, is there a valid contract to arbitrate? If there is no arbitration agreement between the disputing parties, counsel should first consider whether to negotiate one. Arbitration may present an attractive alternative for the parties depending on the amount in controversy, the nature of the claims to be asserted, the privacy that arbitration affords, and its general efficiency and speed compared to court litigation.

If there is a written agreement to arbitrate, counsel must carefully analyze what claims and controversies it includes or omits in the context of the current dispute. Other important considerations

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include which parties are bound by the arbitration agreement or may be compelled to participate. And, if arbitration is sought by one party but resisted by another, the timing of actions to compel arbitration is critical.

Any analysis must recognize the strong policy in favor of arbitration and presumption under the Federal Arbitration Act (FAA) that valid arbitration agreements are both irrevocable and enforceable, unless legal or equitable grounds exist to revoke any other type of contract. *See* 9 U.S.C. § 2. The FAA applies to written domestic arbitration agreements relating to a commercial or maritime transaction (with exceptions), and states have similar arbitration laws. (The FAA separately provides for enforcement in U.S. courts of international arbitration agreements under the New York Convention. *See* 9 U.S.C. § 201.) In general, courts will apply the presumption of validity to resolve any doubts in favor of arbitrability.

The threshold question whether there is a valid arbitration agreement therefore involves analyzing the typical requirements for formation of a contract. The parties need to address the critical issue of whether there has been consent or a meeting of the minds. If a consumer or employment contract is involved, the arbitration clause may be more vulnerable on the consent issue, for example, if it was incorporated into a contract of adhesion or found in an employee handbook. Other contract defenses that may apply are fraud in the inducement, duress, or other arguments that would undermine a finding of free consent to arbitrate. Where two or more related contracts both have arbitration clauses but their terms conflict, a court may find that the arbitration agreement is too vague to enforce or that there was no meeting of the minds. Examples of such conflicting terms may be the contracts' clauses referring to different sets of arbitration rules, applicable substantive law, venue, or other procedural issues that cannot be reconciled to satisfy the consent to arbitrate requirement.

What Claims Are Arbitrable?

The next question is, what claims are arbitrable? Most commonly, clauses refer to all claims "arising from" or "relating to" the interpretation, enforcement, and/or breach of the underlying agreement. Questions that may be litigated over scope often revolve around whether tort or statutory claims are included or should be sent to arbitration if they are not expressly stated to be included. Such issues will be determined by the governing law, but generally arbitration clauses will be construed broadly to require arbitration in order to honor the parties' intent.

Counsel should be aware of the possibility that some claims may be found arbitrable while others will not. In that case, counsel may seek a stay of the litigation to allow the arbitration to proceed first,

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rather than conducting concurrent proceedings in two forums and risking inconsistent findings.

What Rules Apply?

Arbitration clauses may specify the rules of a particular provider such as national organizations (e.g., the American Arbitration Association, the International Centre for Dispute Resolution (ICDR), JAMS, or the International Institute for Conflict Prevention & Resolution (CPR)) or local or regional providers. In such cases, as a first step, counsel must familiarize herself with those rules. Counsel should keep in mind that because arbitration is created by contract, an arbitration clause may be modified by the parties' mutual agreement to specify a different provider or set of governing rules, or to change the number of specified arbitrators or method of arbitrator selection. Provisions in the arbitration clause or in the specified rules concerning the scope of discovery or e-discovery, duration of or time to hearing, or type of award (e.g., a basic award, a reasoned award, or findings of fact and conclusions of law) can also be modified by the parties' stipulation.

Who Must Arbitrate?

Assuming validity of the agreement, the signatory parties are bound to arbitrate. If the contract expressly states that the signatories' successors and assigns are intended to be bound, generally they will be required to arbitrate. But another issue for initial inquiry is whether there are other nonsignatory parties who should be brought into the arbitration in order to afford complete relief on the claims to be arbitrated. Whether a nonsignatory may be compelled to arbitrate is a heavily fact-driven issue and must be analyzed based on the applicable law. Results vary among different jurisdictions. In some instances, a nonsignatory also may seek to intervene in the arbitration by motion or petition.

How Can Arbitration Be Commenced?

A claimant can initiate an arbitration by filing a demand for arbitration in conformity with the rules specified in the agreement. If no provider or rules are specified, and the opponent will not stipulate to how the arbitration should be administered, then the claimant may need to file a court petition to compel the respondent to arbitrate. The requirements of such a petition will vary by jurisdiction, but generally the claimant will need to allege and prove the existence of the arbitration agreement through sworn affidavits or declarations that attach the agreement and explain the rationale for arbitrability of the claims. If the claimant also seeks to join nonsignatories, the petition will need to establish the facts and legal authority that would support requiring the nonsignatories' participation in the arbitration.

If litigation has already been filed, the party seeking to arbitrate will need to file a motion to compel arbitration in accordance with

the court's rules. The motion would make the same type of showing as for a petition to arbitrate, including proving up the parties' agreement to arbitrate or the reasons for requiring nonsignatory participation.

Conversely, a party resisting an arbitration commenced by an opposing party may seek to enjoin an arbitration from proceeding, either by filing an original court action or a motion in pending litigation.

When Should Arbitration Be Commenced?

Any claim must be initiated before the applicable statute of limitations runs. Another consideration, however, is that the right to arbitrate may be lost if the compelling party has participated in litigation of the claims for a period of time, leading a court to find that the party has waived its right to arbitrate or that the delay in compelling arbitration would prejudice other parties. Counsel should therefore advise the client about the risks of delaying any petition or motion to arbitrate, or, conversely, any action to enjoin an arbitration that has been ongoing.

In conclusion, the savvy litigator will make an early assessment, either before filing or upon first commencing the defense of a claim, of all potentially applicable contracts between the parties to determine whether one or more of them calls for arbitration. By addressing the steps outlined above, counsel can fully advise the client as to the benefits, risks, and other considerations of pursuing or resisting arbitration.

Gilda R. Turitz is a partner at Sideman & Bancroft LLP in San Francisco, California, and fellow of the College of Commercial Arbitrators.