To Litigate or To Arbitrate--That is the Question:
Recent Arbitration Developments That Question the Pros and Cons of Arbitration

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A. Pros And Cons Of Arbitration.

Arbitration is a well-known dispute resolution mechanism for parties that are seeking an alternative to litigation, for whatever reason. Some recent developments in the arbitration landscape, however, have adjusted the analysis and should motivate parties to reconsider whether arbitration or litigation is in their best interest, and whether contracts need to adjusted accordingly—because, after all, arbitration is a creature of contract.

This presentation focuses on some of the more unique, and more recent developments and considerations when determining whether and how to include arbitration provisions. But prior to addressing these considerations, it is worthwhile to briefly cover the traditional pros and cons regarding arbitration.

Some of the standard pros include:

- Quicker results than a judicial trial, largely because of less protracted discovery.
- Arbitrations are often shorter and less costly than a judicial trial because the rules of evidence are relaxed and the procedures can be streamlined.
    - That said, from a defense perspective, the requirement to pay arbitrator fees may disincentive a consumer or employee from initiating arbitration over a small matter.
- The parties can select the arbitrator and determine her qualifications.
- The parties can select an arbitrator who is familiar with the practices and customs of the parties and industry.
- Greater privacy than a judicial trial.
- The arbitrator's decision is usually final and binding.

See Pros and cons of arbitration, 1 Domke on Com. Arb. § 1:4. Arbitration can be particularly beneficial when the dispute involves highly technical subject matter and it would help if the decision-maker had some level of expertise in the subject matter. In addition, arbitration is very helpful in international transactions, where there would otherwise be protracted disputes over jurisdiction, venue, what laws apply, and especially enforceability. These international disputes are usually governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, often called the New York Convention. *See* 9 U.S.C. § 201.

That said, there are a number of cons to arbitration, such as:

- While rules of civil procedure and evidence, including the right to discovery, may increase the cost of litigation, they can also provide parties an opportunity to make a more thorough and detailed presentation of their cases.
- Because arbitrators, unlike judges, do not write opinions in some types of disputes—and even when they do, the opinions are often much shorter—arbitrators may not always engage in thoughtful analysis of a dispute because they do not have to reveal to the parties

the reasoning behind their decisions, justify where their decision fits within the greater precedent, and/or craft an order that is less susceptible to appellate review.

- Arbitrators are perceived as more likely than judges to render a compromise award.
- Arbitrations can be less predictable, as arbitrators are not as bound by precedent and can be much more forgiving to procedural missteps.
- There may be significant delays to even initiating the arbitration due to disputes about arbitrability or conditions precedent.
- The lack of procedural rules can make it more difficult for arbitrators to deal with frivolous claims or to properly sanction the parties (who just so happen to be paying the arbitrator and may be a source of referral for future disputes).
- There are very limited grounds for appeal from a judgment confirming the award.

See Pros and cons of arbitration, 1 Domke on Com. Arb. § 1:4.

With the standard considerations out of the way, let's take an in-depth look at some of the more recent and/or unique issues impacting arbitration.

B. Handling Preliminary Injunctive Relief.

While there was a time when litigants subject to arbitration clauses would run to court to get preliminary injunctive relief, many arbitration fora now include rules and procedures to allow for emergency injunctive relief. For example, starting October 1, 2013, any arbitration agreements incorporating the American Arbitration Association Commercial Arbitration Rules incorporated Rule 39 – Emergency Measures of Protection unless the parties agreed otherwise. *See* AAA Commercial Arb. Rule 39 ("AAA Rule"). JAMS, another common arbitration forum, implemented emergency relief procedures the following year. *See* JAMS Comprehensive Arbitration Rules and Procedures, Rule 2 ("JAMS Rule"). In both instances, the rules provide for the appointment of an emergency arbitrator within 1-2 business days who can decide the issue in a couple days-time if needed. *See* AAA Rule 39; JAMS Rule 2.

But while these rules have been available since 2013 and 2014 respectively, many attorneys are either unaware of these procedures or ignore them in favor of running to court. Some state statutes also provide for injunctive relief if an arbitrator has not yet been appointed, the existence of which some parties will try to take advantage and avoid filing for emergent injunctive relief in the arbitration forum. *See e.g.* N.J.S.A. 2A:23B-8(a); Cal. Code Civ. Proc., § 1281.8. The result can be simultaneous litigation in court over the availability of injunctive relief as well as potential motion practice (motion to compel and/or dismiss) while the merits case proceeds in arbitration. This can be time consuming and unnecessarily expensive.

There may be benefits to having a preliminary injunction heard in court rather than arbitration. Some parties feel that certain issues, such as trademark violations, should be dealt with by a court rather than an arbitrator. Arbitrators are often more lenient and less willing to deny preliminary injunction motions for fear that it will prevent the case from proceeding to a full merits review, particularly if one party is smaller and less powerful than the other. Courts also have power to hold a party in contempt of court for failure to follow an order, while arbitrators do not. And while arbitration procedures for emergency procedures are very fast, they may not be able to order temporary restraining orders the same day as a court might. Parties also usually have little control

over who is appointed emergency arbitrator, which removes one of the main draws of arbitration for some parties. On the other hand, arbitration is confidential, and the arbitration clause can specify that only arbitrators with certain experience can decide the case.

C. Dispositive Motions In Arbitration.

Again, two of the main reasons parties choose arbitration over litigation are speed and cost. Dispositive motions, when granted, serve both of these goals. Unfortunately, their treatment in arbitration usually runs counter to them.

That is because arbitrators are often more reluctant than judges to grant dispositive motions. This is so for many reasons. First and foremost, one of the very few reasons that a court can overturn an arbitrator's award—and the most likely for an arbitrator that is not otherwise committing fraud or corruption—is "refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3); *see also* Uniform Arbitration Act § 23(a)(3). In granting a dispositive motion prior to a hearing, an arbitrator is putting herself at risk of deciding the case without considering all the pertinent and material evidence, and thus opening the award up to vacatur.

Second, and less charitably, arbitrators are disincentivized from closing a case. They are paid by the hour, and thus ending the matter means less compensation. In addition, arbitrators often depend on referrals or at least the parties' agreement to use the arbitrator. Deciding a matter before a party feels they have had the full chance to present their case may inhibit the pipeline of future cases.

Another issue that presents with dispositive motions is that arbitrator decisions are not binding in other disputes (unless of course the parties have agreed otherwise). This comes up in the common scenario where a business has a number of related arbitrations going at the same time, which are arbitrated separately due to the contractual provisions, and with each being handled by a different arbitrator. Even though you may be filing a similar dispositive motion in each matter, the arbitrators are not bound by the decisions in the other arbitrations—if they are even allowed to view them due to confidentiality provisions. Thus, whereas in court you may be better able to take advantage of claim/issue preclusion arguments or at least persuasive precedent, these are less available in arbitrations.

Similarly, in areas of law that are frequently arbitrated instead of litigated, the caselaw may be less developed. For example, in the healthcare space, claims-handling disputes between insurers/payors and their members often must be arbitrated, but only after members have satisfied conditions precedent prior to arbitration. There is a surprising dearth of caselaw on whether these conditions precedent are legitimate due to questions of unconscionability, whether they are properly incorporated into the underlying contract (as the requirements are often contained in ancillary agreements), or even allowed under state-specific laws. This, of course, can be a doubled-edged sword as you are not subject to the development of bad and binding caselaw. However, the greater point is that this leads to a less predictable playing field. And businesses (as well as lawyers) are often trying to draft their contracts and organize their operations based on the most likely outcomes.

D. Mass Arbitrations.

a. What they are and why are they happening?

A relatively recent phenomena, mass arbitrations were sparked by U.S. Supreme Court decisions holding that class action and class arbitration waivers are enforceable. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (upholding arbitration class action waiver); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497 (2018) (holding employers can include arbitration agreements that include class and collective action waivers).

Mass arbitrations involve—the usually coordinated filing—of tens, hundreds, and possibly thousands of individual arbitration claims against the same defendant, often requiring defendants to spend tens of millions in arbitrator and initial filing fees, especially in employment and consumer cases where defendants have agreed to pay the filing fees.

b. Repercussions/what do about mass arbitrations.

Some entities have already begun responding to this tactic. For example, the International Institute for Conflict Prevention and Resolution (CPR) developed an Employment-Related Mass Claims Protocol (available at https://static.cpradr.org/docs/ERMCP-2021.pdf). Recognizing that mass arbitrations are a potent counter-strategy for dealing with class action waivers, the process under this protocol begins with randomly selecting initial arbitrations that become test cases. Once those are complete, the procedure then encourages resolution of the remaining arbitrations that will be informed by the test case results.

Likewise, AAA has implemented a sliding scale of filing fees in multiple consumer cases involving 25 or more similar arbitration claims filed by or against the same party. *See* AAA, Consumer Mass Arbitration and Mediation Fee Schedule (available at https://www.adr.org/sites/default/files/Consumer_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf).

In addition, some companies are no longer requiring that consumer and employees waive class action claims—either in arbitration or litigation. Although there are of course drawbacks to class actions, some companies have decided it is better to face one class action than a large number of individual arbitrations. *See* Responses to mass arbitrations, 1 Alt. Disp. Resol. § 8B:3 (4th ed.).

Companies may also want to reconsider the cost provisions in their arbitration agreements. Mass arbitrations are most effective for the consumer/employee when the company has agreed to pay the arbitration fees. Requiring that the parties split these fees, or making fee-splitting a requirement once the number of similar-type arbitrations reach a certain threshold, may dissuade the practice or at least not make it so punitive in the first instance.

E. *Smith v. Spizzirri*, 601 U.S. 472 (2024)

On May 16, 2024, the U.S. Supreme Court issued its opinion in *Smith v. Spizzirri*, 60 U.S. 472 (2024), holding that Section 3 of the Federal Arbitration Act ("FAA") requires a court to stay

the litigation upon request by a party. The decision resolved a circuit split in which the Second, Third, Seventh, Tenth, and Eleventh Circuits held § 3 of the FAA mandates a stay when all claims are subject to arbitration and a party requests a stay, while the First, Fifth, Eighth, and Ninth Circuits held the court retained discretion to dismiss or stay the case if all claims were arbitrable.

In reaching its unanimous decision delivered by Justice Sotomayor, the Supreme Court took a practical, textual approach to reading § 3 of the FAA. Section 3 states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added).

The Court stated that here, as it has held in other contexts and in other portions of the FFA, "the use of the word 'shall' creates an obligation impervious to judicial discretion." 60 U.S. at 476. Relying on the Second Edition of Black's Law Dictionary in addition to the plain statutory text, the Court rejected the argument that stay could also mean dismiss. *Id.* at 477. The Court also pointed to the fact that the FAA permits an automatic interlocutory appeal only where a motion to compel arbitration is denied. *Id.* at 477-78. "If a district court dismisses a suit subject to arbitration even when a party requests a stay, that dismiss triggers the right to an immediate appeal where Congress sought to forbid such an appeal." *Id.* at 478. Finally, the Court also reasoned that staying the case "comports with the supervisory roles that the FAA envisions for courts," by providing mechanisms for courts to assist parties in an arbitration by appointing an arbitrator, enforcing subpoenas, and facilitating recovery on an arbitral award. *Id.*

F. What to do with all of this: practical tips and things to think about.

In light of all of that, here are some practical tips for addressing these new developments when determining whether and how to draft arbitration provisions in contracts:

1. **Preliminary Injunctive Relief**. Consider whether you want any preliminary injunction motions to be heard in court or in arbitration, and then carefully draft your arbitration provision to make it clear where those motions need to be heard to help avoid unnecessary motion practice. If you choose to have preliminary injunction motions heard only in arbitration, you should be prepared to get challenges due to attorneys' lack of understanding of the options in arbitration or general preference for court proceedings over arbitration.

2. **Cost provisions**. Especially for contracts that could be susceptible to mass arbitrations, businesses should expressly limit the instances where they will cover the costs of arbitration. This can be done by expressly incorporating the AAA Arbitration and Mediation Fee Schedule, or by creating a tailoring the specific circumstances under which a business will and will not cover costs.

3. **Attorney's fees provisions**. Many contracts hold that attorney's fees are recoverable by the "prevailing party." This may encourage mass arbitrations, as it provides an added incentive for plaintiffs' attorneys to seek out more potential claimants.

4. **Class action waivers**. These waivers are enforceable, but they may no longer be in a business's best interests due to the rise of mass arbitration. It may be better for a business to handle one case (or a few) than thousands of individual arbitrations.

5. **Conditions precedent**. A number of states have specific laws about what conditions precedent to arbitration are proper. *See* Idaho Code § 29-110(1) (does not allow parties to contractually limit statutes of limitation or require arbitration to occur outside the state). It is worth reviewing the relevant state law concerning conditions precedent to arbitration to ensure the procedures are enforceable.

6. **Requesting a Stay**. When bringing motions to compel arbitration, keep in mind that even if all of a parties' claims are arbitrable, you will not be able to request dismissal of the case if either party requests a stay. If you don't want a stay, make sure you don't fashion the motion as one to compel and stay. The other party may still request a stay, but at least you have forced the other party to pay attention if it wants to stay the litigation if it loses the motion to compel.

All told, while arbitration still exhibits many of the traditional pros and cons, recent developments should motivate businesses to reconsider how to best utilize this alternative dispute mechanism.