Improving Arbitration-Award Making and Enforcement by Faithfully Implementing the Purposes and Objectives of the Federal Arbitration Act

Part II:
A Consent-Based Framework
for Making and Enforcing Arbitration Awards

Introduction

In Part I we argued that improving arbitration in general?and the award making and enforcement process in particular?requires persons with a stake in arbitration's success to adjust how they think about arbitration. We also argued that the purposes and objectives of the Federal Arbitration Act (the ?FAA?) provide a relatively simple analytical framework which, if consistently and properly applied, can help persons with a stake in arbitration's continued success make decisions that should help facilitate the achievement of that goal.

This Part II discusses that analytical framework, which is based on United States Supreme Court interpretations of the FAA and its purposes and objectives. It posits that arbitration's improvement and continued success as a dispute resolution mechanism for a broad range of disputes depends on it being an attractive alternative to litigation, and that arbitration can remain such an attractive alternative for a broad range of disputes only if courts, arbitrators, and parties fully and forthrightly accept that arbitration is a matter of contract, and that the awards that it yields should be freely and summarily enforced, provided that they represent a legitimate product of the agreement to arbitrate.

There is, of course, nothing particularly controversial about this principle, judicial support for it can be traced back many decades, and in most cases, it guides the outcome of FAA-governed award enforcement proceedings. But, as we shall discuss in future segments, courts, arbitrators and parties not infrequently honor it in its breach, and that not only creates problems for arbitration, but subverts the purposes and objectives of the FAA. And as respects arbitrators and parties in particular, adhering strictly to the letter?rather than the spirit?of the principle can undermine arbitration's continued success, even where the result is an award that passes (however barely) the necessarily-not-very-demanding requisites for judicial enforcement of FAA-governed awards.

This Part II analyzes the legal basis of the consent-based analytical framework for the making and enforcement of arbitration awards. Future segments shall discuss how it can better guide the decision-making of courts, arbitrators and parties in the award making and enforcement process.

Enforcing Arbitration Agreements to Promote Arbitration

The purposes and objectives of the FAA are the same whether the question is whether arbitration should be compelled, litigation should be stayed or an award confirmed or vacated. The cornerstone of the FAA is the enforcement mandate of Section 2, which says: ?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 an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.? Section 2 establishes federal substantive law mandating that arbitration agreements be placed on an ?equal footing? with other contracts.[1] The other provisions of the FAA implement Section 2's enforcement command.[2]

The U.S. Supreme Court has repeatedly said ?that the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.?[3] An important corollary to the FAA's enforcement purpose is ?the basic precept that arbitration ?is a matter of consent, not coercion'. . .?[4] While the courts have extensive coercive powers over persons and disputes within their statutory and constitutional personal and subject matter jurisdiction, ?[a]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes?but *only* those disputes?that the parties have agreed to submit to arbitration.?[5] And to that end, ?[w]hether enforcing an agreement to arbitrate or construing an arbitration clause,? the FAA requires ?courts and arbitrators . . . [to] give effect to the contractual rights and expectations of the parties.?[6]

The Supreme Court in *AT&T Mobility LLC v.* Concepcion[7] recently explained that the objective of the FAA is to ?promote arbitration.?[8] The Court did not say that the FAA was supposed to promote arbitration for arbitration's own sake or simply to promote the rigorous enforcement of arbitration agreements according to their terms. The Court's point was that the FAA ?promote[s] arbitration? by lending judicial support and assistance to an alternative to litigation that is party driven and more cost-effective, less time consuming, less formal, and more confidential than litigation, and which offers the added benefit of party autonomy, including the right to specify the substantive and procedural rules of decision and the opportunity to select specialized decision makers to decide particular disputes.[9]

The Court was not suggesting that the FAA ?promotes? arbitration simply because arbitration is ? or at least can be ? a more party-friendly way of resolving disputes, or because arbitration is somehow inherently superior to court adjudication. What it meant was that the FAA should be interpreted to encourage parties to agree to it, and thus opt out of the court system.

Though courts only rarely acknowledge it expressly, the reason the Supreme Court, most or all other federal courts, and probably the vast majority of state courts want to encourage parties to arbitrate their disputes is pragmatic and based on simple economics. For many decades, state and federal courts have been overburdened by the number of criminal and civil cases they must hear. That imposes significant costs not only on the courts themselves, but on private and public litigants ? who suffer from delays and other resulting inefficiencies ? and on the tax payers who foot the bill. Arbitration mitigates some of these burdens and costs by shifting them to private sector, and thus is beneficial not only to the court system, but to the public at large.[10]

Associate Justice Antonin Scalia's majority opinion in *Concepcion* seems to acknowledge, albeit tacitly, that arbitration users have, over the years become dissatisfied with it to a certain extent. It reminds the courts that the FAA must be interpreted so as to encourage persons to agree to arbitrate. The FAA, explained the Court, lends judicial enforcement of arbitration agreements to enable parties to design ?arbitration processes. . . to allow for efficient, streamlined procedures tailored to the type of dispute,? including the use of specialist decision makers and confidentiality provisions.[11] The arbitration ?envisioned by the FAA? is, compared to its litigation counterpart, ?less costly, more streamlined, and more likely to achieve ?expeditious results.?[12]

The FAA effectively offers to prospective court litigants a bargain of sorts. In exchange for opting out of the court system, the courts will enforce arbitration agreements in a way that should allow litigants to benefit from some of the advantages that arbitration can have over litigation?speed, cost-efficiency, informality, party autonomy, confidentiality, specialist decision makers, party autonomy and the like?provided that those who agree to arbitrate are willing to trade off some of the potential advantages that litigation has to offer?intensive procedural protections, strict application of the rules of law and evidence, broader subpoena powers, pristine decision-maker neutrality, joinder, coercive power over attorneys, self-executing contempt power over persons within the court's personal jurisdiction irrespective of their status as parties, impleader, appellate review and so on.

The required trade-off is not intended to punish or discourage persons who agree to arbitrate; without it arbitration would be a decidedly more time consuming and costly way of resolving disputes. Even though that might benefit *some* parties in the context of certain specific disputes, it would almost always disadvantage at least one of the parties. It would also deprive the courts and the general public of the arbitration's benefit of shifting dispute resolution costs to the private sector and would probably *increase* those costs by exponentially proliferating judicial proceedings and appeals and forcing the courts to become deeply embroiled in disputes that were supposed to be finally decided by private decision makers. The whole point of any privatization scheme is to reduce overall costs through efficient allocation of resources, not to increase them by inefficient allocation.

The extent of the trade-off exacted from parties who agree to arbitrate must therefore be sufficient to ensure that judicial involvement in the arbitration process does not defeat the purposes and objectives of promoting arbitration. But the extent of the tradeoffs should never exceed that necessary to avoid defeating those purposes and objectives.

Arbitration can provide benefits to the parties that opt for it, but the risk-benefit ratio is probably in most cases relatively high, all other things being equal. If the risk-benefit ratio is perceived as too high, then arbitration will tend to be perceived as too risky and

fewer persons will agree to it.

Since the purpose of the FAA is to enforce arbitration agreements to serve the objective of promoting arbitration, arbitration agreements should not be ?enforced? in a way that discourages arbitration by making it more risky than it has to be. Enforcement of arbitration agreements in a way consistent with the FAA thus requires some careful balancing to ensure that courts do not, under the guise of enforcement, force parties to assume arbitration-related risks that they did not expressly or impliedly agree to accept, and which need not be imposed upon them as a matter of law to avoid undue interference with the FAA's objective of promoting arbitration.

How do the Award Enforcement Provisions of the FAA Promote Arbitration?

The FAA provisions governing the confirmation and vacatur of arbitration awards are designed to enforce arbitration agreements in a way that attempts to ensure that the parties not only bear the risks necessary for the FAA to meet its objective, but also to allow arbitration users to realize the benefits of agreeing to arbitrate. For our purposes, the pertinent provisions are Section 9?which governs confirmation of awards (i.e., entry of judgment upon them)?and Section 10?which authorizes courts to vacate awards (i.e., declare them to have no legal effect).[13]

Like most other issues arising under the FAA, whether a court should confirm an award depends on what the parties agreed. Section 9 of the FAA, which governs confirmation of arbitration awards, says?with bracketed lettering added: ?[A] If the parties in their agreement have [B] agreed that a judgment of the court shall be entered upon the [C] award made pursuant to the arbitration, and shall [D] specify the court, then [E] at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless [F] the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.? Items [A] through [D] above each concern party consent as evidenced by the arbitration agreement or submission.

While not necessarily immediately apparent from the words of Section 10 of the FAA, whether an award may be vacated also turns on party consent. Section 10(a) authorizes courts to vacate FAA-governed awards on four grounds, each of which concerns whether the arbitrators or one of the parties materially deprived the challenging party of a benefit it could legitimately expect to receive when it agreed to enter into an FAA-governed arbitration agreement:

- Section 10(a)(1) establishes that parties who agree to arbitrate can legitimately expect that the prevailing party did not obtain the award by ?fraud, corruption? or like ?undue means.?
- Section 10(a)(2) establishes that parties who agree to arbitrate can legitimately expect that none of the arbitrators who will decide their disputes will be ?guilty of corruption,? and that at least the neutral arbitrators will not be ?guilty? of ?evident partiality,? that is, they will meet certain minimum standards of arbitral impartiality.
- Section 10(a)(3) implies into every arbitration agreement some minimal, procedural due process requirements by authorizing vacatur where the arbitrators ?were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.?
- Section 10(a)(4) ensures that the arbitrators do not exceed the powers the parties contractually delegated to them, or do not ?execute? them ?so imperfectly? that they fail to make ?a mutual, final, and definite award upon the subject matter submitted. . . .?

The judicial review authorized by Sections 9 and 10 is thus designed principally to ensure that the award upon which the court is asked to enter judgment is a legitimate product of the parties' agreement to arbitrate, and that the challenging party has not been deprived of the modest requirements of fundamental fairness Sections 10(a)(1) through 10(a)(3) imply into every arbitration agreement. Circuit Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit summarized the point quite well in his inimitably terse, clear and insightful prose:
It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting

arbitration award he perforce does so not on the ground that the arbitrators made a mistake *but that they violated the agreement to arbitrate*, as by corruption, evident partiality, exceeding their powers, etc.?conduct to which the parties did not consent when they included an arbitration clause in their contract.[14]
Section 10 thus implements the enforcement purpose of the FAA. Parties who agree to arbitrate must sacrifice much in the way of procedural protection, and assume the risk that the arbitrators may make even egregious errors of law, fact and contract interpretation. That is part of the arbitration bargain, which Section 10 enforces by strictly limiting the nature and scope of arbitration award challenges.

Section 10 also enforces arbitration agreements by authorizing vacatur where enforcing the award would violate the arbitration agreement?including the baseline requirements of fundamental fairness Sections 10(a)(1)-(a)(3) imply into every arbitration agreement? or otherwise sanction an exercise of arbitral power to which the parties did not consent. It provides the parties with at least some assurance that the end product of an arbitration agreement will be a matter of consent, not coercion.

Without at least that modest degree of protection, arbitration would be a far less attractive an alternative to litigation than it was intended to be. Just as few would likely agree to arbitrate if its legitimate result could not be readily?and, if necessary, coercively?enforced, so too would few agree to arbitrate if there were in place no check against material violations of arbitration agreements or the risk that an award was otherwise not grounded in party consent.

Unfortunately, the purposes and objectives of the award-enforcement provisions of the FAA are, from time-to-time, lost on, or overlooked by, arbitrators, judges, parties and counsel. That can cause unnecessary problems for arbitration, undermining its ability to serve as an attractive and effective alternative to litigation. It is to some of those problems?and some straightforward solutions?that in future posts we will next turn.

[1]*AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-46 (2011); *Buckeye Check Cashing Co. v. Cardegna*, 546 U.S. 440, 447 (2006).

[2]*See, generally, Buckeye*, 546 U.S. at 447 (doctrine of severability, although based on language of Section 4, ?ultimately arises out of § 2,? and ?establishes how [Section 2's] equal-footing guarantee is to be implemented?); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624,129 S.Ct. 1896, 1901-02 (2009) (explaining relationship between FAA Section 2 and FAA Section 3).

[3]*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) *(*quotation omitted); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 58 (1995); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *see, generally*, 9 U.S.C. § 4 (?The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court *shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement*?) (emphasis added)).

[4]*Stolt-Nielsen*, 130 S. Ct. at 1773, 1773-75 (citations and quotation omitted).

[5]*First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis in original).

[6]*Stolt-Nielsen*, 130 S. Ct. at 1773-74 (citation and quotation omitted).

[7]131 S. Ct. 1740 (2011).

[8]AT&T Mobility, 131 S. Ct. at 1749.

[9]131 S. Ct. at 1748-53.

[10] See, e.g., Roughneck Concrete Drilling & Sawing Co. v. Plumbers' Pension Fund, 640 F.3d 761, 765 (7th Cir. 2011) (?[The law's bias in favor of arbitration . . . seems largely motivated by a desire to limit judicial workloads. Why otherwise prefer nonjudicial to judicial dispute resolution processes??) (Posner, J.); *AIG Baker Sterling Heights, LLC v. America Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007) (?purpose of the Federal Arbitration Act? is "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation.") (quotation and citation omitted); *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1384 (6th Cir. 1995) (?Arbitration lightens courts' workloads, and it usually results in a speedier resolution of controversies.") (quotation and citation omitted).

[11]*See* 131 S. Ct. at 1749.

[12]131 S. Ct. at 1749, 1753.

[13]9 U.S.C. §§ 9, 10.

[14]*Wise v. Wachovia Securities, LLC*, 450 F. 3d 265, 269 (7th Cir. 2006) (Posner, J.).