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ACC NCR Webcast: To Arbitrate or Not

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Panelists



Angela (Anji) Foster
Certified Mediator & Arbitrator
SVAMC, CCA, NADN, AAA,
ICDR, CPR, WIPO



Patrick Chaing
Associate General Counsel
Sallie Mae Bank



**Christopher N. Manning
(Chris)**
Partner
Co-Chair, Arbitration Practice
Williams & Connolly LLP



Ellen E. Oberwetter
Partner
Co-Chair, Arbitration Practice
Williams & Connolly LLP

Agenda: To Arbitrate or Not

- General Principles
- Key Decision Points
- Legal and Policy Considerations
- Cost Comparisons
- Arbitral Organizations
- Arbitrator Selection
- Discovery
- Challenging Arbitral Awards
- Drafting Considerations
- Discussion

Arbitration: General Principles

“[T]he basic policy of conducting arbitration proceedings is to offer a means of deciding disputes expeditiously and with lower costs than in ordinary litigation.” *Schmidt v. Finberg*, 942 F.2d 1571, 1573 (11th Cir. 1991)



Arbitration: General Principles

- “A creature of contract”
- Private
- Opportunity to select your decision maker(s)
- Streamlined proceedings, quicker resolutions, at lower costs

... ideally

Key Decision Points: Whether To Arbitrate or Not

1. Do you include an arbitration clause in your contract?
2. When a dispute arises, do you invoke the clause or argue (or agree) that the dispute is outside the scope of the clause?

Practice Tip: if you do take different approaches, keep track of changes to arbitration provisions and keep copies of agreements.

Legal and Policy Considerations: Generally

- The Federal Arbitration Act (FAA) governs most U.S. arbitrations.
9 U.S.C. § 2: “A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.”
- The FAA preempts conflicting state arbitration codes. However, parties may add portions of state arbitration law to their agreement or opt out of the FAA entirely (but must do so expressly). *Volt Information Sciences, Inc. v. Bd of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).
- *Practice tip: consider application of state law, but the FAA usually will apply.*

Legal and Policy Considerations: Invalidity Challenges

- Section 2 permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability.” *Doctor’s Assoc’s, Inc. v. Casarotto*, 517 U.S. 681 (1996).
- Arbitration agreements may not be invalidated by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2010).

Legal and Policy Considerations: Prohibited Subject Matters

- The FAA expressly excludes employment disputes involving
 - workers engaged in foreign/interstate commerce (maritime, aviation). 9 U.S.C. § 1.
 - sexual assault or sexual harassment claims. *Id.* §§ 401-402. Whether this exclusion applies “shall be determined by a court, rather than an arbitrator.” *Id.* § 402(b).
- Other statutes ban mandatory arbitration of certain claims. *See, e.g.*, Military Lending Act, 10 U.S.C. § 987. FAIR Act legislation (H.R. 963), if enacted, would prohibit arbitration of employment, consumer, antitrust, and civil rights disputes.
- *Practice Tips: (1) employers may continue to compel arbitration of wage and hour, sex/gender discrimination, Equal Pay Act and related claims; (2) research potential other exclusions; (3) be wary of dual-tracking arbitrable and non-arbitrable claims.*

Legal and Policy Considerations: Class Actions

- The FAA preempts any state law that prohibits arbitration clauses requiring consumers to waive their right to pursue class-action lawsuits. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2010).
- Unintended Consequences:
 - “Mass Arbitrations”
 - Automated Filings (FairShake)
- *Practice Tips:*
 - *Consider an initial mediation requirement*
 - *How do your arbitration agreements/rules address payment of fees?*

Cost Comparisons: AAA Fee Examples

Fee	Commercial	Consumer	Employment
Initial Filing	\$925 - \$65,000 (claimant)	<u>Single consumer</u> \$200 (individual) \$300 - \$625 (business) <u>Multiple consumers (3,000 cases)</u> \$50 – 100 (individual) \$500,000 (business)	\$300 (individual) \$1,900 - \$2,800 (company)
Case Management	+10% for each add'l separately represented party (up to 50%)	\$1,400 - \$1,775 (business)	\$750 - \$1,000 (company)
Hearing	Varies	\$500 (business)	Varies (company)
Arbitrator(s)	Varies	Desk: \$1,500/case Hearings: \$2,500/day (business)	Varies (company)

► *Is arbitration always less expensive?*

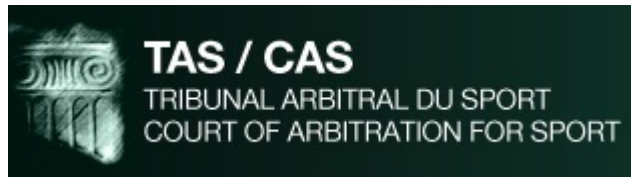
Cost Comparisons: Pros and Cons

Pros	Cons
<p>Faster time to decision (usually)</p> <p><i>*AAA survey: median 497 days to award (commercial cases)</i></p>	<p>Early dismissal less likely (usually)</p> <p><i>*NCSC report: 75% of state court civil cases decided within 372 days</i></p> <p><i>*Dalton: avg. federal civil case terminated within 364 days (but range up to 7,083!)</i></p>
<p>Lower discovery costs (usually)</p>	<p>Arbitrator fees (always)</p> <p><i>*AAA survey: median \$31,866 (1 arbitrator); \$116,964 (3 arbitrators) (commercial cases)</i></p>
<p>Fee shifting clauses can deter frivolous disputes (in some cases)</p>	<p>Filing fee risk (mass arbitration) (consumer/employment cases)</p>

Cost Considerations: AAA Survey (commercial cases)

- Factors that contribute the most to time/cost:
 - *Discovery (39%); Motions Practice (36%); Uncooperative Parties (27%); Postponements (20%)*
- Motions filed in > 85% of cases (discovery motions most common, > 50%)
- Discovery disputes present in over 75% of cases
- *Yet less than 10% of arbitration clauses address motions or discovery*
- *Practice Tips: (1) limit discovery in arbitration agreement; (2) address motions practice; (3) agree to (and enforce) scheduling order; (4) foster cooperation among counsel.*

Selecting an Arbitral Organization



...and many more!

Selecting an Arbitral Organization

- Considerations in Selecting an Arbitral Organization
 - Subject Matter Experience
 - Quality/Experience of Arbitrators
 - Rules
 - Costs/Fees
 - Venue



Arbitrator Selection

- Rules
 - One arbitrator or three (or more)?
 - How selected? What about objections, replacements?
- Due diligence
 - Selecting a qualified/experienced arbitrator
 - Knowledge of an arbitrator’s record
- Special considerations in multi-member panels
 - How are the members selected?
 - Neutral or partisan “wings”?
 - Panel relationship and dynamics



Discovery

- 9 U.S.C. § 7: “The arbitrators selected ... may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any ... document ... which may be deemed material as evidence in the case.”
- Pre-hearing discovery of third parties may not be available:
 - Majority: Not available. See, e.g., *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210 (2d Cir. 2008). Third, Ninth, Eleventh Circuits are in accord.
 - Minority: *In re Security Life Ins. Co.*, 228 F.3d 865 (8th Cir. 2000).
- *Practice tip: check if state arbitration code provides for pre-hearing third party discovery.*



Challenges to Arbitral Awards: Statutory

- The statutory grounds to appeal/vacate an arbitral award are limited.
- 9 U.S.C. § 10: Award can be vacated where:
 - (1) the award was procured by corruption, fraud, or undue means;
 - (2) there was evident partiality or corruption in the arbitrators....;
 - (3) 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; or
 - (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- These are the exclusive bases for vacating an award under the FAA. *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

Challenges to Arbitral Awards: Contractual

- Parties may provide for appellate rights in their arbitration agreement.
- *Practice Tip: if you include the right to appeal an arbitral award in your arbitration agreement, make sure the language is carefully considered for potential eventualities. For example,*
 - *Who hears the appeal?*
 - *Under what standard?*
 - *If an appeal is “de novo,” does that mean a new hearing and/or presentation of evidence is required, or simply review akin to an appellate court?*

Practice Tips: Drafting Considerations

- Threshold question: *do you include an arbitration clause or not?*
- If you do, consider the following additional questions:
 - *What issues must/may be arbitrated?*
 - *What is the arbitral venue (location)?*
 - *Which arbitral organization do you select?*
 - *What rules apply to the arbitration?*
 - *How many arbitrators? How are they selected? How are replacements determined?*
 - *Is early mediation required prior to arbitration?*
 - *Who pays the filing fees?*
 - *What discovery is allowed?*
 - *What is the scope/form of the award?*
 - *Is interim/emergency relief available? If so, before arbitrators or a court?*
 - *Is there a right to appeal/challenge awards? If so, to whom?*

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Panel Discussion

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Questions?

Contact Information



Angela (Anji) Foster
Certified Mediator and Arbitrator,
SVAMC, CCA, NADN, AAA,
ICDR, CPR, WIPO
afoster@FosterAtLaw.com



Patrick Chaing
Associate General Counsel
Sallie Mae Bank
patrick.chaing@salliemae.com



Christopher N. Manning
Partner
Co-Chair, Arbitration Practice
Williams & Connolly LLP
CManning@wc.com
+1-202-434-5121



Ellen E. Oberwetter
Partner
Co-Chair, Arbitration Practice
Williams & Connolly LLP
EOberwetter@wc.com
+1-202-434-5849