

Contract Considerations for Arbitration Provisions and Alternative Dispute Resolution A Changing World

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Effectiveness of District Courts Terminating Cases and Importance to Preserve Right to a Jury

Fiscal Year	Total Cases Terminated	% Cases Terminated Before Pretrial Conference	% District Court Cases Reaching Trial
1990	213,429	78.5	4.3
2000	259,234	87.9	2.2
2005	270,973	88	1.4
2007	239,292	82	4.1

Source: Annual Report of the Director: Judicial Business of the United States Courts

Satisfaction of Arbitration (Harris Interactive Survey 2005) 31,000 Participants In Arbitrations Were Surveyed

75% — Arbitration is faster than going to court

51% — Arbitration is cheaper than litigation

61% — Of the losers believed the arbitrations are
fair



ABA Section of Litigation Survey (2003) 7,000 Litigants and Counsel Were Surveyed

78% — Arbitration is faster than going to court

56% — Arbitration is cheaper than litigation

46% — Arbitration is just as fair as compared to litigation verdicts

25% — Arbitration results are not as fair as compared to litigation verdicts

28% — Arbitration results are more fair as compared to litigation verdicts

Employment Arbitrations

Collective Bargaining Contracts

- Over 95% of contracts contain arbitration provision

Non-Union Contracts

- 75% of companies surveyed require arbitration for employment disputes



Employment Arbitrations

Survey Conducted by Dilikat and Kleiner (2003)
125 Employment Discrimination Cases (S.D.N.Y.)
186 Arbitration Cases Administered by NASD

- Claimants prevailed in arbitration 46%; versus 34% in court
- \$100,000 is median award in arbitration; versus \$95,554 in court
- \$69,388 is median attorney's fee awarded in arbitration; versus \$149,756 in court
- 16 months is median time to complete arbitration; versus 25 months in court



National Workrights Institute Study on Employment Arbitrations

Claimants Prevail in Arbitrations:

- Bingham I – 73%
- Maltby – 66%
- Eisenberg & Hill – 43%
- Bingham II – 63%

Average of the four surveys: 61%

Plaintiffs Prevail in Litigation:

- Eisenberg & Hill –
 - 43% (all cases)
 - 57% (cases tried)



National Workrights Institute Study on Employment Arbitrations

- Mean Award for All Cases
 - Litigation: \$462,000 (jury award)
 - Arbitration: \$153,000

- Mean Award for Arbitrations Involving Issues Similar to Litigation Cases:
 - Arbitration: \$292,000



Arbitration

- Federal Arbitration Act
- Pennsylvania Uniform Arbitration Act of 1980
 - Pennsylvania Arbitration Act of 1927
- Pennsylvania Common Law Arbitration
- American Arbitration Association

Which Arbitration Act Applies When A Contract is Silent

- Federal Arbitration Act
- Pennsylvania Uniform Arbitration Act of 1980
 - Pennsylvania Arbitration Act of 1927
- Pennsylvania Common Law Arbitration
- American Arbitration Association



Scope of Arbitration

■ Broad Clauses

- Any controversy or claim arising out of or relating to this contract shall be submitted to and resolved by arbitration governed by the _____, as in effect as of _____ (insert date).

■ Narrow Clauses

- Any controversy or claim relating to _____ (identify issue) shall be submitted to and resolved by arbitration governed by the _____, as in effect as of _____ (insert date).



Number of Arbitrators

- Federal Arbitration Act
 - One arbitrator, unless otherwise mandated in contract
- Pennsylvania Uniform Arbitration Act of 1980 and 1927
 - No guidance
- Pennsylvania Common Law Arbitration
 - No guidance
- American Arbitration Association
 - One arbitrator, unless the AAA administrator approves three



One Versus Three Arbitrators

- Complexity of Issue
- Prior Experience with Arbitrations
- Cost of Arbitration



Selection of Arbitrators

- Federal Arbitration Act
 - Follow contract, otherwise agree or go to court
- Pennsylvania Uniform Arbitration Act of 1980 and 1927
 - Follow contract, otherwise agree or go to court
- Pennsylvania Common Law Arbitration
 - No guidance



Selection of Arbitrators

- American Arbitration Association
 - Follow contract
 - If not specified in contract, AAA will supply list of 10 arbitrators



Specifying Arbitrators

- Subject Matter Expertise
 - Complex Commercial Litigation
 - Construction
 - Intellectual Property
 - Securities
- Retired Judge
- Particular Alternative Dispute Resolution Firms



Discovery

- Federal Arbitration Act
 - Does not regulate discovery procedures
- Pennsylvania Uniform Arbitration Act of 1980 and 1927
 - Must request discovery from arbitrator
- Pennsylvania Common Law Arbitration
 - Must request discovery from arbitrator



Discovery

- American Arbitration Association
 - Must request discovery from arbitrator



Why Specify Discovery?

A Cautionary Tale:

- *Fastuca v. L. W. Molinar & Associates*, No. 1226 WDA 2007 (Pa. Super. May 9, 2008), alloc. granted, No. 410 WAL 2008 (Pa. Super. April 15, 2009).



Drafting Questions

Specify Discovery

- Production of Documents
- Interrogatories
- Depositions
 - Lay and expert
 - Duration
- Discovery Period



Location of Arbitration

- For all types of arbitration
 - Contract Controls
 - Parties Agree
 - Arbitrator Will Decide



Choice of Law

- For all types of arbitrations
 - Contract Controls
 - If contract is silent, common law principles will apply



Statute of Limitations

- Consider shortening time period



Remedies

- Federal Arbitration Act
 - No guidance
- Pennsylvania Uniform Arbitration Act of 1980 and 1927
 - No guidance
- Pennsylvania Common Law Arbitration
 - No guidance



Remedies

- American Arbitration Association
 - Arbitrator has authority to issue injunctive relief



Drafting Questions

Remedies

- Permit or prohibit arbitrators to issue injunctive relief
- Consequential Damages
- Punitive Damages
- Establish maximum amount of damages

Content of Arbitration Award

- Federal Arbitration Act
 - No guidance
- Pennsylvania Uniform Arbitration Act of 1980 and 1927
 - No guidance
- Pennsylvania Common Law Arbitration
 - No guidance



Arbitration Award

- American Arbitration Association
 - Reasoned award versus one-line decision



Arbitration Award

- Reasoned opinion versus one-line award
 - Findings of fact and conclusions of law



Attorneys Fees

- Governed by Contract
- Prevailing Party



Appeal of Arbitration Award

- Federal Arbitration Act
 - Timing
 - Appeal to district court within 90 days from date of order
 - Orders from which appeals may be taken
 - Grounds of appeal
 - Award procured by fraud or corruption
 - Evident partiality by the arbitrators
 - Arbitrators are guilty of misconduct
 - Manifest disregard of the law as a reason to vacate award
 - United States Supreme Court decision restricts/eliminates standard



Appeal of Arbitration Award

- Pennsylvania Uniform Arbitration Act of 1980
 - Timing
 - Appeal to state court within 30 days from date of order
 - Orders from which appeals may be taken
 - Grounds of appeal
 - Evident partiality by the arbitrators
 - Corruption or misconduct by arbitrators
 - Arbitrators exceeded their powers
 - Arbitrators refused to hear material evidence
 - Alleged errors in law is not a basis



Appeal of Arbitration Award

- Pennsylvania Uniform Arbitration Act of 1927
 - Grounds of Appeal
 - Contrary to law
 - Other grounds, substantially similar to Act of 1980



Appeal of Arbitration Award

- Pennsylvania Common Law Arbitration
 - Timing
 - Appeal to state court within 30 days from date of order
 - Orders from which appeals may be taken
 - Grounds of appeal
 - Fraud, misconduct or corruption by arbitrators
 - Mistakes in law or finding of fact are not grounds to vacate



Appeal of Arbitration Award

- American Arbitration Award
 - Timing
 - Orders from which appeals may be taken
 - Grounds of appeal



Recent Litigation Attempting to Invalidate Arbitration Clauses in Contracts

- Hostility To Class Action Waivers in Consumer Arbitration Agreements:
 - Homa v. American Express & Chalk v. T-Mobile USA
- Discrimination Claims: What does the future look like after 14 Penn Plaza LLC v. Pyett?
- Stay Only Applies to Those Who Explicitly Sign Arbitration Agreements:
 - Mendez v. Puerto Rican Int'l Cos.



Jay D. Marinstein



- Jay serves midsize to large publicly and privately held companies in complex, high-stakes, and high-profile commercial litigation. Serving in a strategic advisory role, Jay focuses on long-term partnerships to achieve his clients' business and financial objectives. He has represented manufacturers, retailers, and service providers in cases related to trade secrets, restrictive covenants, breach of contract and tortious interference, fraud and breach of fiduciary duties, securities, partnership and shareholder actions, and employment.

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