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Effective Planning for Arbitration

Presented to the ISB Young Lawyers Section

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The Benefits of Arbitration



The stated benefits of arbitration:

A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results.

Preston v. Ferrer, 552 U.S. 346, 357 (2008) (emphasis added).

The Benefits of Arbitration



In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.

Stolt-Nielsen, S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 685 (2010) (emphasis added).

Possible Disadvantages of Arbitration



- Payment of arbitrator fees
 - Weigh arbitrator fees against fees saved in discovery
- Fewer procedural rules *can* create more work if you don't plan ahead

The Phases of Arbitration



- **Arbitrability:** whether the parties agreed to arbitrate the dispute at issue. Often decided by the courts but can also be decided by arbitrator.
- **Administrative stage:** setting procedure for discovery, motion practice, and the hearing.
- **Discovery and pre-trial motions.**
- **Arbitration hearing/trial.**
- **Confirmation of award and entry of judgment.**

Arbitrability: Contractual Nature of Arbitration



- “Notwithstanding the federal policy favoring it, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Tracer Research Corp. v. Nat’l Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994) (internal quotation marks omitted).
- “A party seeking to compel arbitration has the burden under the FAA to show (1) the existence of a valid, written agreement to arbitrate; and, if it exists, (2) that the agreement to arbitrate encompasses the dispute at issue.” *Ashbey v. Archstone Prop. Management, Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015).

Arbitrability: Who Is Required to Arbitrate?



- Parties who signed the arbitration agreement
- “Non-signatories” may be required to arbitrate in limited circumstances, “under ordinary contract and agency principles”
 - E.g., incorporation by reference, assumption, agency, veil-piercing/alter ego, equitable estoppel, and third-party beneficiary. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006).
 - Who is trying to enforce the arbitration agreement against whom? *See Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045-47 (9th Cir. 2009).
 - Read the arbitration provision carefully. *See Lewis v. CEDU Educ. Servs., Inc.*, 135 Idaho 139, 141-44, 15 P.3d 1147, 1149-52 (2000).

Arbitrability: Which Claims Are Arbitrable?



- Narrow arbitration provision only has “arising out of” or “arising under” language.
 - Example: “Any dispute arising out of this Agreement shall be submitted to arbitration.”
- Broad arbitration provision includes “relating to” language.
 - Example: “Any dispute arising out of or relating to this Agreement shall be submitted to arbitration.”
- See, e.g., *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 923 (9th Cir. 2011); *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983).

Key Issues to Consider and Address at the Outset



- Rules, procedural law, and substantive law.
- Exchange of documents.
- ESI discovery issues – *see Randolph and Bennett*, 54 Feb. Advocate 34.
- Interrogatories and other types of discovery.
- Procedure for subpoenas to third parties.
 - Be wary – requires compliance with standard federal or state rules re: subpoenaing third parties.
 - I.C. § 7-907; 9 U.S.C. § 7.

Key Issues to Consider and Address at the Outset



- Deadline to amend claims.
- Confidentiality agreement.
- Expert witness disclosures.
- Dispositive and pre-trial motions.
- Witness and exhibit disclosures.
- Date, time, and location of the hearing.

Sources of Arbitration Rules



- As parties agree(d).
- AAA Commercial, Construction, and Employment Rules: Minimal discovery and pre-trial motion rules; arbitrator has complete discretion to allow discovery or motions.
 - All provide for exchange of documents.
 - Commercial and construction rules say depositions only allowed in extraordinary cases.
 - Employment rules seem more open to depositions and written discovery beyond document production.

Sources of Arbitration Rules



- Financial Industry Regulatory Authority Code of Arbitration: More detailed rules regarding discovery and motions.
 - Rules 12503-04: Rules regarding motions.
 - Rules 12505-13: Rules regarding discovery.
- Federal or Idaho Rules of Civil Procedure.

Location of the Arbitration



- As agreed by the parties.
 - *But see I.C. § 29-110(1): Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals . . . is void as it is against the public policy of Idaho. Nothing in this section shall affect contract provisions relating to arbitration so long as the contract does not require arbitration to be conducted outside the state of Idaho.*
 - *See also Cerami-Kote, Inc. v. Energywave Corp., 116 Idaho 56, 773 P.2d 1143 (1989).*

Location of the Arbitration



- AAA Commercial Rule R-11.
 - Disputes must be submitted within 14 days “of the AAA’s initiation of the case.”
 - If arbitration agreement is silent or ambiguous as to the locale, the AAA decides subject to the arbitrator’s final determination.