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Agreement to Arbitrate

- Is there an agreement to arbitrate? Note this can be in place even with claims that the rest of the contract is invalid.
- Claim of fraudulent inducement of the entire contract did not implicate the making of the agreement to arbitrate . *Prima Paint Corp v Flood & Conklin* 388 U.S. 395, 402-06 (1967)
- Who is bound by the agreement?
- Does the agreement cover a particular controversy?

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What does the FAA say?

- Written agreements to arbitrate controversies arising out of contracts/transactions involving commerce are valid, irrevocable and enforceable
 - *except* where there are **grounds for revocation of the arbitration agreement**
 - grounds for revocation of the rest of the agreement – for example, fraud in the inducement – would not necessarily be grounds to revoke the arbitration provision.

Determining Arbitrability (Under FAA)

- “The question of who decides arbitrability is itself a **question of contract**. The Act allows parties to agree by contract that **an arbitrator, rather than a court**, will resolve threshold arbitrability questions as well as underlying merits disputes.”
 - *Henry Schein, Inc. v. Archer And White Sales, Inc.*, 139 S. Ct. 524 (2019) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68–70, 130 S.Ct. 2772 (2010) ; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–944, 115 S.Ct. 1920 (1995)).
- **Standard for determining whether an arbitration provision delegates issue of arbitrability to the arbitrator:**
- There must be “**clear and unmistakable evidence**” that the parties agreed to arbitrate arbitrability.
 - *Henry Schein*, 139 S. Ct. at 530 (citing *First Options* and *Rent-A-Center*)

Whether Challenges to Arbitrability Are to be Resolved By Courts or Arbitrator

- Unless the parties have agreed to arbitrate the issue of arbitrability, it is presumed that the parties intend the court, not arbitrators to decide such issue- but this can depend upon the jurisdiction of the Court.
- What does the agreement say about determining arbitration/arbitrator jurisdiction?
- Does it refer to administrative rules?
- If the contract references an arbitration service that grants arbitrator authority to rule on challenges to the arbitrator's jurisdiction, this is clear and conclusive evidence of parties' intent. *First Options of Chicago v. Kaplan* 514 U. S. 938, 944-45 (1995).

AHLA Commercial Rules – Arbitrator Decides Jurisdiction/Arbitrability

5.1- A responding party may object to arbitration of a claim

3.1 -After receiving appropriate evidence and argument, the **arbitrator, once appointed, shall have the power to determine his or her jurisdiction and any issues of arbitrability**

5.2- Once appointed the arbitrator may issue a preliminary award that addresses whether the arbitration clause is valid, and whether it applies to the claims or counterclaims raised by the parties.

5.4- During the status conference the arbitrator will inquire regarding any challenges to the arbitrator's jurisdiction

Language Example on Arbitrability

- Any dispute arising out of or relating to this contract or the subject matter thereof, or any breach of this contract, including any dispute regarding the scope of this clause, will be resolved through arbitration administered by the American Health Law Association Dispute Resolution Service and conducted pursuant to the AHLA Rules of Procedure for Arbitration. Judgment on the award may be entered and enforced in any court having jurisdiction.
- *Source: AHLA clause generator*

Dissecting the Language Example

- **Disputes to be resolved through arbitration:**
 - Disputes arising out of or relating to the contract or the subject matter thereof
 - Any breach of the contract
 - Any dispute regarding the scope of this clause
- **Who decides arbitrability?**
 - Arbitration to be conducted pursuant to the AHLA Rules of Procedure for Arbitration

New Exception– Added March 3, 2022

- *Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act of 2021-9 USC 401*—no predispute arbitration provision shall be enforceable. Determination to be by court & not an arbitrator.
- *“Irrespective of whether the agreement purports to delegate such determinations to arbitrator”*

Scope of Arbitrator Authority

- Based on the language in the parties' agreement to arbitrate except 9 USC 401.

Scope determines:

- Which issues are arbitrable?
- Which substantive law will govern the arbitration?
- Which service and which rules the arbitration will follow?.
- Form of damages arbitrator may award.

SCOTUS

- A party is not required to arbitrate any dispute the party did not agree by contract to arbitrate.
- Parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom they will arbitrate.
- Even though the Federal Arbitration Act (FAA) contains no express preemption provisions, it preempts state laws to the extent they are contrary on their face or in application.

• See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 341–43 (2011); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 297, 122 S. Ct 754, 764 (2002); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Federal Arbitration Act (FAA) applies:

- If the arbitration provision states the arbitration is governed by the FAA.
- Contracts/transactions involving commerce (interstate, with foreign nations, US Territories, or DC, or between them) and maritime contracts/transactions
- “Involving commerce” broad in scope, within the flow of interstate commerce
- *FAA Section 2*

FAA versus State Laws

- All 50 states have arbitration laws that apply to arbitrations seated in that state.
- Most state arbitration laws are based, at least in part, on the Uniform Arbitration Act (drafted by Uniform Law Commission a/k/a National Conference of Commissioners on Uniform State Laws).
- State arbitration acts do not apply for procedural issues unless specified in the arbitration agreement.
- Most arbitration disputes are contract disputes so state law applies for substantive issues.
- Parties in scheduling order may wish to incorporate state procedural law or state arbitration acts or federal evidentiary law.

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Role of Arbitrator in Arbitration Process

The arbitrator:

- should **act within, and exercise fully, the authority** granted to the arbitrator by the parties' arbitration agreement
- is obligated to **follow any procedures or rules** set forth in the arbitration agreement
- should conduct the arbitration process so as to **advance the fair and efficient resolution** of the matters submitted for decision
- should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or **other abuse or disruption** of the arbitration process

See AHLA Code of Ethics for Arbitrators in Commercial Arbitration.

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The “Litigation Mindset”

- Attorneys are frequently more familiar and more comfortable with the rules of litigation.
- Too often parties prepare for arbitration as if they are presenting a litigation case to a judge or jury.
- Some arbitrators are uncomfortable with creating new procedures for efficiency purposes because fearful their decisions will be vacated or not liked by the parties.

Fairness and Efficiency

Party autonomy/party choice is fundamental to the principle of arbitration, *but* the arbitrator needs to advance fair and efficient resolution.

- Collaborate with the parties for a fair and efficient arbitration proceeding.
- Discourage proposed processes that would undermine the fairness or efficiency of an arbitration.
- Encourage parties to reconsider typical litigation procedures as their framework for arbitration discovery and hearing.
- Present options for discovery and hearing that are more efficient and economical compared to litigation.

Opportunities for Making the Process More Efficient

- Written witness statements as opposed to live testimony
- Time limited hearings - chess clocks
- Expert conferences prior to hearing to ascertain areas of agreement and disagreement
- Determining whether a motion is likely to expedite or facilitate the conduct of the arbitration prior to allowing it to be filed
- Similar determination on discovery- but refer to contract!
- Discourage fishing expeditions in discovery

AHLA Rules Provide Arbitrator Flexibility

AHLA Rule 4.1 Conduct

(a) POWERS AND DUTIES. An arbitrator has the power to:

- (1) determine his or her powers and duties under an arbitration clause;
- (2) interpret the Rules to the extent that they relate to his or her powers or duties;
- (3) sanction parties for failing to comply with orders of the arbitrator or any obligations under the Rules;
- (4) stay or dismiss proceedings for good cause, which may include agreement of the parties; and
- (5) take any actions and make any decisions that are necessary and proper to conducting a fair and efficient arbitration under the Rules.

Case Law Supports Flexibility Granted by AHLA Rules

Heartland Surgical Specialty Hospital v William O. Reed, Jr. M.D. 48 Kan. App.2d 237 (2012)

- Hospital filed motion to vacate AHLA arbitration award against it in favor of a physician on hospital's claim that physician had violated noncompete clause in settlement agreement.
- One of hospital's claims was that arbitrator erred in not holding an evidentiary hearing.
- Award affirmed. Court held "The AHLA ADR Rules of Procedure, which the parties agreed would apply, grant the arbitrator wide discretion as to what hearings are set in the course of an arbitration procedure."



Questions?






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