ABA Section on Dispute Resolution's Arbitration Committee E-Newsletter

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Linda A. Michler, Editor
Elizabeth K. Lilienthal, Assistant Editor **Harout Samra and David Tenner, Co-Chairs**

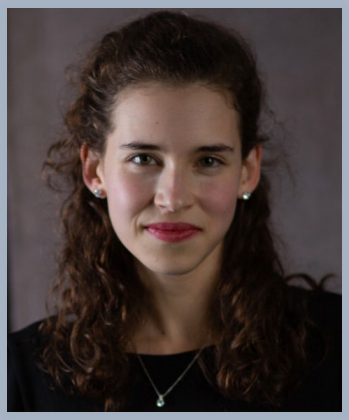
ARBITRATION COMMITTEE MEMBER SPOTLIGHT:

ELIZABETH K. LILIENTHAL

1. How did you get into the dispute resolution field?

I always knew that I wanted to be a litigator. While in law school, I participated in moot court negotiation competitions, a litigation practicum and a course on negotiations. My experiences provided me with a greater appreciation for alternative dispute resolution, as it serves as a cost-effective and efficient manner of resolving legal disputes outside of court.

Following law school, I began practicing as a plaintiff's personal injury attorney. The majority of my cases were arbitration level cases in the Philadelphia Court of Common Pleas.



Elizabeth K. Lilienthal is an attorney at Obermayer Rebmann Maxwell & Hippel LLP in Philadelphia, PA. She is a member of the Litigation Department. She is also the assistant editor for the ABA Section on Dispute Resolution's Arbitration Committee E-Newsletter.

2. What roles do you currently play in the dispute resolution field—e.g., domestic arbitrator, international arbitrator, mediator, lawyer representing clients in these processes, other?

I am an attorney who has experience representing clients in arbitration matters.

3. What are you doing now and why were you interested in the Arbitration Committee?

I am currently working at Obermayer Rebmann Maxwell & Hippel LLP as an attorney in the Litigation Department. Linda Michler is a family friend, who provided me with the opportunity to assist her as an editor for the Dispute Resolution's Arbitration Committee E-Newsletter. This experience has introduced me to various litigation tactics and different perspectives for resolving legal disputes.

Elizabeth K. Lilienthal, Con't on Page 2.

CO-CHAIRS' NEWS UPDATE FOR MARCH 2022

We are excited about what the rest of this Bar year has in store for our Committee!

In the coming months, we will be announcing new programming and our members will be integrally involved in the upcoming Arbitration Institute in Chicago from June 1 to June 3, 2022! If you haven't had a chance to sign up for the Institute, please do so as soon as you can because we expect another sold-out program! More information is available here: http://ambar.org/arb2022.

We also welcome our two new Section of Dispute Resolution Fellows, Viktoria Karamane and Grace Acosta, who will be joining Usher Winslett, who himself has stepped into a new role with the Committee as the Committee's Programs Subcommittee Chair. Welcome!

We have more good news to share concerning our Resolution on Non-Administered Arbitration Rules. It was recently approved by the Section of Dispute Resolution Council to be sent to other ABA sections and organizations for their input and potential co-sponsorship. This has been a major program of our Committee for many years, and special thanks to all involved in this effort, especially Peter Merrill, Kate Krause, Jaya Sharma, Tom Hanrahan, and Ed Lozowicki!

As always, our Publications team has prepared a fantastic newsletter for the Committee. This newsletter features fantastic contributions by our committee members on conditions precedent to arbitration, choice of law, and practical tips for "business divorce" arbitrations. We also feature Elizabeth Lilienthal, who has been a valued contributor to the Committee and an integral part of our Publications team, and our aforementioned Programs Chair and Section Fellow, Usher Winslett. Please be sure to read their profiles!

We look forward to having as many of you as possible on our next Committee call. We will announce the date and time soon. Please be sure to register and check the ABA Communities for the latest news!

Thank you!

Harout Samra and David Tenner, Co-Chairs

4. What knowledge, experience and/or skills are essential for a successful arbitrator?

I believe that a successful arbitrator must be able to objectively analyze facts, and both understand and apply the law. As a practicing attorney, I quickly realized the importance of small details, as they can either make or break your entire case. A successful arbitrator must be able to appreciate the importance of these details.

5. Do you specialize in a particular subject matter or field? If so, how did you become involved in that field?

I have always wanted to be a litigator, and my practice currently focuses on general commercial litigation. More recently, one of the partners at my firm has provided me with the opportunity to become involved in matters concerning election law, including campaign finance and lobbying laws. My first job following law school was in a personal injury firm. Additionally, I have limited experience in labor and employment matters.

6. What book is on your nightstand?

I am currently reading "Anatomy of the Spirit" by Caroline Myss. As someone who is very interested in health and wellness, this book caught my interest, as it discusses the physical repercussions of spiritual unfulfillment. I am also reading "The Daily Stoic" by Ryan Holiday. The book contains daily meditations and is very self-reflective and thought provoking. I was a philosophy major in college, so this book is right up my alley!

Over the past 20 years, David Allgeyer has served as arbitrator in over 90 commercial and intellectual property disputes. In 2018, he formed Allgeyer Law & ADR, devoted to serving as an arbitrator and mediator. David is a Fellow in the American College of Commercial Arbitrators and included on the Silicon Valley Arbitration and Mediation Center's list of Leading Technology Neutrals. A frequent lecturer and panelist on ADR and intellectual property matters, David's ABA Book, *Arbitrating Patent Cases, a Practical Guide* is available at *shopaba.org and Amazon.com.* His recent Chapter, "Mediating Intellectual Property Cases," is included in the ABA Book, *Mediating Legal Disputes: Effective Techniques to Resolve Cases*.

7. Is there anything else you would like to tell the readers about yourself?

My interests are extensive. For example, I enjoy learning about the science of nutrition, the mathematical formulas of the economic models and the various perspetives of philosophers. While none of these topics appear to be related, the skills, discipline to study, and attention to detail are all assets that carry over from my hobbies into the practice of law.

BE CAREFUL WHAT YOU DON'T ASK FOR: FULFILLING CONDICTIONS PRECEDENT IN MEDIATION-ARBITRATION AGREEMENTS

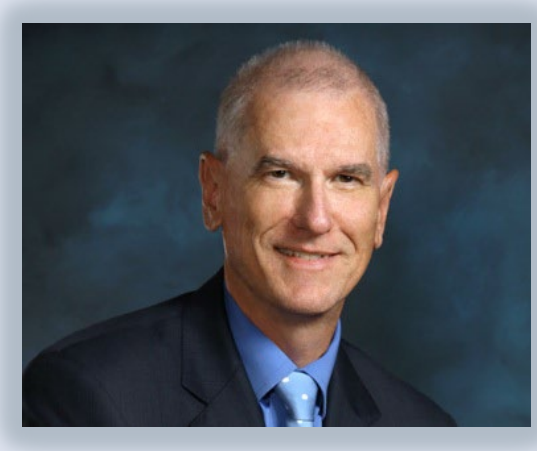
By: David Allgeyer and Steven Gregory

Arbitration clauses that require the parties to mediate before filing an arbitration demand – often called "med-arb clauses" -- have become popular. It is easy to see why. Done right, mediation can get disputes resolved efficiently, help preserve business relationships, and let

everyone get back to business. Many business disputes are caused by misunderstandings and lack of information by decision makers that can be dispelled by a quick mediation. So, it makes sense to require that the parties try mediating before invoking arbitration. Arbitration is sure to be more expensive and time consuming than mediation.

But med-arb clauses can complicate getting a case to arbitration, possibly requiring a trip to court to resolved disputes about the dispute resolution process. That is the sort of time and expense parties try to avoid by agreeing to arbitrate. Worse yet, a party can lose its right to arbitrate a dispute if it ignores the mediation requirement.

So, let's take a look at some recent law involving med-arb clauses. We will then consider ways in which arbitrators can deal with such clauses, ways to avoid some problems these clauses can cause, and finally whether med-arb clauses are worth including in agreements to arbitrate.



Steven Gregory's law practice has included arbitration and mediation since 1995. He has served as arbitrator and mediator in a wide range of securities, consumer, employment, family law and divorce, and commercial disputes. He is a member of the roster of mediators and arbitrators for the Financial Regulatory Authority as well as the Commercial and Consumer Panels for the American Arbitration Association. Mr. Gregory has been appointed to over one hundred arbitration panels, serving as chair in approximately half of those. He has participated as faculty and judge at law school-sponsored law student mediation competitions and has conducted training in the form of webinars for the Alabama Center for Dispute Resolution. He has also served as a court-appointed appellate mediator for the Alabama Supreme Court. He was appointed to the Arbitration and Mediation pools of the Court of Arbitration for Art in The Hague in January 2020.

A Typical Med-Arb Clause

Here is a typical med-arb clause:

> Any dispute . . . shall be resolved by mediation and/or binding arbitration in accordance with the procedures specified in this Section, which shall be the sole and exclusive procedures for the resolution of any such Dispute. The parties will first attempt to resolve such Dispute by mediation. . .. In the event the mediation is not successful, the Dispute shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

Such a clause establishes mediation as a mandatory condition precedent to arbitration. As noted below, this can have significant legal implications and complications.

A Recent Example of a Med-Arb Problem

Burke v. Roberson, No. 01-19-00920-CV (December 17, 2020, Tex. Civ. App.), involved a dispute between the members and managers of a company, UEW, that supplied porta potties to Texas oilfields. Business was off when the oil business took a downturn. Mr. Burke thought his distributions were too low and that other members and managers of the business were cheating him. He demanded arbitration under UEW Agreement's arbitration clause. The clause was pretty simple. It read:

> Except as otherwise provided above by Section 12.1, any controversy which touches on or concerns this Agreement shall be resolved by mediation, and if such mediation is unable to resolve the controversy then exclusively by binding arbitration administered pursuant to American Arbitration Association rules then applicable for commercial disputes.

It isn't clear whether the respondents received Mr. Burke's mediation demands. In any event, mediation never took place.

Mr. Burke then filed an arbitration demand. He said in the demand all conditions precedent had been met and that the respondents "failed and refused" to mediate. It isn't clear whether respondents got notice of the arbitration demand. But we know they did not appear at the arbitration hearing.

So, an arbitration hearing was held without them because, under AAA rules, there are no defaults. The arbitrator said AAA had assured him he had jurisdiction. He then found in favor of Mr. Burke and against the respondents.

Mr. Burke moved in court to confirm the award, and the respondents moved to vacate it. The court vacated the award but didn't say why. Mr. Burke appealed. Even after recognizing that an arbitration award has the "same effect as a judgment of a court of last a resort" and "all reasonable presumptions are indulged in its favor . . .," the Texas Court of Appeals upheld vacation of the judgment.

The Court found that mediation was a condition precedent to arbitration, and it was not met. The Court rejected Mr. Burke's argument that respondents waived that condition by ignoring his demand to mediate. Waiver, it said, cannot be implied by a party's inaction.

Federal Courts of Appeal

Two federal courts of appeal have also found a party cannot ignore its agreement to mediate before demanding arbitration.

In *Kemiron Atlantic, Inc. v. Aguakem Intern., Inc.*, 290 F.3d 1287 (11th Cir. 2002), the Eleventh Circuit affirmed the district court's denial of a motion to compel arbitration in a dispute between a supplier and a purchaser of chemicals. The supplier, alleging that its purchaser had failed to pay for certain shipments of the chemicals, filed suit in federal court. The purchaser-defendant filed a motion to stay the case pending arbitration. But the parties' contract required that any dispute first be submitted to mediation. The proponent of arbitration admitted it had not at any time demanded mediation. The district court denied the motion to stay the case pending arbitration.

A distinguished senior panel of the Eleventh affirmed the district court's holding. It wrote, "[t]he FAA's policy in favor of arbitration does not operate without regard to the wishes of the contracting parties. . . . Here, the parties agreed to conditions precedent before arbitration can take place and, by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort." But, the Court noted, witnesses for both parties admitted they had not sought to arbitrate. Therefore, "neither party met the first condition required to invoke the arbitration clause in the Agreement. In fact, the record reveals that Aguakem still has not demanded any mediation or arbitration. Because neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply." *Id.* at 43.

Faced with similar facts and a similar dispute resolution clause to that in *Kemiron*, the First Circuit affirmed the federal district court's denial of a motion to compel arbitration in *HIM Portland, LLC v. Devito Builders, Inc.,* 317 F.3d 41 (1st Cir. 2003). There a hotel owner sued a construction company which had agreed to perform renovation work on the hotel owner's property. The district court denied a motion to compel arbitration because "the plain language of the contract manifested the parties' clear intent to require mediation as a condition precedent to arbitration. . . . [and] the [district] court found that HIM's failure to request mediation precluded enforcement of the contract's arbitration clause."

The Court explained:

> Under the plain language of the contract, the arbitration provision of the agreement is not triggered until one of the parties requests mediation. *See Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287,1291 (11th Cir. 2002). In *Kemiron*, the Eleventh Circuit faced a similar issue and held: "the parties agreed to conditions

> precedent before arbitration can take place and, by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort." *Id*. at 1291. Further, "[b]ecause neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply." *Id.* Congress did not enact the FAA to "operate without regard to the wishes of the contracting parties" *Mastrobuono*, 514 U.S. at 57, 115 S. Ct. 1212. Where contracting parties condition an arbitration agreement upon the satisfaction of some condition precedent, the failure to satisfy the specified condition will preclude the parties from compelling arbitration and staying proceedings under the FAA. Because neither HIM nor DeVito ever attempted to mediate this dispute, neither party can be compelled to submit to arbitration.

Neither *Kemiron* nor *DeVito Builders* has been questioned by any subsequent decisions, and they remain controlling law in those circuits. Thus, at least in those circuits, where the parties have incorporated a "med-arb" clause into their agreement, the proponent of arbitration must establish that it first demanded mediation when the ADR clause sets up such a demand as a condition precedent to arbitration.

Who Decides?

Another complication that med-arb clauses can cause for a party seeking to arbitrate is deciding who will decide whether a condition precedent has been met. Generally, courts will follow the United Supreme Courts' guidance in *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 86 (2002), that the issue will be for the arbitrator. There the Court noted that "[w]ithout the help of a special arbitration-disfavoring presumption," it could not conclude that the parties intended to have a court interpret and apply an NASD time limit rule.

But deciding who decides the issue can still inject yet another issue the parties may need to go to court to resolve, adding time and expense. That is exactly what parties are typically trying to avoid by agreeing to arbitrate rather than litigate disputes.

How Arbitrators Sort Out Med-Arb Problems

What should an arbitrator do when faced with a situation where mediation is required, but the arbitration demand is filed before there has been mediation?

There are a couple of alternatives. One is for the arbitrator to simply decide he or she has no jurisdiction because a condition precedent has not been met. But this isn't completely satisfying. It requires dismissing the arbitration and requires one party to somehow enforce the required mediation provision and then start another arbitration if the mediation doesn't resolve the case. That all takes extra time and money.

Another alternative is for the arbitrator to order the parties to mediate before scheduling the hearing. One of your authors had a case where that solved the problem. In another case, the parties agreed in writing to forego mediation. That was an active waiver of the mediation condition precedent, again solving the problem. Of course, the situation may get more complicated where one party simply refuses to mediate and uses that to delay resolution of the dispute.

Approaching Mediation and Arbitration

What can we learn from the problems that med-arb clauses can cause and courts' decisions about them?

Mediation is great, but not at the price of foreclosing arbitration. Because requiring mediation without more can cause problems, drafters should be cautious about med-arb clauses. If parties are determined to require mediation before an arbitration demand can be filed, they should put into the clause how mediation should be demanded, how long the parties have to get the mediation done, and that mediation is waived if the mediation is not completed in time. Then

counsel will need to prove they made the demand properly, and the other party failed to timely comply with the mediation requirement.

But that gets complicated. It may be better in many cases to just skip med-arb clauses. The parties can always mediate if they want, even if a party first files an arbitration demand. This has the added benefit of allowing the parties and the mediator to read the demand to know what's in dispute.

THIRD CIRCUIT ALTERS FAA SECTION ONE QUESTION SEQUENCING
TRIAL COURTS MUST DETERMINE CHOICE OF LAW ISSUES FIRST[1]

By: Robert K. Bartkus

Since at least *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764 (3d Cir. 2013), trial judges in the Third Circuit have followed a fairly consistent pattern when faced with a motion by a defendant to enforce an arbitration agreement and compel arbitration: If the complaint contains sufficient information on which to decide the motion under a Fed. R. Civ. P. 12(b)(6) standard, then the court will proceed to decide the motion based on the arbitration agreement and other facts alleged (or documents referenced or attached). Where the allegations do not permit a decision under the existing standard (*i.e.*, "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (simplified)), or if the parties raise facts outside the complaint, then the court may deny the motion or convert the motion to one for summary judgment, following sufficient opportunity for the parties to present facts by affidavit or after discovery. Accordingly, a good number of arbitration motions each year in the NJ District Court are denied subject to a renewed motion after discovery limited to the formation and scope of the arbitration agreement (not the contract as a whole) or, if there is a delegation clause, to facts relevant to whether or not a valid arbitration clause had been formed under traditional principles of the applicable state contract law.

Robert E. Bartkus is of counsel to Anselmi & Carvelli, L.L.P. in New York City and Florham Park, N.J., where he now concentrates his practice on arbitrating commercial and other business disputes. He is co-author, with Hon. William A. Dreier (P.J.A.D.) (ret.), of New Jersey Arbitration Handbook (2021 ed.).

A twist to this procedure was introduced in the context of Section One of the Federal Arbitration Act, 9 U.S.C. 1, and whether the arbitration agreement was exempt from the FAA because the plaintiff was a "transportation worker." In those circumstances, the court may deny the motion, subject to renewal after discovery regarding whether plaintiff was part of a "class of workers engaged in foreign or interstate commerce." This inquiry can be "fact specific" and depend on the nature of the work performed not only by the particular plaintiff but

[1] This article was previously published in the Litigation Section.

also the "class of workers" to which he or she belonged. The inquiry is further complicated by the test in the Third Circuit: "[employees in any transportation industry are exempt who] engage[] in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it." *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 452 (3d Cir. 1953). On the renewed motion, the court would determine if Section One applied and, if so, whether the state law applicable to the arbitration agreement (not the contract as a whole) would require arbitration — as if the FAA did not exist. *See Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004) ("had never been enacted"). The New Jersey Supreme Court recognized a similar procedure recently in *Arafa v. Health Express Corp.*, 243 N.J. 147 (2020), holding that the New Jersey Revised Uniform Arbitration Act, 2A:23B-1, *et. seq*, was the default statute governing any arbitration agreement in New Jersey absent any other mandated law.

Into this puzzle, and the context that whether Section One's exemption applies is a non-delegable threshold inquiry, *New Prime, Inc. v. Oliviera*, 139 S. Ct. 532, 537 (2019), the defendant in *Harper v. Amazon.com Services, Inc.*, No. 19-21735, 2020 U.S. Dist. LEXIS 133238 (D.N.J. July 28, 2020), *rev'd*, __ F.4th __, 2021 U.S. App. LEXIS 26959 (3d Cir. Sept. 8, 2021), filed a motion to compel arbitration of a Wage and Hour claim by a "flex" delivery driver for overtime and related matters. (The existence of an arbitration clause with a delegation requirement was not in dispute.) Consistent with the practice noted above, including *Singh v. Uber Techs., Inc.*, 939 F.3d 210 (3d Cir. 2019) (remanding for discovery), the district court denied the motion, without prejudice, subject to renewal after limited discovery regarding the applicability of the Section One exemption as to the Plaintiff.

On appeal, Amazon argued, among other things, that discover was not required, and that the district court's initial inquiry should have been what law applied to the arbitration agreement *assuming* that the Section One exemption applied to the plaintiff. The general contract choice of law section was for Washington State; the arbitration clause said that the FAA or other federal law applied to the arbitration clause; and New Jersey's choice of law rules (to be applied by a court in New Jersey) required application of the New Jersey Revised Uniform Arbitration Act as the default. Since Washington State also had adopted the Revised Uniform Arbitration model law, there should be no actual conflict, so the matter would be fairly simple— i.e., it was moot unless there were some odd precedential court decisions on a relevant point (*see* below). Although plaintiff argued that the FAA precluded the application of state law—contrary to *Palcko* — Amazon did not treat that as a serious argument. No one (as best as I can recall) asked whether the choice of law question was an issue to be decided by the arbitrator pursuant to the arbitration's delegation clause — a common sense position, I suggest, since the existence of a valid contract was not in issue and the non-delegable threshold issue of Section One's effect was moot so long as both New Jersey and Washington State law would enforce the arbitration clause. (Plaintiff raised the issue of whether the clause properly waived the right to a court determination, as required in New Jersey by *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014), but there *was* a waiver phrase, and it is hard to see the *Atalese* argument as a serious one.)

The Third Circuit, *Harper v. Amazon.com Servs.*, __F.4th __, No. 20-2614, 2021 U.S. App. LEXIS 26959 (3d Cir. Sep. 8, 2021), reversed in a split decision. The majority opinion held that a proper respect for the "balance of authority between the several States and the United States [in a diversity case]" required a decision on state law "claims, including state arbitrability," even where the FAA "may apply." Thus, the determination of arbitrability under state law, including a conflict of law analysis, "is a threshold inquiry, ensuring prompt review of state law claims, particularly before turning to sort through a comparatively complex federal question." As the majority noted, "a court can only determine *whether* state law provides grounds for arbitration by deciding *what* state law applies using the rules of the forum state." Apparently seeing a conflict among the circuits as to whether the choice of FAA is severable, *see* 2021 U.S. App. LEXIS at *11 n.6, the majority saw a legitimate issue as to whether the parties intended that there would be no arbitration if the FAA did not apply. Hence the state law issues should be decided by the district court in the first instance. The dissent argued that this was a new direction, contrary to the 2004 opinion in *Palcko* on which parties have a right to rely.

On remand, the issue may not be as easy as one might assume. Apparently, it is not only a matter of deciding between Washington and New Jersey, both of which have adopted the Revised Uniform Arbitration model law but may have

different case law applicable to the issue. In New Jersey, relying on *Palcko*, the Supreme Court has held that if the FAA does not apply it is as if the FAA did not exist, so that state law default law applies. As noted above, the parties' contract had a Washington choice of law clause, but it added "except [as to the arbitration clause]," which designated the FAA or other federal law. A choice of law analysis in the *Harper* case might decide that New Jersey's default act would apply since the contract was made and performed in New Jersey, and of course the New Jersey federal court must apply New Jersey's choice of law rules. Thus, the District Court might well follow *Palcko* and *Arafa* and enforce arbitration under the NJRUAA. The Ninth Circuit, however, in a case brought in Washington State by a Washington employee, Rittmann *v. Amazon.com, Inc.*, 971 F.3d 904, 920 (9th Cir. 2020), interpreted the same clause under Washington law as not allowing severance of the inapplicable FAA, but applying the no-Washington law clause to mean *no law* applied. This might not have fared well in a choice of law class in law school—how can *no* law apply?—especially if the result would be to annul the parties' primary intent to arbitrate their disputes— a principle honored by the New Jersey Supreme Court recently in *Flanzman v. Jenny Craig, Inc.*, 244 N.J. 119, 141 (2020), and highlighted in the majority's final paragraph: "After all, the parties' primary agreement is to arbitrate their disputes, so courts should explore both contractual routes to effectuate that agreement …."

Harper is interesting from a pedagogical point of view also. A "concurrence" by the author of the majority opinion, a unique if not unprecedented step, argued that it was time to reevaluate the 1925 FAA, which the author described as (my words) woefully outdated, twisted from its original purpose, and past its prime. Do not hold your breath for Congress to take up this suggestion. In the meantime, we await the district court's briefing schedule to flesh out the knotty issues now left at its doorstep.

PRACTICE TIPS FOR "BUSINESS DIVORCE" ARBITRATIONS FOR SMALL BUSINESSES AND CLOSELY HELD COMPANIES

By: Aric J. Garza and Sylvia Mayer

As neutrals, we frequently arbitrate and mediate disputes between owners of small businesses and closely held companies as they separate their interests through a "business divorce." Often, these disputes are both emotionally charged and cost sensitive. Below are some practical suggestions to streamline business divorce arbitrations and balance the parties needs for due process, expediency and cost containment.

Pre-Dispute Drafting Tips

Many small businesses and closely held companies are created by friends and family (or both) who do not contemplate the potential for future disputes. However, even minor disputes may create chaos for the company's ongoing operations. Failing to address dispute resolution mechanisms in the governing documents may put the future viability of the company in jeopardy.

Aric J. Garza is an attorney, mediator and arbitrator. He is a panelist with the American Arbitration Association (Commercial, Consumer and Employment Panels). He handles numerous arbitrations, mediations and other legal proceedings via Zoom. During his leisure time, Aric (otherwise known as "The Blues Lawyer") plays and sings live blues in San Antonio (@theblueslawyer).

Drafters of the governing documents should carefully construct a dispute resolution clause tailored to the unique needs of the business and the principals. Dispute resolution clauses sometimes include a stair-step approach whereby the parties begin with an informal settlement process, then if not resolved, escalate to mediation, and then if still not resolved, escalate to arbitration. Particularly if parties wish to start with an informal process, it should be provided for in the agreement. While an arbitrator may encourage parties to consider mediation, absent clear contractual provisions, an arbitrator cannot require the parties to engage in informal settlement talks prior to spending time and money on arbitration.

Another area for consideration when drafting dispute resolution provisions that include arbitrator is the scope of authority granted an arbitrator. In addition to rendering a final award, unless the governing documents grant exclusive powers to the trial court, an arbitrator may have the authority to grant emergency relief (such as injunctions, specific performance and temporary restraining orders). Please note, however, that typically trial courts are charged with enforcement of any such emergency orders.

Sylvia Mayer is an arbitrator, mediator and attorney with nearly 30 years of legal experience. She has been inducted into the National Academy of Distinguished Neutrals for both mediation and arbitration and serves as a neutral on panels for, among others, the American Arbitration Association (AAA), Internal Institute for Conflict Prevention and Resolution (CPR), American Health Law Association (AHLA), and the Texas Department of Insurance. She offers online, hybrid and in-person arbitrations and mediations.

If the parties choose to utilize arbitration, then the governing documents should include an arbitration clause addressing: (a) location of the arbitration, (b) number of arbitrators (one versus panel of three), (c) selection of the arbitrator(s), (d) whether the arbitration will be administered by a third party administrator (i.e., AAA or JAMS), (e) scope of discovery (informal exchange, use of FRCP Rule 26 disclosures, limited discovery, etc.), (f) desk arbitration versus final evidentiary hearing, and (g) form of award (concise reasoned award, findings of fact and conclusions of law, etc.).

In a nutshell, if the parties' primary focus is cost containment and expeditious resolution, then specifying a sole arbitrator, limiting discovery to an informal exchange and disclosures, forgoing an evidentiary hearing in favor of a desk arbitration, and providing for a concise reasoned award are effective tools to achieve these goals.

There are several helpful tools available online to assist with drafting dispute resolution provisions. Two commonly used resources are offered by the AAA and JAMS: https://www.adr.org/Clauses and https://www.jamsadr.com/clauses.

While these tools are a fantastic resource, make sure to tailor the clause to the needs of each situation.

Selection of the Arbitrator(s)

demand is submitted and the fee paid, the case administrator will provide the parties with a list of neutrals along with their resumes or bios. In a non-administered arbitration (or private arbitration), the parties will select an arbitrator (or arbitrators) using the methods provided in their dispute resolution clause.

PROGRAMS SUBCOMMITTEE CO-CHAIR, USHER WINSLETT

Co-chairs of the Programs Subcommittee, Usher Winslett (www.usherwinslett.com) and Richard Faulkner, would welcome your ideas for Arbitration focused programs, which are usually roundtables (no CLE) or webinars (with CLE) running an hour to an hour and a half. Any topic relevant to arbitration practitioners would be appropriate – e.g., recent court decisions, practice development, ethics issues, etc.

We are currently working on an event examining when and how ADR is best used in intellectual property disputes, tentatively scheduled as a hybrid event on April 6, 2022. The AAA has generously offered to host the live portion in its midtown New York Zoom Room. The plan is to begin the hourlong program at 5 pm ET and follow it with a networking reception for an hour or so. Usher will moderate a panel that will include Oliver Armas (Global Head of the International Arbitration practice group at Hogan Lovells), Jeff Zaino (Vice President - Commercial Division at American Arbitration Association), and one or two more leaders in the field. Please stay tuned for further information.

In the meantime, please contact Usher (uwinslett@wsmblaw.com) with any suggestions for future programs.

Regardless of the process for selecting the arbitrator(s), parties should consider whether the arbitrator has experience relevant to the dispute (e.g., corporate governance, limited liability companies, partnerships, small businesses, contract disputes, etc.). In addition, to help ensure that a fair and impartial arbitrator is selected, the parties should provide detailed information to the arbitrator to facilitate their conflicts review and disclosures. Among other things, each party should submit a list of parties, entities, counsel, consultants and individuals involved in the dispute, as well as potential witnesses.

Maximize Preliminary Hearing and Scheduling Conference

After the arbitrator have been selected, a preliminary hearing and scheduling conference will be held. The conference is an ideal opportunity for both the parties and the arbitrator to tailor the arbitration to serve the needs of the particular dispute, including to limit delays and manage costs. Importantly, because of the impact of internal disputes on the continuation of small businesses and closely held businesses, particular attention should be paid to expediting resolution.

In cases that are administered by a third party, the administrator may provide a template "Scheduling Order" to the parties. In both administered and private arbitrations, the arbitrator may provide the parties with guidance prior to the conference as well. Such guidance may be in the form of a list of questions or topics to be discussed or may include a template or form used by that arbitrator. Parties should carefully review any guidance or forms of order provided as they prepare for the conference.

While the process should be tailored to each dispute, the following suggestions may assist the parties and the arbitrator in streamlining the dispute resolution:

Confer in Advance

Prior to the scheduling conference, parties should be encouraged or required to meet and confer about matters that will help streamline resolution of the dispute, including applicable arbitration act, procedural rules, and governing substantive law; potential dates for the final evidentiary or election of a desk arbitration in lieu of an evidentiary hearing; the scope and deadlines for discovery; and clarification of the precise issues to be adjudicated.

Format of Arbitration

To save on the cost of travel and overhead, the parties may elect to conduct the arbitration hearing via video conference, rather than physically in-person. Depending on the circumstances, alternatively, the arbitrator may suggest or require the hearing be held via video conference.

Limit Discovery to an Exchange of Information

By design, arbitration is not litigation. What is referred to as "discovery" in arbitration, is actually a more informal information exchange process than is used in traditional litigation. If allowed at all in a given case, most arbitrators impose caps on the number of documents requests and depositions, prohibit interrogatories, and limit requests for admissions to the authenticity and existence (or lack thereof) of third-party documents. On the other hand, in some cases, parties request and/or arbitrators suggest incorporating disclosure requirements consistent with FRCP Rule 26. It is worth noting, however, that the authority of the arbitrator(s) to limit discovery is hindered if the arbitration clause expressly provides for full discovery consistent with a state or federal court trial practice. In such cases, the arbitrator must abide by the terms of the agreement absent an agreement between the parties to waive this requirement.

Limit Motion Practice

As noted above, arbitration is not litigation. Motion practice in arbitration should be minimal, which should reduce both costs and delays. Dispositive motions are rarely granted, and few other motions are warranted in an arbitration given the informal exchange of information and expedited timeframe. Nonetheless, this issue should be discussed at the scheduling conference – particularly, if one or both parties believe their case is unique and certain motions may be warranted. While certainly every case is unique and the schedule should be tailored to each case, that rarely justifies an extensive motion practice.

Streamline Final Evidentiary Hearing

If the parties have not elected to utilize a desk arbitration and a final evidentiary hearing will be held, then the scheduling conference can be used as a means to structure the hearing, including the use of stipulated facts, joint exhibits, submission of expert reports, and use of fact witness statements in lieu of giving live direct testimony.

Conclusion: Arbitration Expressed in a Mathematical Equation

For both parties and arbitrators, when involved in "business divorces" of small businesses and closely held companies, the arbitration process can be reduced to this:

Arbitration ≠ Litigation

Information Exchange ≠ Discovery

Time + Delay = Costs and Expenses

ANNOUNCEMENTS:

Next Arbitration Committee Meeting:

To be held during the ABA DR Spring Conference April 27-30, 2022. Exact time to be determined. Stay tuned for details.

Summer 2022 E-Newsletter

The ArbCom is seeking submissions for the Summer 2022 E-newsletter. We are looking for articles that are approximately 1,500 words. The deadline for submission is **June 15, 2022**. Please contact Linda A. Michler, Chair of our Publications Sub-committee at Linda.Michler@michlerlaw.com with your ideas for an article. When you send your information to Linda, please copy Elizabeth K. Lilienthal who is assisting Linda with the E-newsletter. Elizabeth's email is eklili1112@yahoo.com.