Morgan Lewis

The Nuts and Bolts of Arbitration

May 30, 2014

DOECAA
Department of Energy Contractor Attorneys' Association

Brad Fagg
202.739.5191
bfagg@morganlewis.com

Morgan Lewis

Agenda

- Introductions and definitions
- Arbitration and the Federal Government
- Arbitration and the DOE Contractor Community
- Practical advice: some questions that you might be asked when an arbitration matter “hits your desk”
  - Drafting an arbitration clause
  - Initiation of arbitration (or whether to fight arbitration or not)
  - Selection of arbitrators
  - Discovery and other pre-hearing procedures
  - The hearing itself
  - Challenging or enforcing an award

Introduction and Definitions

ARBITRATION

- "An arrangement for the taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation." Black's Law Dictionary (5th ed.)

- "A proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree to accept as final and binding." Britton, The Arbitration Guide (1982).

- Overriding characteristic is a contractual basis. A creature of contract.

  (Putting aside for present purposes rare specialized statutory schemes.)

Introduction and Definitions

- "Arbitration" is not:
  - mediation
  - facilitation
  - judicial arbitration
  - mini-trial

Arbitration and the Federal Government

- In some ways a quick topic: it (mostly) doesn't happen
  - Based on long standing lack-of-authority position. *e.g.,* 32 Decisions of the Comptroller General 333, 336 (1953)
    - "In the absence of statutory authorization. . . officers of the Government have no authority to submit or agree to arbitration claims which they themselves would have no authority to settle and pay."
- Some *limited* exceptions
  - Post-dispute agreements
  - Requires a "cap," under current DOJ policy

Arbitration and the Federal Government

- Lack of willingness to “arbitrate” does not necessarily mean that alternative dispute resolution with Federal Government is not available
- Contract Disputes Act sometimes characterized as an alternative mechanism
- Administrative Dispute Resolution Act, 5 U.S.C. § 571 et seq.
- Many others
  - *e.g.,* Appendix H, Rules of Court of Federal Claims
  - FAR 33.214

Arbitration and the DOE Contractor Community

- Subcontractor, supplier, and vendor relationships.
- The most common instances of commercial arbitration in the DOE contractor community, and our focus today.
  - Employment and other specialized arbitration schemes are topics for another day (and speaker).
  - Domestic focus for today: International Arbitration can present unique issues.

Arbitration and the DOE Contractor Community

- DOE Arbitration Guidance for M&O Contractors (February 2010)
  - "there is currently no legal prohibition on M&O contractors including binding arbitration in their contracts with others"
  - "In fact, we believe it will often be a good idea to include arbitration clauses as a means of limiting the risk of litigation which is often more time consuming and expensive than arbitration"
  - Also, intent to be "expansive" regarding post-dispute arbitration
  - "It would be wise to give serious consideration to using the Civilian Board of Contract Appeals."

Available at: http://energy.gov/gc/articles/doe-general-counsel-issues-arbitration-guidance-management-and-operations-contractors

Arbitration and the DOE Contractor Community

- December 2010:
- DOE “announced today that it has entered into a Memorandum of Agreement with the United States Board of Contract Appeals (CBCA) to enable the Department’s lab and facility management and operation (M&O) contractors employ the CBCA for mediation, arbitration, and other alternative dispute resolution services.”

Drafting a Commercial Arbitration Clause

- AAA standard clause:

  "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

- Forms: AAA website: www.adr.org.; Forms books (e.g., Nichols, Cyclopedia of Legal Forms Annotated, Arbitration and Alternative Dispute Resolution.). See 1 Domke on Commercial Arbitration § 8:24, p 8-63 (3d ed., 2012).
- No separate consideration required
- If not standard form incorporating standard rules—so-called "ad hoc" clauses should specify enough detail to ensure that the process works.

  e.g, number of arbitrators, how appointed, place of arbitration, law applied, and rules.

Drafting a Commercial Arbitration Clause

- Checklist for drafting a commercial arbitration clause:
  - Don't confuse with mediation or facilitation clauses
  - Consider, though, good faith negotiations, mini-trial, other settlement steps
  - Clear and unambiguous language regarding scope
  - Clear statement regarding binding nature
  - Choice of arbitration service provider
  - Rules—specified or incorporated by reference
  - Rules of evidence and discovery to be applied
  - Selection of arbitrators; number of arbitrators, any special qualifications, what to do if parties cannot agree on selection
  - Location of arbitration
  - Time within which a party must notify other party of intent to arbitrate, after dispute arises
  - Time limits: appointment, pre-arbitration, decision and award
  - Governing law
  - Apportionment of costs and expenses
  - Any special appeal rights, ability of arbitrator to grant interim relief, limitations or expansions of relief, other unique procedural terms

Drafting a Commercial Arbitration Clause

- Hybrid clauses and the DOE scheme
- Flow-down clauses: parallels to FAR 52.233-1
  - How is it *really* going to work?

Initiation of Arbitration

- Timely demand
  - Cross “t’s” and dot “i’s.”
  - Comply with any special contractual notice, delivery, etc. requirements (e.g., hand delivery, certified mail)
- No special pleading requirements
  - No need to identify legal theories.
  - But, do have to fairly apprise the other party of what is at issue.
  - And, demand will take on a life of its own. As a strategy matter, should be a persuasive document.

Response to an Arbitration Demand: Fight It or Not?

- Resist temptation to reflexively resist. Important threshold consideration of what is *actually* at stake if dispute arbitrated, versus litigated.

- Does it *really* make a difference?
  - Jury?
  - "Home" court?
  - Need for liberal discovery?
  - Need for extraordinary or injunctive relief?
  - Speed of resolution?
  - Appeal rights?
  - Collateral issues: agree to validity of contract? Limitations on damages?

Response to an Arbitration Demand: Fight It or Not?

- Statutory presumptions in favor of arbitration
  - Uniform Arbitration Act (1955) and Revised Uniform Arbitration Act (2000)
  - Federal Arbitration Act, 9 U.S.C. §§ 1-14 (“FAA”)
  - FAA applies to interstate or foreign commerce (creates federal substantive right, but does not provide “federal question” jurisdiction).
- 1988 Amendments to FAA:
  - Order denying arbitration, or refusing stay of court action in favor of arbitration, is appealable.
  - Order compelling arbitration is not directly appealable.
  - Common theme: favoring arbitration
- Typically, for broad clauses, doubts resolved in favor of arbitrability. *E.g., Kaplan v. First Options of Chicago, Inc.,* 19 F.3d 1503 (3d Cir. 1994).

Response to an Arbitration Demand: Fight It or Not?

- Potential issues of "scope." Does the arbitration clause cover the specific dispute?
- Compare:
  - *"all disputes arising out of or relating to" this agreement*.
  - includes fraud in the inducement, etc.
- With:
  - *"any dispute arising hereunder."*
  - Arising under contract itself. May not include conspiracy to induce breach, quantum meruit, etc.. *See* 1 Domke on Commercial Arbitration § 8-37, p 8-37 (3d ed., 2012) (noting circuit split over significance of "relating to" language.)

Response to an Arbitration Demand: Fight It or Not?

- Potential basis to resist arbitration:
  - Lack of valid agreement
  - Particular dispute not within scope of arbitration clause
    - But split of authority on whether court or arbitrator decides
  - Failure to satisfy condition precedent
  - Untimeliness of demand or other procedural defect
  - Waiver of right to arbitrate
    - Cases split on whether waiver is determined by court or arbitrator
    - Most common grounds for waiver are initiation of, or active participation in, court proceedings
      - But, some cases require showing of actual prejudice to party resisting arbitration: *i.e.,* significant affirmative litigation activity

Selection of Arbitrators

- Two basic methods: (1) parties identify and select; or (2) appointed under rules of agency administering the arbitration
- Preference for sole arbitrator (versus panel), if not otherwise specified
- If no agreement, dispute is still arbitrable, and courts will usually appoint an arbitrator. *e.g., Marchant v. Mead-Morrison Mfg. Co.,* 252 N.Y. 284 (1929)

Selection of Arbitrators

- "Tripartite Tribunal"
  - Each party selects one arbitrator; they select the third
- Expectations about impartiality of party-appointed arbitrators not the same as for sole arbitrator
  - Party-appointed arbitrators are so-called "Canon X" arbitrators, for Canon X of the AAA Code of Ethics for Arbitrators in Commercial Disputes
  - BUT, all three arbitrators are expected to observe standards of fairness, etc. Canon IX A of AAA Code of Ethics for Arbitrators in Commercial Disputes
  - Strategic issues regarding appointment

Selection of Arbitrators

- Checklist for potential arbitrators:
  - Expertise
  - Reputation
  - Views on pre-hearing discovery
  - Interest/availability/commitment
  - Relationship to parties
  - Lawyer/non-lawyer
  - Track record

Discovery and Other Pre-hearing Procedures

- Prehearing conference
  - Important to ask for one early
- Discovery: generally far less than in a court proceeding
  - One of the hallmarks of arbitration
- Discovery subject to the almost "unbridled discretion" of the arbitrator *e.g., Perry Homes v. Cull*, 258 S.W.3d 580 (Tex 2008)
- Unless limited by the terms of the Arbitration Agreement

Discovery and Other Pre-hearing Procedures

- Subpoena power and amount of available discovery is a murky area
  - specific circumstances should be researched carefully
- Generally, arbitrators have power to subpoena parties for depositions and documents
  - FAA, 9 U.S.C. § 7
  - AAA Commercial Arbitration Rules, Rule 31(d)
  - Enforceable, or challengeable, in court
- But, for documents, some authorities suggest only for hearings, and only from testifying witnesses
- And, some authorities hold arbitrator has no power to subpoena non-parties for documents or pre-hearing depositions. *E.g., Life Receivables Trust v. Syndicate 102*, 549 F.3d 210 (2d Cir. 2008)

Discovery and Other Pre-hearing Procedures

- Pre-hearing dispositive or other motion practice:
  - Again, governed by contractual terms
  - Not nearly as common as in judicial proceedings
    - "Expedited" or "cost effective" resolution is already (theoretically) achieved by the arbitration process itself
  - Practical advice: assess receptiveness of the arbitrator(s) before committing resources to preparation of dispositive motion. Take advantage of informality

The Hearing Itself

- Preparation: witness prep should be just as thorough as a trial
- Rules of evidence and examination procedures will not apply
- Attendance of witnesses
  - Subpoena power of arbitrator: FAA or state statutes
- Ensure that the “ground rules” are clear
  - order of witnesses
  - expectations for direct and cross
  - objections (generally not technical—more speaking)
  - presentation of documentation
  - transcribed proceedings?

Post-award: Enforcement

- FAA and state statutes provide for expedited review and summary confirmation

- Advantages of confirmation as judgment include enforceability, assistance with res judicata if necessary

Post-award: Challenge

- Challenge after full arbitration is an uphill battle
- Grounds for vacating or modifying (9 U.S.C. §§ 10, 11)
  - Corruption
  - Fraud
  - Misconduct by arbitrators
  - Arbitrators exceeded their power
  - Evident material miscalculation
- No review for errors of fact or law like a traditional appellate court. *E.g., United Paperworkers Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)

Post-award: Challenge

- "Manifest disregard of law"
  - even if applicable, requires: (1) clear law, and (2) knowing disregard by arbitrator
  - exceptionally narrow grounds. *e.g., Greenberg v. Bear Stearns & Co.,* 220 F.3d 22 (2d Cir. 2000)
  - And, even that potential basis is now subject to doubt. *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008)

The Nuts and Bolts of Arbitration

QUESTIONS?

The Nuts and Bolts of Arbitration

- References:
  - L. Edmonson, *Domke on Commercial Arbitration: The Law and Practice of Commercial Arbitration* (3d ed., 2012)
  - AAA Commercial Rules: available at www.adr.org.
  - Federal Arbitration Act, 9 U.S.C. §§ 1-14
  - Uniform Arbitration Act, available at http://www.lectlaw.com/files/adr06.htm.

Brad Fagg

Washington, D.C.
tel. 202.739.5191
fax. 202.739.3001

Brad Fagg is a partner in Morgan Lewis's Litigation Practice. Mr. Fagg represents sophisticated commercial clients in a wide variety of high-stakes contractual and regulatory disputes, federal and other procurement matters, construction disputes, government and internal investigations, False Claims Act cases, and pre-dispute counseling matters. Mr. Fagg has extensive experience in all manner of government disputes—he has recovered well over a billion dollars for clients in connection with government claims during the past five years, and was recently described in a published order by a Court of Federal Claims judge as representing clients "zealously, creatively, and with civility."

Prior to joining Morgan Lewis, Mr. Fagg was a trial attorney in the Civil Division of the U.S. Department of Justice, where he handled civil fraud cases, procurement disputes, takings claims, and employment appeals.

Mr. Fagg is admitted to practice in the District of Columbia and New York, and before the U.S. Supreme Court, the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Federal Claims, and many federal district courts and regional courts of appeal.

Morgan Lewis