The Federal Arbitration Act: a Businessperson?s FAQ Guide

This is the first in a series of posts that will pose and answer several important questions about the Federal Arbitration Act (the "Federal Arbitration Act" or ?FAA?), and FAA practice and procedure. The Federal Arbitration Act is the federal statute that governs arbitration agreements that ?affect commerce,? making them irrevocable, valid and enforceable to the same extent as contracts generally. It provides for the expedited enforcement (including the challenge) of arbitration awards, empowers arbitrators to issue hearing subpoenas that are enforceable in court against third parties, and authorizes Courts in appropriate circumstances to compel arbitration, stay litigation, and appoint arbitrators.

Chapter One of the Federal Arbitration Act, and the many court decisions construing it, constitute the main body of arbitration law governing arbitration agreements in contracts ?affecting commerce.? That body of arbitration law also includes state law governing contracts generally as well as state arbitration law, where applicable. More on that another day.

Before addressing specific FAQs, we review why arbitration law is important and what small businesses can do to help protect themselves in today's challenging arbitration environment. We next provide an overview of Chapter One of the Federal Arbitration Act, summarizing its provisions.

This guide, including the instalments that will follow in later posts, is not designed to be a comprehensive recitation of the rules and principles of arbitration law. It is designed simply to give clients, prospective clients, and other readers general information that will educate them about the legal challenges they may face and how engaging a skilled, trustworthy, and experienced arbitration attorney

can help them confront those challenges more effectively.

Why is Federal Arbitration Act Arbitration Law Important and How can Small Businesses Protect Themselves in Today's Challenging Arbitration Environment?

Arbitration can be a very effective way of resolving a wide range of disputes arising out of many legal and commercial relationships. It can benefit the parties if they make informed decisions about agreeing to it, craft their agreement accordingly, invest ample time and resources into the dispute-resolution process, proactively manage it, and make reasonable strategic and tactical decisions aimed at maximizing the odds of a beneficial outcome. It can benefit the courts and the general public by shifting to the private sector dispute-resolution costs that the public-sector (funded by tax payers) would otherwise bear.

Arbitration is not a perfect form of dispute resolution (and none is, including court litigation). That is so even when: (a) parties carefully draft their arbitration agreements and arbitrate in good faith; and (b) arbitrators, arbitration service providers and courts do their best to ensure the integrity, reliability, and cost-efficiency of the process and otherwise strive to protect the legitimate contractual expectations of the parties.

But at least over the last few decades or so, arbitration has, in the eyes of many, become a less attractive alternative to court litigation than it was intended to be, could be, and once was. One reason for the decline is because courts and arbitrators do not always enforce arbitration agreements in a way most likely to promote arbitration, even though they may believe in good faith that their decisions make arbitration a more attractive alternative to litigation.

The Arbitration Cottage Industry: Repeat Players versus Outsiders

Yet another reason is that arbitration has evolved into a cottage industry consisting of arbitration providers; and professional arbitrators (whether affiliated or not with one or more arbitration providers or arbitration societies). This industry serves (or is supposed to serve) relatively large businesses as well as smaller businesses, individuals, and consumers.

But it is a business that frequently pits repeat players**?**businesses which frequently use an arbitration provider's services, usually because they regularly appoint in their arbitration agreements the arbitration provider as administrator**?**against outsiders**?**businesses or individuals who find themselves in an arbitrations administered by an arbitration provider before which they do not find themselves on a regular basis, usually because they either do not regularly appoint the arbitration provider as administrator in their arbitration agreements, or because they do not ordinarily agree to arbitrate in the first place.

Repeat players generate more revenue for arbitration providers and their stable of arbitrators over time than do outsiders. In theory that shouldn't matter, for at least ostensibly, providers and arbitrators offer the market neutral dispute resolution services that are not supposed to favor repeat players, outsiders, or anyone else.

But economic realities can make that ostensible goal difficult to achieve in practice, even for exceedingly-well-intentioned providers and arbitrators. Those economic realities suggest an actual or potential conflict of interest**?**that is, a conflict between the provider's and arbitrator's interest in neutrality and their interest in an arbitration outcome that will not dissuade the repeat player from continuing regularly to use the provider's services.

Businesses, particularly smaller business that are not arbitration provider repeat players, thus may find themselves in a challenging environment, one in which they probably did not anticipate being when they agreed to arbitrate. They are outsiders in an arbitration system that may be administered by an organization, and presided over by one or more arbitrators, who may consciously or unconsciously habor, or at least labor under, institutional predispositions that could tip the scales in favor of the repeat player and against the outsider.

The potential for such free-floating institutional bias or predisposition ordinarily will not, without more, support an argument that the arbitrator has a material conflict of interest. The reasons that is so are, for present purposes, beyond the scope of this post, but

irrespective of whether arbitration law provides or should provide any relief from such a conflict, the economic realities described pose risks for outsiders, whose odds of success on the merits might not be what they would otherwise be if the tables were turned, and they, not their adversaries, were the repeat players.

Outsiders who find themselves in arbitration disputes with repeat players need all the help they can get.

Arbitration Law: Limited Relief, Arcane Rules, and Traps for the Unwary

The nature of arbitration law itself poses other challenges with which businesses (including repeat players) must grapple. Arbitration law authorizes courts to provide only very limited relief to parties who claim to be the victims of arbitration-agreement violations, whether committed by arbitrators or by an adverse party.

To make matters worse it is not unusual for certain judges to interpret and apply arbitration law in a way that makes it all the more difficult to obtain relief, even when granting that relief would, in all likelihood, promote arbitration as an attractive alternative to litigation, which is the main objective of arbitration law.

For example, courts will sometimes confirm arbitration awards that should have been vacated even though the facts reveal that the arbitrators egregiously violated the parties' arbitration agreement by exceeding their powers, being guilty of fraud, corruption, or evident partiality, or committing prejudicial procedural misconduct. Courts seem conciously or unconsciously to go out of their way to avoid recognizing such grave improprieties, perhaps because the public might perceive the outcome ? a vacated arbitration award and an arbitration do over ? as disfavoring arbitration. And that is so even though vacatur would, in all likelihood, promote arbitration by enforcing the parties' arbitration agreement and protecting reasonable expectations of fundamental fairness.

The same kind of scenario may play out in the context of a pre-arbitration dispute about compelling arbitration and staying litigation pending arbitration. Believing in good faith that they are promoting arbitration, and perhaps desiring an outcome that appears to favor arbitration?such as one that compels arbitration and stays litigation pending arbitration?Courts sometimes determine persons have consented to arbitration in circumstances where a comprehensive examination of the facts and applicable law may indicate otherwise.

Arbitration law doctrines, rules, and procedures remain somewhat arcane even though arbitration disputes and arbitration-related litigation are fairly common. Consequently, outcomes and rationales are often counterintuitive, unless the lawyer has thorough knowledge of and experience with arbitration law. We'll discuss some examples in later posts.

Even apart from that, arbitation law's procedural rules are fraught with traps for the wary, which are, among other things, designed to encourage early forfeiture of defenses that might otherwise be raised in FAA litigation. Most, if not all, of these rules nevertheless serve purposes which at least arguably promote arbitration as a viable alternative to litigation. If your attorney doesn't know the rules well or doesn't follow them, then your interests may be in jeopordy.

Protecting your Interests in Arbitration and Arbitration-Related Litigation

How can you best protect your interests in the seemingly informal, but sometimes covertly hostile, arbitration environment? First, you must make sure that you are represented by an attorney who has abundent knowledge of and experience in arbitration law and in representing parties in arbitrations and in FAA litigation.

This can make a huge difference ? the author has, over the years, encountered situations where another lawyer did not, for example, detect or adequately preserve for judicial review issues that may otherwise have provided a basis for vacating an adverse award. As a consequence, these parties lost the race before it even started, and ended up being saddled with arbitration awards that, in a more perfect world, they may have been able to vacate. Needless to say, situations like this are far less likely to occur if experienced arbitration counsel been involved from the start.

If you are already represented by an attorney in your arbitration, but find yourself facing challenging FAA enforcement litigation, or the prospect of such litigation, then your interests are best suited by hiring skilled and experienced counsel who regularly handle such litigation. Depending on the circumstances, your own needs, and other considerations, you may wish to retain a new lawyer to handle the FAA litigation, while continuing to retain your current lawyer for purposes of handling the merits of the underlying arbitration (but making sure the FAA litigation lawyer is consulted at each step along the way to help preserve and enhance the record for future FAA litigation).

Second, you should work closely with that attorney, advising him or her of all matters pertinent to your claims and defenses, including matters that may be peculiar to your particular business or industry, including customs, practice, and usage. Always be an active part of your case and work only with attorneys who allow and encourage you to do that.

Third, you should keep yourself informed about arbitration-law related matters, as well as the legal rules and principles that bear on the merits of your case. This series of posts addresses numerous basic questions concerning the Federal Arbitration Act, and thus should be a useful educational aid for that purpose.

An Overview of the Federal Arbitration Act and its Provisions

The judicial and arbitral enforcement of arbitration agreements that affect interstate commerce is governed by the Federal Arbitration Act (the ?FAA?), a statute first enacted in 1925 as the ?United States Arbitration Act.? As originally enacted, the FAA consisted of 15 provisions, section 14 of which Congress repealed in 1947, renumbering as Section 14 former Section 15.

In 1970 Congress designated those remaining 14 provisions as ?Chapter 1? of the FAA, and added a ?Chapter 2,? which consists of various provisions implementing and enabling the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (a/k/a the ?New York Convention?).

In 1988 Congress added two additional provisions to Chapter 1 of the FAA, Sections 15 and 16. In 1990 Congress added to the FAA a Chapter 3, which consists of provisions implementing and enabling the Inter-American Convention on International Commercial Arbitration (a/k/a the ?Panama Convention?).

The majority of U.S. domestic arbitration disputes are
decided under Chapter One of the FAA, 9 U.S.C. §§
1-16. Of these 16 relatively sparse statutory provisions, Sections 1 through 14
have been on the statute books in largely the same form for about 95 years.

The provisions of Chapter One have not only been on the books for nearly 100 years, but they are fairly sparse, and certainly do not even come close to addressing expressly and comprehensively all of the many issues that may arise concerning the enforcement of arbitration agreements and awards.

Out of necessity, a robust body of judicial interpretations and applications of the provisions has arisen to attempt to address these problems. These interpretations and applications of the FAA often vary from one circuit court of appeals to the next, and the U.S. Supreme Court has, on many occasions over the last four decades (and even before) stepped in to resolve such circuit splits and attempt to make FAA law more uniform by developing and implementing various FAA rules and principals, a number of which were first created in cases arising out of Labor Management and Relations Act ("LMRA")-governed labor arbitration cases.

But before delving into any of the gory details, let's look at the domestic, commercial arbitration-law outline that Chapter One of the FAA provides. Our starting point is Section 2, which is sometimes referred to as the FAA's ?enforcement command.?

The Federal Arbitration Act's Enforcement Command: Section 2

Section 2 of the FAA is the provision that declares that

arbitration agreements falling within its scope are ?valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of of any contract.? 9 U.S.C. § 2.

It also tells us what arbitration agreements fall within the scope of Section 2 and the other provisions of FAA Chapter One: (a) ?[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof [;] or [(b)] an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal. . . .? 9 U.S.C. § 2.

Section 2's scope provision therefore, and as interpreted by the U.S. Supreme Court, applies to written pre-dispute arbitration agreements in: (a) ?maritime contract[s]? (?Maritime Contracts?); or (b) ?contract[s] evidencing a transaction involving commerce. . . .? (?Contracts Affecting Commerce?). It also applies to written post-dispute arbitration agreements ?to settle by arbitration a controversy thereafter arising out of such [Maritime Contracts or Contracts Affecting Commerce], or the refusal to perform the whole or any part thereof. . . .? 9 U.S.C. § 2; see **Allied-Bruce Terminix Cos. v. Dobson**, 513 U.S. 265, 273-282 (1995); Citizens Bank v. Alafabco, Inc.], 539 U.S. 52, 55-58 (2003). As interpreted by the U.S. Supreme Court, Section 2's use of the ?word ?involving,' like ?affecting,' signals an intent to exercise Congress' commerce power to the full.? Allied-Bruce, 513 U.S. at 277. More on that another day.

Under Section 2, ?arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms.? Schein v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019). Section 2 also ?requires courts to place arbitration agreements on an equal footing with all other contracts.? **Kindred Nursing Centers Ltd. P'ship v. Clark**, 137 S. Ct. 1421, 1424 (2017) (quotations and citations omitted).

Section 1 of the FAA : Definitions and an Exemption

Section 1 of the FAA provides some definitions and exempts from the FAA a fairly limited universe of agreements that would otherwise fall within the scope of the Act. See 9 U.S.C. § 1. As respects the exemption, Section 1 provides that "nothing [in the FAA] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.? 9 U.S.C. § 1.

According to the United States Supreme Court, the exemption applies ?only? to ?contracts of employment of transportation workers.? **Circuit City Stores, Inc. v. Adams**, 532 U. S. 105, 119 (2001). But those ?contracts of employment? include not only contracts establishing an employer-employee relationship, but also contracts establishing independent contractor relationships. New Prime Inc. v. Oliveira], 139 S. Ct. 532, 539-41, 544 (2019).

The Rest of the FAA

The other provisions of Chapter 1 implement the enforcement command by lending judicial support to the enforcement of arbitration agreements and awards. These are briefly summarized below:

- Section 3 ? Requires courts to stay litigation in favor of arbitration. - Section 4 ? Provides for courts to compel arbitration.- Section 5 ? Provides for courts to appoint arbitrators when there has been a default in the arbitrator selection process.- Section 6 ? Provides that motion practice rules apply to applications made under the FAA, thereby expediting the judicial

disposition of such applications. - Section 7 ? Provides for the judicial enforcement of certain arbitration subpoenas.- Section 8 ? Provides that where the basis for federal subject matter jurisdiction is admiralty, then ?the party claiming to be aggrieved may begin his proceeding [under the FAA?by libel and seizure of the vessel or other property?.? 9 U.S.C. § 8.- Section 9 ? Provides for courts to confirm arbitration awards, that is, enter judgment upon them.- Section 10 ? Authorizes courts to vacate arbitration awards in certain limited circumstances.- Section 11 ? Authorizes courts to modify or correct arbitration awards in certain limited circumstances.- Section 12 ? Provides rules concerning the service of a motion to vacate, modify, or correct an award, including a three-month time limit.- Section 13 ? Specifies papers that must be filed with the clerk on motions to confirm, vacate, modify, or correct awards and provides that judgment entered on orders on such motions has the same force and effect of any other judgment entered by the court.- Section 14 ? Specifies that agreements made as of the FAA's 1925 effective date are subject to the FAA.- Section 15 ? Provides that ?Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.?- Section 16 ? Specifies when appeals may be taken from orders made under the FAA, and authorizing appeals from final decisions with respect to arbitration.

More to follow in future posts. . . .

You might also be interested in the following posts **here**, here], here], here], and here].

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