What Every Litigator Should Know About Arbitration Law

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Why are we talking about this?

- Many industries have arbitration as default dispute resolution
  - Arbitrations filed with AAA/JAMS near number of federal civil filings
- EPI study found over 56% of all private sector non-union employees had arb agreements with employer, or $60 M people. In early 2000s was ~ 23%.
  - Matters b/c 41% of those ees waive class/collective actions (24.7M workers); may include other barriers too (SOL, atty fees, dmg limit).
- Personal: Uber, Lyft, credit cards, banks, Amazon.com, home builders, doctors, insurance…
- Overview of today's presentation

30,000 Feet: Why do Companies Choose Arbitration?

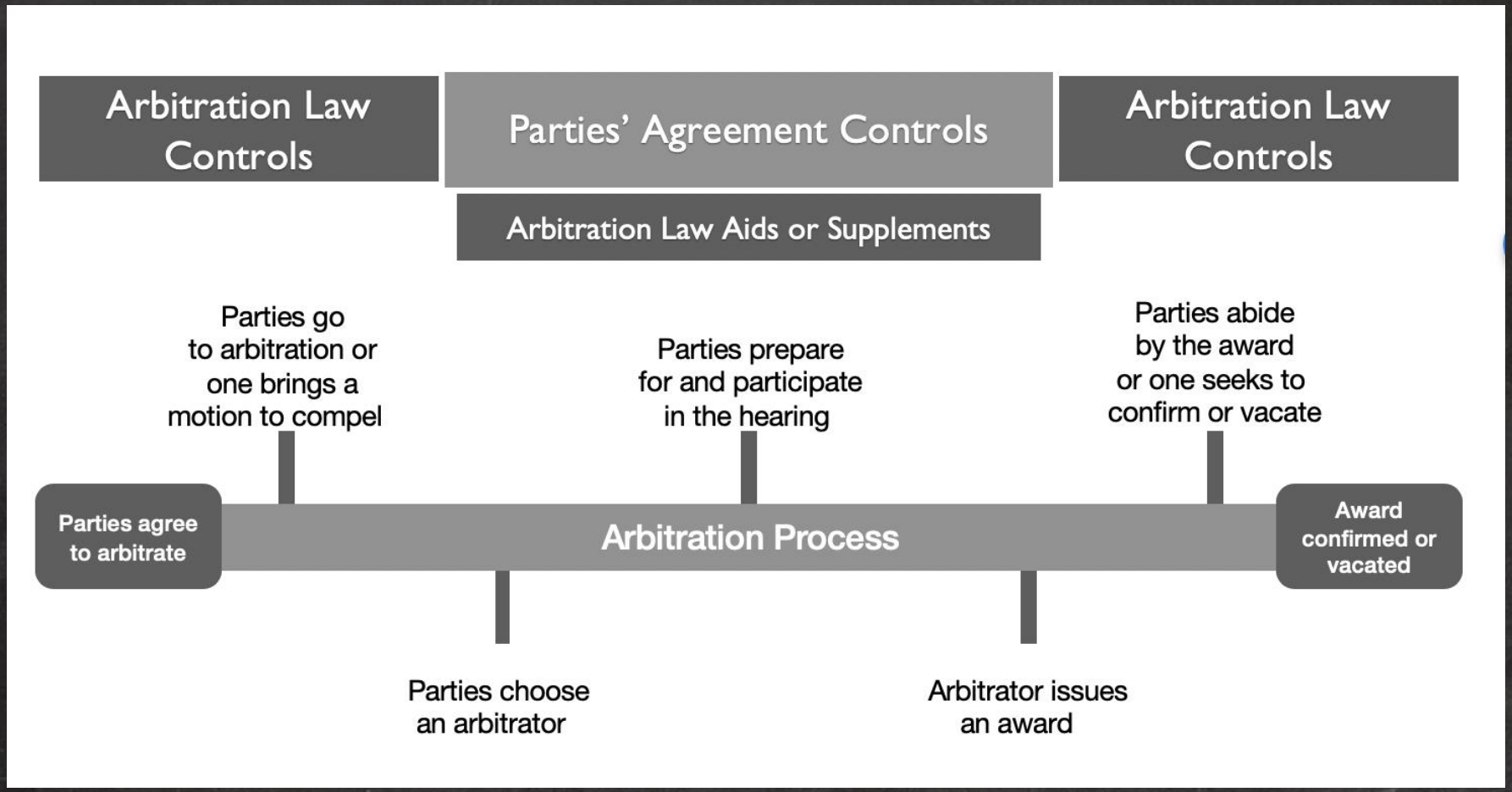
- Out of the public eye
- Expert decision-makers
- Usually quicker than public court litigation
- Maybe cheaper?
- In international cases, easier enforceability of award
- Avoidance of class actions
- Streamlined (and customizable) procedures
- Tailored standards of decision

30,000 Feet: Is Arbitration Cheaper?

- 2012 study comparing 9 arbitrated disputes to 10 litigated disputes: arbitrated cases averaged $30k more/case in fees (attorney and arbitrator).
- Best commercial arbitrators command high hourly fees (and you could be paying 3 of them)

30,000 Feet: Is Arbitration Faster?

- Micronomics 2017: “on average, U.S. district court cases took more than 12 months *longer* to get to *trial* than cases adjudicated by arbitration (24.2 months v. 11.6 months)”
- AAA (2012): The median case valued between $1 and $10 million dollars administered by the AAA took 414 days to get to an award
- Judiciary (2017): median time from complaint filing to trial in Minn. federal court is 35 months. State court closer to one year.


Arbitration Law Controls
Parties' Agreement Controls
Arbitration Law Controls
Arbitration Law Aids or Supplements
Parties go to arbitration or one brings a motion to compel
Parties prepare for and participate in the hearing
Parties abide by the award or one seeks to confirm or vacate
Parties agree to arbitrate
Arbitration Process
Award confirmed or vacated
Parties choose an arbitrator
Arbitrator issues an award

CORE CONCEPTS: FAA Governs

- Federal Arbitration Act (9 USC § 1-16) governs if the contract or transaction affects or involves interstate commerce
- "[B]roadest permissible exercise of Congress' Commerce Clause power" Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003)
- FAA is short, but SCOTUS has developed "substantive law of arbitrability" in case law
- Important because of preemption issues

CORE CONCEPTS: Federal Court Jurisdiction

- FAA does not confer federal jurisdiction. Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 581–82 (2008).
- Need other basis to be in federal court, i.e. diversity or fed'l question.
- Can "look-through" court pleadings on motion to compel arbitration to "substantive controversy between parties" to find jurisdiction. Vaden v. Discover Bank, 556 U.S. 49, 53 (2009).
- N.B: watch out for accidental arbitration clauses.

CORE CONCEPTS: Separability

- Contract for the Sale of Goods

Price Terms
Payment Terms
Delivery Terms
Warranty Terms
Choice of Law

Arbitration Agreement

The separability doctrine says that the arbitral agreement is separable from the "container contract" — the contract that contains it.

For purposes of analyzing arbitrability then, you must
consider the arbitration agreement as separate and apart from the container contract.

CORE CONCEPTS: Who Decides?

Courts decide only:

- existence of arb agmt
- validity of arb agmt
- scope of arb agmt
- whether arb waived by conduct

Arbitrators decide everything else...

- validity of contract
- statute of limitations/ other dispositive motions
- conditions precedent

CORE CONCEPTS: Who Decides?

- Those presumptions can be altered if parties clearly and unmistakably delegate arbitrability to arbitrator
  - Incorporating AAA or JAMS rules is enough
  - Delegation clause is enforced unless party opposing arb specifically challenges that clause. Rent-A-Center, W. v. Jackson, 561 U.S. 63 (2010)
- Some federal courts conducted an initial smell test – to determine if the demand for arbitration was "wholly groundless." In Henry Schein v. Archer & White (2019), SCOTUS laid the wholly groundless doctrine to rest.
  - N.B. some circuits have a different test for delegating availability of class arbitration. E.g. Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966 (8th Cir. 2017)

CORE CONCEPTS: Court Intervention

- Court can maintain status quo (so can arbitrator)
- Court can help if breakdown in selecting arbitrator (Section 5 of FAA)
- Otherwise, courts refuse to intervene mid-arbitration (even if basis to vacate)

CORE CONCEPTS: Subpoenas

FAA authorizes an arbitrator to “summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.” 9 U.S.C. § 7

CORE CONCEPTS: Appealing

9 U.S.C. §10 (a) allows vacatur only:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

CORE CONCEPTS: Appealing

Minnesota allows vacatur if (Section 572B.23):

(1) the award was procured by corruption, fraud, or other undue means;

(2) there was:

- (A) evident partiality by an arbitrator appointed as a neutral;
- (B) corruption by an arbitrator; or
- (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 572B.15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

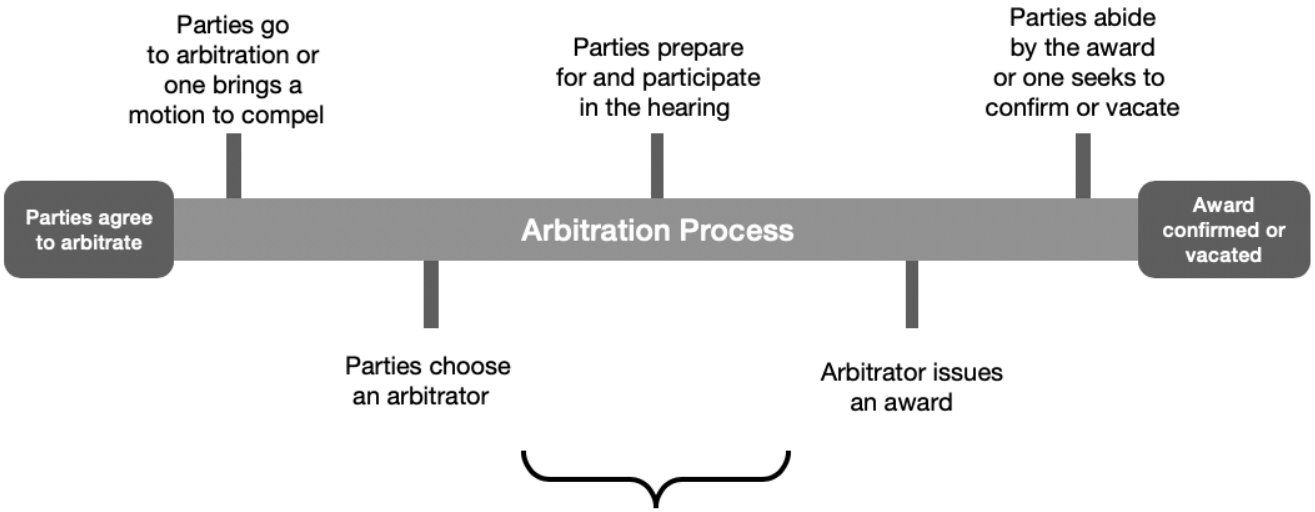
(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 572B.15, subsection (c), not later than the commencement of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 572B.09 so as to prejudice substantially the rights of a party to the arbitration proceeding.

CORE CONCEPTS: "Appealing"

- FAA allows only those 4 bases. Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008). Can't expand or contract.
- Judicially-created bases dead in 8th circuit (manifest disregard/public policy). Medicine Shoppe Intern., Inc. v. Turner Invs., Inc., 614 F.3d 485 (8th Cir. 2010). Still alive, but narrow, in Minn. City of Richfield v. Law Enforcement Labor Servs., 923 N.W.2d 36 (Minn. 2019)
- Have to preserve arguments with arbitrator – even bias and exceeding power.
- FAA: 3 mos to vacate/ 1 yr to confirm | MRUAA: 90 days/ no limit

Life Cycle of a Typical Arbitration



- Scheduling Conference
- Discovery
- Dispositive Motions
- Injunctive Relief

CURRENT TRENDS

- Class Arbitration

Class Arbitration: A brief history

First big issue – Can companies force consumers/employees to waive class/collective actions in arb clauses?

- Started inserting in 1990s, increasing in 2000s
- Multiple states refused to enforce the waiver (using savings clause of Section 2)
- In 2011, SCOTUS said California's state law rule on class waiver was preempted by FAA:
    - Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.
    - AT&T Mobility Inc v. Concepcion, 563 U.S. 333 (2011)

Class Arbitration: A brief history

In 2018, SCOTUS made clear the National Labor Relations Act offers no exception.

- Epic Systems Corp. v. Lewis held class action waivers in employment agreements are valid and not precluded by National Labor Relations Act.
- 5-4 decision. Gorsuch for majority; Ginsburg for dissent.

Class Arbitration: history, cont'd

Second big issue: if there is no waiver, when can class arbitration proceed?

- In 2010, SCOTUS holds that class arbitration is only authorized if allowed by parties' contract. (Stolt-Nielsen, 559 U.S. 662 (2010))
- In 2013, SCOTUS upholds arbitrator's allowance of class arb, despite no language specific to class arb in parties' agmt. (Sutter, 569 U.S. 564).

Class Arbitration: history, cont'd

In April 2019, SCOTUS issues Lamps Plus, Inc. v. Varela

- Held that courts cannot find the necessary consent to class arbitration in an ambiguous arbitration clause
- Can't have state law tie-breaker that is not based on principles of consent (9th Cir used *contra proferentem* rule)

Class Arbitration: history, cont'd

Third issue: Is there relief outside the federal courts?

- 2016-17 – federal agencies issue rules restricting class arbitration for certain classes of people (nursing home residents, college students, consumers of financial products) (now rescinded)
- However, many state courts still resist. E.g., Pedigo v. Robertson, 2017 WL 4838243 (Miss. Oct. 26, 2017); Kindred Nursing Centers Ltd P'ship v. Wellner, 2017 WL 5031530 (Ky. Nov. 2, 2017); and increasing number of states that have held that FAA sections 9-11 are not preemptive.
- Some corporations have succumbed to consumer/employee pressure to change agreements.

Class Arbitration: 2019

Decision issued in New Prime v. Oliveira

SCOTUS held :

1) it is for courts, and not arbitrators (regardless of any delegation clause) to determine whether the Federal Arbitration Act applies

2) the Federal Arbitration Act does not apply to interstate transportation workers

CURRENT TRENDS

- #MeToo

"Reforming arbitration laws is key to stopping sexual harassment."
- Gretchen Carlson

#MeToo – Legislative Reaction

- Federal legislation introduced (not passed)
- State legislation included
  - NY: banned mandatory arbitration of sexual harassment claims
  - Wash: passed legislation voiding arbitration agreements that preclude an employee from filing assault or harassment complaints
  - But… preempted by FAA.

#MeToo – Corporate Reaction

- Corporations pledged not to enforce arb in cases of sexual harassment:
  - Microsoft
  - Google
  - Facebook
  - Uber
  - Lyft

CURRENT TRENDS

- “Wrap Agreements”

Wrap Agreements – Defining Notice

- Constructive awareness of boilerplate terms coupled with an individual purchasing something from a commercial party amounts to assent.
- The problem is, what counts as reasonable notice?
  - Meyer v. Uber Technologies, Inc., 2017 WL 3526682 (2d Cir. Aug. 17, 2017)
  - Cullinane v. Uber Technologies, Inc., 2018 WL 3099388 (1st Cir. June 25, 2018)
  - Dye v. Tamko Building Products, Inc., 2018 WL 5729085 (11th Cir. Nov. 2, 2018)

THANK YOU