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LITIGATING ARBITRATION CLAUSES: WATCH THE WORDING

As anyone who practices even a small amount of litigation is aware, arbitration clauses are becoming commonplace in a wide variety of settings: in commercial contracts of all kinds, employment agreements, licensing agreements, etc. If you do litigation today, you will encounter arbitration agreements. You may also be called upon to advise a client of wording an arbitration agreement.

Litigation over arbitration agreements, however, has outrun the development of any consistent judicial treatment of such agreements. This is a long way of saying that no one really knows how a Court will construe the wording of an arbitration agreement, and counsel should not take anything for granted. The reality is that different Courts attach different meaning to the same sorts of wording. This is frustrating to the scholar seeking a uniform rule, and to the draftsman who would like to think he knows how his language will be interpreted, but it is an invitation to the creative litigator seeking to enforce or avoid an arbitration clause.

The problem usually arises when the Plaintiff alleges a variety of causes of action, sounding in both contract and tort, and possibly some statutory causes of action as well, then moves to have them all arbitrated pursuant to an arbitration clause in a contract. If the Defendant also wishes to have all the claims arbitrated - no problem. If, however, the Defendant wants only some of the claims to be arbitrated, it may well file a motion to sever the claims, and send some to arbitration while either proceeding separately on the other's in court, or staying the claims left

in the court. In this event, you and your client may scratch your heads and say - “If we have an arbitration clause, why wouldn’t all the claims be arbitrated?”

There are two basic points to be kept in mind when arguing an arbitration clause:

1. Federal policy favors arbitration. Moses H. Cone Memorial Hospital v. Mercury Const. Co., 460 U.S. 1, 2425 (1983) (Federal Arbitration Act, 9 U.S.C. § 1-16, favors arbitration). There are many cases on this point, and this is a useful starting point when trying to persuade a Court to direct claims to arbitration.

2. Being contracts, arbitration clauses will be interpreted to give effect to the intent of the parties. Only those claims which the parties intended to be subject to arbitration will be arbitrated. Courts will look to the language of the clause to ascertain this intent. The holdings are widely diverse, with Courts characterizing clauses as “broad” or “narrow.” As a review of the cases shows, however, there is absolutely no uniformity in the holdings. What this means practically is that there will most likely be authority for construing almost any arbitration language in almost any direction.

- ◆ Clause providing for arbitration “if any dispute should arise under this Charter” was too “narrow” to include a claim for fraudulent inducement to enter the contract. In Re Kinoshita & Co., 287 F.2d 951 (2nd Cir. 1961).
- ◆ This same phrase was held broad enough to include a claim for rescission of a contract based on fraudulent inducement. Fabrex Corp. v. Winard Sales Co., 200 N.Y.S.2d 278 (1960).
- ◆ Contract providing for arbitration of “disputes hereunder” was held to be “broad” in a breach of contract case. Alamria v. Telcor Intern., Inc., 920 F. Supp. 658 (D.Md. 1996).

- ◆ The similar clause “any disputes arising hereunder” held too narrow to include claims for tortious interference and quantum meruit; the phrase was held to apply only to disputes related to the interpretation and performance of the contract. Mediterranean Enterprises, Inc. v. Sangyong, 708 F.2d 1458 (9th Cir. 1983). The concept of distinguishing between claims involving the interpretation and performance of the contract is perhaps the closest thing to any uniformity in this area. There is a difference between matters related to the formation of the contract and matters related to what the contract means and whether the parties have performed their duties. A “narrow” clause can be said to reach only the latter, whereas as a “broad” clause can be said to reach all of them. Again, there is no magic language that will guarantee that your clause will be read as you wish by your Court. However, if you wish to draft a broad arbitration clause, you may wish to specify that all matters related to formation, interpretation, and performance under the contract will be arbitrated. Using phrases like “hereunder,” and “all disputes” leaves you unable to predict how a Court will interpret the clause. This type of vague language has also allowed Courts to distinguish between tort and contract claims, sometimes holding that tort claims are excluded from arbitration. This can defeat the purpose of arbitration, and lead to parallel litigation in arbitration and in civil court, over basically the same set of facts. (The Fourth Circuit has strongly rejected this distinction, holding that tort and contract claims are arbitrable under the following clause: “any dispute, controversy, or claim arising out of or related...” American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996).

Another question that arises is whether statutory claims are subject to arbitration. While one can argue that an enactment evinces an intent to preclude arbitration, it is generally held that statutory claims are arbitrable. This has been the subject of some litigation, though, so it would be prudent again, if you are interested in drafting a broad clause, to specify that arbitration also applies to any statutory claims arising out of the contract or the relationship. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Brown v. TransWorld Airlines, 127 F.3d 337, 341 (4th Cir. 1997); O’Neill v. Hilton Head Hospital, 115 F.3d 272 (4th Cir. 1997). In Boisentine v. Stone & Webster Engineering Corp., 117 F.3d 519 (11th Cir. 1997), the following language was held to exclude arbitration of a statutory claim: “the arbitrator’s decision must be based solely upon an interpretation of the provisions of this Agreement.”