Keeping **Arbitrations** on Track


By Phillip J. Smith and Dorothea K. Langsam

With the increasing emphasis on alternative dispute resolution, parties commonly find themselves in arbitration when disputes arise under agreements. Focused on perceived cost savings and timely results, parties frequently include language in their agreements requiring the resolution of their disputes by arbitration.

A party who has agreed to a "standard" arbitration clause borrowed from another agreement's boilerplate may find that an agreement to arbitrate doesn't necessarily mean that the dispute will be resolved as quickly or inexpensively as hoped.

For starters, disputes often emerge over the obligation to arbitrate and the scope of an arbitration clause. There is irony in the fact that the courts — the very agencies from which arbitrating parties have departed seeking greener pastures — are in the position of enforcing and validating the parties' freedom to choose arbitration.

Courts have enforced contracting parties' decisions to arbitrate disputes in a wide variety of circumstances.[1] They have also recognized public policies favoring the resolution of disputes by arbitration.[2] The unsurprising result is that parties who find themselves in a dispute when an arbitration clause is at issue often find themselves having to arbitrate those disputes.

A client faces challenges that arise from being required to arbitrate. Under the theory that forewarned is forearmed, this article discusses some common complications (certainly not all of them) that arbitration can present. These issues are best considered when arbitration clauses are being drafted, but they are often confronted by litigators who are called to assist clients when a dispute has arisen.

Full Speed Ahead?

Clients who have been injured in some way by others' conduct are usually not of the view that their dispute should take months or even years to resolve. They want relief and are convinced that any objective third party will see the dispute their way. These interests drive clients in a variety of contexts to include arbitration clauses in their agreements in the first place.

Contrary to common wisdom, however, arbitration may not provide the private "rocket docket" some parties expect.

As an initial matter, a typical agreement to arbitrate specifies at least something about the procedure to be used to arbitrate and resolve the dispute. The American Arbitration Association, a common venue for parties seeking arbitration—but only one of an ever-growing number of providers of arbitration and mediation services—has long made available sample contractual language that anyone can include in an agreement to ensure that disputes are arbitrated.[3]

The AAA provides a variety of sample language for clients engaged in different industries and disputes. But a typical example requires that "any controversy or claim arising out of or relating to this contract or the breach thereof" be submitted to "arbitration administered by the American Arbitration Association."

Language in an agreement that requires that the parties arbitrate utilizing a specific arbitration service binds the parties (absent an agreement that they reach once a dispute is already under way — a difficult time in which to forge consensus) to use those services.

As always, it pays to be an informed consumer, and parties would be well served to consider the costs, track record, and services of the arbitration association they select. By contrast, parties who downplay the potential for a dispute and crib a boilerplate arbitration clause from another contract may be disappointed to discover when a dispute arises that their choice of forum can have expensive and time-consuming consequences.

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Arbitration associations charge fees for their case administration services. These services are analogous to services that the clerk's office or a judge's staff performs: keeping track of filings, assisting with scheduling, and the like. When parties have agreed to arbitrate, they are obligated to pay up-front costs for administrative services that are often substantially higher than those charged in court. Filing fees for an arbitration are »

frequently tied directly to the dollar-amount of the claim being brought. Parties in arbitration should also expect that they will have to pay for their share of the services of the arbitrator or arbitrators — who are often attorneys charging an hourly rate — in advance of a hearing.

These fees may be economically justified if the dispute is resolved more efficiently by virtue of arbitrating. But commencing a dispute with an arbitration association does not set a case on an automatic path to a prompt resolution.

Once a claim is filed, the skill of the administrators makes a great deal of difference to how quickly a case will proceed. Arbitration case supervisors have dockets with many cases. As in court, the administrators' ability to move a case forward has much to do with the volume of their caseload.

Commonly the arbitrators over a dispute establish a schedule and deadlines for the completion of matters before an arbitration hearing. But until an arbitrator is appointed, the parties depend on case administrators to get the case to an arbitrator. Significant steps along the way include notifying the responding parties, receiving the response to the arbitration demand, initiating the process for the selection of arbitrators, and identifying an arbitrator.

Each of these steps requires time, and it may take several months from the presentation of an arbitration demand just to have the arbitrator appointed. By contrast, courts in the Cincinnati area typically assign judges to a case at the time of filing or shortly thereafter.

This can be troublesome for clients who have compelling issues requiring attention at the outset of a dispute. For example, administrators may delay taking further action, at least for a time, if there is a challenge to the arbitrability of the dispute.

Parties who consider and plan for the procedures for arbitrating a dispute before it arises will encounter fewer surprises. Because the arbitration is a creature of its contract, the parties may be able to agree on a more efficient route to get a dispute into the hands of an arbitrator who will resolve it. For instance, the parties could identify by name the arbitrator or arbitrators who would hear any disputes that arise.

However, this requires that parties spend time and effort (and their counsels') to set forth rules for resolving a dispute — one that contracting parties at the outset of a relationship hope never happens. Moreover, going outside one of the recognized providers of arbitration services leaves the parties to their own devices in identifying qualified neutrals who can preside over their dispute.

One obvious disadvantage to an agreement to arbitrate is the risk that a party may ask a court to determine the arbitrability of the dispute

In short, parties would be wise to understand the consequences of selecting a particular arbitration forum in terms of cost and the time involved to have a dispute heard. While understandably written with a bent toward encouraging the use of its services, the AAA has a helpful publication that raises a number of issues that a practitioner may want to consider when drafting an arbitration clause, including the adoption of procedures for preliminary relief, pre-arbitration mediation, and others.[4] Before borrowing a boilerplate arbitration provision from elsewhere, parties and counsel will reap dividends from spending time considering their options and understanding how a potential dispute would be resolved.

All Aboard—Including All Parties

Because arbitration is a process to which the parties must agree, complications can arise when disputes involve multiple parties and potentially multiple agreements, even if they all arise out of a common dispute.

A 2009 decision from Ohio's Seventh District illustrates some of the issues that can arise. *Trinity Health System v. MDX Corp.*,[5] involved two agreements, one of which included an arbitration clause and one that did not, and multiple parties with complex and evolving relationships. While it found one party had no obligation to arbitrate, it left unresolved whether a non-signatory holding company of a party to an arbitration agreement might be bound to arbitrate under theories of "*estoppel*, incorporation by reference, assumption, agency, veil-piercing/alter ego, and third-party beneficiary."[6]

This case illustrates that the involvement of some parties in a dispute who are required to arbitrate does not mean that all other stakeholders will necessarily be compelled to participate in an arbitration. It also shows that even parties who do not themselves sign arbitration agreements may be compelled to arbitrate their claims. Acquisitions, reorganizations, and assignments often give rise to significant questions in this regard.

Likewise, the existence of multiple agreements that involve the core dispute among the parties would not preclude a finding that some claims are subject to arbitration while others are subject to litigation. From a practitioner's perspective, the fact that *the appeal* of the lower court's decision on the question of arbitrability in *Trinity Health* took nearly two years while a parallel arbitration was under way suggests that there was considerable risk and uncertainty facing the parties as to whether any intervening decisions from the arbitration would be binding.

Parties should be cognizant that their contracting counterpart's structure may impact their ability to secure complete relief in an arbitration. Accordingly, it may be prudent to consider whether additional parties (such as principals, guarantors, and parent, sibling, or subsidiary corporations) should be made parties to an arbitration agreement or whether steps can be taken to ensure the applicability of an arbitration agreement in the face of changes in circumstance. For example, in the face of a counterpart's restructuring, would it be possible to update the arbitration clause by amendment before any dispute arises?

No matter how careful a practitioner may be, the perils of being in an arbitration with an incomplete cast of

participants may be a risk inherent in agreeing to arbitrate disputes. In view of the circumstances and risks involved, it may be prudent to review these possibilities with the client in advance.

Two Tracks

If, as in *Trinity Health*, the same or related parties are, or potentially will be, involved in both arbitration and litigation, they also need to consider whether a decision in one forum may affect the outcome in the other.

The doctrine of *res judicata* (claim preclusion) bars *claims* that were or *could have been* raised in a prior action. Collateral *estoppel* (issue preclusion) prevents re-litigation of *issues* actually and necessarily decided in a prior action. These doctrines apply when subsequent matters involve the same parties or their "privies." In addition to a more formal analysis of relationships involving privity, the Supreme Court of Ohio has said that privity may also be found when a non-party actively participates in litigation or shares a "mutuality of interest" with a party.[7] Collateral *estoppel* may also apply if a non-party could have joined the prior action.

As a general matter, an arbitration may qualify as a prior action for purposes of both *res judicata* and collateral *estoppel*. Preclusive effect attaches to the forum that reaches final judgment first. Thus, if the expectation that arbitrations resolve more quickly than litigation proves correct in any particular dispute, the arbitration may preclude litigation of claims or issues in court. Alternatively, if a court reaches final judgment first, an arbitrator could give preclusive effect to the court's decision to the extent required by general principles of preclusion.

Counsel should also be aware that the General Assembly has provided that arbitration will preclude subsequent litigation in certain circumstances — regardless of traditional principles of *res judicata*. For instance, Revised Code § 4112.14(C) bars age discrimination claims in court when an arbitrator has found that the employee was discharged for just cause.

Thus, whenever there is potential for related arbitration and litigation, counsel should consider possible preclusive effects.

Detours through Court

Even with a broad and enforceable arbitration agreement, parties may find themselves in court, at least at the outset of a dispute. As noted above, one obvious disadvantage to an agreement to arbitrate is the risk that a party may ask a court to determine the arbitrability of the dispute — a matter that will involve at least some litigation that usually must be resolved before either an arbitrator or court may reach the merits.

Another issue that may arise and require court intervention is a claim for preliminary injunctive relief. A clause in an arbitration agreement that provides for an arbitrator's resolution of "all disputes" could lead a court to find that it is not empowered to adjudicate a temporary restraining order.[8] Such a finding could leave a party seeking emergency relief in limbo so long as an arbitrator has not yet been appointed.

But in *Dunkelman v. Cincinnati Bengals, Inc.*, the First District Court of Appeals held that the lower court should decide a motion for preliminary injunction before ruling on a motion to stay pending arbitration.[9] Other courts have determined they can issue preliminary injunctive relief even when the parties have agreed to resolve disputes by arbitration.[10]

Rather than having to litigate the issue of whether interim injunctive relief is available, parties would again be well served to consider this issue in advance. Possibilities include drafting the arbitration clause to permit application to a court for emergency injunctive relief. Parties could also agree to provide for the issuance of such relief through an arbitration association's rules or by identifying a third-party neutral who would be empowered to decide such claims.

Conclusion

The above are a few illustrations of just some of the issues that can arise when parties have determined to resort to alternative dispute resolution procedures rather than the courts. Arbitration is an increasingly common form of dispute resolution. It can provide advantages to parties who choose it. Practitioners who thoughtfully consider the potential detours and obstacles that may emerge on the road to an arbitrator's appointment and resolution of a dispute will be better able to counsel their clients on what to expect and how to deal with the impact those events may have on their cases.

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1 *See, e.g., Hussein v. Hafner & Shugarmen Enters., Inc.*, 176 Ohio App.3d 127, 890 N.E.2d 356, 2008-Ohio-1791 (6th Dist. 2008) (arbitration clause in home construction contract); *McGuffey v. LensCrafters, Inc.*, 141 Ohio App.3d 44, 749 N.E.2d 825 (12th Dist. 2001) (employment contract); *cf.* Ohio Arbitration Act, codified at R.C. Chapter 2711.

2 *See, e.g., Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 66, 908 N.E.2d 408, 2009-Ohio-2054, ¶15 (2009) (noting that arbitration "provides the parties thereto with a relatively expeditious and economical means of resolving a dispute" and "has the additional benefit of unburdening crowded court dockets") (citations omitted).

3 See American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* (September 1, 2007).

4 American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* (September 1, 2007).

5 180 Ohio App. 3d 815, 2009-Ohio-417 (2009)

6 *Id.* at ¶22.

7 *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 531-32, 905 N.E.2d 1210, 2009-Ohio-1704, ¶¶33,34 (2009).

8 *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984); *Kendall/Hunt Publishing Co. v. Decision Development Corp.*, 666 N.W.2d 619 (Table), 2003 WL 1969225 (Iowa App. 2003).

9 158 Ohio App.3d 604, 821 N.E.2d 198, 2004-Ohio-6425, ¶44 (1st Dist. 2009) (cited by *State ex rel. CNG Financial Corp. v. Nadel*, 111 Ohio St.3d 149, 152, 855 N.E.2d 473, 2006-Ohio-5344, ¶16 (2006))

10 *See, e.g., Yudin v. Knight Indus. Corp.*, 109 Oio App.3d 437, 672 N.E.2d 265 (6th Dist. 1996); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kramer*, 816 F.Supp. 1242 (N.D. Ohio 1992).