ARBITRATION: WHAT'S A TRIAL LAWYER TO DO?

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I. INTRODUCTION

Ironically, although arbitration was intended to keep disputes out of court, collateral lawsuits about arbitration remain an active area of litigation in American courts. [1] This past term, the United States Supreme Court decided several arbitration cases, which included: *Vaden v. Discover Bank*,[2] *Arthur Anderson LLP v. Carlisle*, [3] and *14 Penn Plaza LLC v. Pyett*.[4] The case law overwhelmingly demonstrates a judicial deference to arbitration. More and more types of cases seem to become arbitrable. That is, subject to binding arbitration at the expense of a jury trial each day and arbitral awards seem to become more and more insulated from judicial scrutiny each day. [5] Perhaps one of the best examples of this limited judicial review of arbitral awards is the 2008 United States Supreme Court case *Hall Street v. Mattel*,[6] in which the Court held that the exclusive grounds for vacating or modifying arbitral awards are those stated by the Federal Arbitration Act (FAA). Thus, overruling common-law grounds for judicial review of arbitral awards under the FAA.

At the same time, the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) report increasing arbitration filings in 2008. The AAA arbitration case filings in 2008 rose to 138,447, up 8.4 percent from a year earlier and its international cases rose 13 percent.[7] Similarly, the ICC shows that the court's workload has been growing during the recent years, with the number of cases registered jumping to 663 last year from 599 in 2007. [8] In addition, 407 awards were rendered in 2008, compared with 349 in 2007.[9]

On the other hand, a general sense seems to be emerging, among some at least, that the arbitration tidal wave may be going too far, and a legislative movement at the Federal level has emerged that promotes the so-called Arbitration Fairness Act of 2009[10], which, if passed, would limit the use of binding arbitration in consumer, employment, franchise, and civil rights disputes. A similar bill was introduced at the 81st Regular Session of the Texas Legislature (S.B. 222). [11] However, the bill did not make it out of committee.[12]

The summer of 2009 has seen no shortage of changes in the area of consumer arbitration. In a surprising move, the National Arbitration Forum (NAF) —the country's largest administrator of credit card and consumer collections arbitrations— has agreed on to step aside from the credit card and consumer debt arbitration business. [13] This agreement came only a few days after Minnesota's Attorney General sued NAF on July14 alleging consumer, deceptive trade practices, and false advertisement.[14] Following a U.S. Congressional Hearing[15] on consumer arbitration held on July 22, the American Arbitration Association (AAA) said that it will not

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[1] *See* Donald Philbin, *Trends in Litigating Arbitration: Using Motions to Compel Arbitration and Motions to Vacate Arbitration Awards*, 76 DEF. COUNS. J. 338 (2009) *available at* http://adrtoolbox.com/docs/Trends_in_Litigating_Arbitration.pdf; *see also* Litigating Alternative Dispute Resolution in the Fifth Circuit, 41 TEX. TECH L. REV. 739 (2009) *available at* http://adrtoolbox.com/docs/Litigating_in_the_Fifth_Circuit_2009.pdf (discussing noteworthy arbitration cases decided by the Fifth Circuit Court of Appeals).

[2] Vaden v. Discover Bank, 129 S.Ct. 1262 (2009) (federal court may look through a petition to compel arbitration to determine whether it has jurisdiction).

[3] Arthur Anderson LLP v. Carlisle, 129 S.Ct. 1896 (2009) (third party to arbitration agreement could invoke stay provision if state contract law allowed him to enforce agreement).

[4] 14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456 (2009) (collective bargaining agreement that clearly and unmistakably required union members to arbitrate ADEA claims was enforceable as a matter of federal law).

[5] *See* The Honorable Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen In America?* 40 ST. MARY'S L.J. 795, 869-70 (2009).

[6] Hall Street Associates, L.L.C. v. Mattel, Inc., 128 S.Ct. 1396, 1405 (2008).

[7] Deborah L. Cohen and Julie Kay, *Where the Work Is*, ABA Magazine, August 2009, *available at* http://www.abajournal.com/magazine/where_the_work_is/.

[8] *New ICC Arbitration Court Members Named*, June 9, 2009, *available at* http://www.iccwbo.org/iccdafdg/index.html.

[9] *Id.*

[10] H.R. 1020; S. 931. In addition to the Arbitration Fairness Act, several alternative dispute resolution bills are currently pending in the U.S. Congress, *see* Victoria VanBuren, *U.S. Dispute Resolution Update*, June 23, 2009, *available at* http://www.karlbayer.com/blog/?p=2693.

[11] *See* Victoria VanBuren, *Texas Legislature Update: Alternative Dispute Resolution Bills*, June 6, 2009, *available at* http://www.karlbayer.com/blog/?p=2227.

[12] *Id.*

[13] Victoria VanBuren, *National Arbitration Forum Settles with Minnesota's Attorney General*, July 20, 2009, *available at* http://www.karlbayer.com/blog/?p=3682.

[14] The Complaint and press releases can be found at www.karlbayer.com/blog/?p=3448.

[15] Find the prepared testimony by witnesses at http://www.karlbayer.com/blog/?p=3797 and the videos of the hearing at http://www.karlbayer.com/blog/?p=4954.

initiate arbitrations to collect from consumers until new guidelines are established.[16] Soon after, JPMorgan Chase[17]and Bank of America[18] announced that they will no longer require mandatory arbitration on customers' credit card disputes. For recent developments in the area of dispute resolution, we invite you to read our legal blog ***Disputing*** at http://www.karlbayer.com/blog.

With all of that said, please accept as the context for this paper a judicial climate in which a case is likely arbitrable if an arbitration clause is anywhere near the dispute, including non-parties to the arbitration agreement and in which the arbitrator's final decision, that is the arbitral award, will likely be un-appealable. Once you accept this version of the world, the next logical question becomes: what now? While numerous reported cases explain parties' potential rights and applicable standards of review both before and after the arbitration proceeding, we get much more limited guidance from the courts with respect to how the arbitration itself is conducted, and what to do if we do not think it's been conducted appropriately.

This paper is not an exhaustive review on the topic of arbitration, but instead seeks to simply expose Texas litigators to some issues at play. Accordingly, Part II outlines the issue of arbitrability, that is, whether or not a party to a dispute can force the dispute into binding arbitration. Part III discusses recent case law about whether nonsignatories are bound by an arbitration agreement. Part IV examines discovery issues in arbitration proceedings. The authors would like to note that this section is an update on a paper presented on that topic. Next, Part V addresses the enforceability of arbitral awards; that is, how one can either reduce an arbitration award to judgment or seek to have an arbitral award vacated. Part VI considers noteworthy cases in employment arbitration. Finally, Part VII concludes the paper.

[16] Find the AAA press release at http://www.karlbayer.com/blog/?p=3768.

[17] Ashby Jones, *The Revolution Rolls On: JPMorgan Chase Suspends Arbitration Activity*, July 24, 2009, The WALL STREET JOURNAL'S LAW BLOG, *available at* http://blogs.wsj.com/law/2009/07/24/the-revolution-rolls-on-jpmorgan-chase-suspends-arbitration-activity/.

[18] Dionne Searcey, *Bank of America Says 'No Mas' To Arbitration*, THE WALL STREET JOURNAL'S LAW BLOG, August 13, 2009, *available at* http://blogs.wsj.com/law/2009/08/13/bank-of-america-says-no-mas-to-arbitration/?mod=djemWEB&reflink=djemWEB&reflink=djemWLB.

II. ARBITRABILITY: MOTIONS TO COMPEL ARBITRATION

Arbitrability is a term used to describe whether or not a dispute can be forced from litigation into binding, private, arbitration. It comes up chiefly in appellate opinions on mandamus or interlocutory appeal of trial court orders refusing to compel arbitration, since a trial court order compelling arbitration is unappealable.[19] In the most common scenario, a party sues another party in a traditional court setting, and the Defendant asks that trial court to either abate or dismiss the case in favor of an order compelling the parties to arbitrate their dispute.

These orders to compel arbitration are most commonly requested pursuant to either the Federal Arbitration Act (FAA) or the Texas Arbitration Act (TAA).[20] Texas also has an International Arbitration Act (TIAA), which contains some interesting and potentially useful features absent from the TAA or FAA, but international arbitration is beyond the scope of this paper. [21] The FAA allows parties to initiate independent, distinct proceedings in a federal district court solely for the purpose of asking that court to compel arbitration against a party resisting arbitration.[22] The TAA contains a similar provision. [23] The TAA also allows parties to initiate independent proceedings to stay arbitrations "commenced or threatened" so that a court can decide the question of arbitrability. [24]

A. FAA or TAA: Which One Applies?

As a threshold matter, a party seeking to compel arbitration should consider whether or not the FAA or the TAA applies to his, her or its case. The first place to look, as in any arbitration question, is the arbitration clause itself. Parties are free to specify which statute should apply in an arbitration clause. However, if the arbitration clause is silent as to which statute applies, the clause can be said to potentially invoke both federal and state law. [25]In order to determine if the FAA can apply in a state-court proceeding, Texas courts look at the relationship

[19] *See Perry Homes v.Cull,* 258 S.W.3d 580, 586 (Texas 2008).

[20] 9 U.S.C. §§1-16; TEX. CIV. PRAC. & REM. CODE §§ 171.001-098.

[21] *See* TEX. CIV. PRAC. & REM. CODE §§ 172.001-215.

[22] 9 U.S.C. §4.

[23] *See* TEX. CIV. PRAC. & REM. CODE §171.024.

[24] TEX. CIV. PRAC. & REM. CODE §171.023.

[25] *See* In re D. Wilson Constr. Co., 196 S.W.3d 774, 779 (Tex. 2006).

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