What Happens if the Arbitral Forum or Arbitrator Is Unavailable?

Judge Abraham J. Gafni (Ret.)
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Parties entering into a business relationship are often advised that a fully formulated arbitration agreement should be carefully prepared so that if a dispute arises, the pathway to resolution is fixed and clear. Among suggested provisions is one identifying the arbitrator(s) or arbitral forum that will administer and, ultimately, enter a final award.

What happens, however, when the designated arbitrator or forum cannot or will not fulfill that obligation? Are the courts always empowered to designate a substitute arbitrator or forum or are there restrictions on their ability in this regard?

The answer to this question is not clear as there is conflicting case law among the federal circuits, including the U.S. Courts of Appeal for the Third Circuit and our neighboring Second Circuit.

A very recent case from the Second Circuit, *Moss v. First Premier Bank* (decided Aug. 29), reflects this conflict. In *Moss*, the plaintiff had filed RICO claims against banks alleging that they had facilitated illegal high-interest payday loans. The banks moved to compel arbitration based upon the agreements plaintiff had signed in her loan applications requiring that all disputes be resolved by and under the procedures of the National Arbitration Forum (NAF). Ultimately, however, the NAF was unable to accept the dispute pursuant to a consent judgment barring it from consumer arbitrations. Consequently, the plaintiff returned to the district court requesting that it vacate the order compelling arbitration as the NAF had declined to accept the case. The district

court determined that the arbitration agreements "reflected the parties' intent to arbitrate exclusively before the NAF." Accordingly, a substitute arbitrator might not be appointed.

In agreeing, the appellate court emphasized that as arbitration is a matter of contract, its terms, including those specifying the identity of the arbitrator or forum, must be enforced. Where the parties have agreed to arbitrate only before a particular designated arbitrator, arbitration before another cannot be compelled.

It noted that in this case the agreements contained frequent references to the NAF relating to filing, fees, and conduct of the arbitration. In addition, there is no provision for the appointment of a substitute. It concluded, therefore, based upon a prior Second Circuit holding, that, "In view of this mandatory language, the pervasive - references to the NAF in the agreement, and the absence of any indication that the parties would assent to arbitration before a substitute forum if NAF becomes unavailable, … the parties agreed to arbitrate only before the NAF."

But, argued the banks, what about Section 5 of the Federal Arbitration Act (FAA), which provides that courts "shall" appoint a substitute in the event of a "lapse" in the naming of an arbitrator or a subsequent vacancy. The court rejected this argument stating that such lapses relate only to naming an arbitrator, filling a vacancy or some other mechanical breakdown. Here there was no such lapse or breakdown as the matter was referred to the intended arbitrator, but was refused. In such circumstances, "Where the forum is exclusive, the district court may not use [Section] 5 to circumvent the parties' designation of an exclusive arbitral forum."

The court acknowledged, however, that there was a difference of opinion among the circuits. It cited two cases, *Flagg v. First Premier Bank*, (11th Cir. Feb. 23), and *Ranzy v. Tijerina*, 393 Fed. Appx. 174 (5th Cir 2010), which were consistent with its holding. They reflected that arbitration will be precluded if the choice of the arbitral forum or arbitrator is an integral or central part of the agreement to arbitrate. The instant holding in Moss was based upon a determination that the selection of the NAF as the arbitration forum was such an integral part.

Two other circuits, however, in *Green v. U.S. Cash Advance,* 724 F. 3rd 787 (7th Cir. 2013) and *Khan v. Dell,* 669 F. 3rd 350 (3rd Cir 2012) disagreed, holding that the unavailability of the NAF did, in fact constitute a "lapse" within the meaning of Section 5.

In *Green*, the court essentially rejected the analysis under which courts would determine whether the arbitrator selection provision was an integral or central part of the agreement. Rather, in its view, the focus should be on the parties' evidenced desire to have the matter resolved through arbitration. In such circumstances, the courts should have the competence to supply the missing details in a manner no different from those circumstances where the parties' agreement is limited to a simple statement that any dispute should be resolved through arbitration.

In *Khan*, the Third Circuit, highlighted several points of ambiguity in the contract language including that all disputes "Shall Be Resolved Exclusively and Finally by

Binding Arbitration Administered by the National Arbitration Forum." The court found that it was unclear whether the word "Exclusively" modified "Binding Arbitration," "The National Arbitration Forum" or both.

That conflicting interpretations of this contract language had been adopted by various courts confirmed this ambiguity for the Third Circuit. Accordingly, it concluded that the "liberal federal policy in favor of arbitration" warrants resolution of the ambiguity in favor of arbitration. It further held that the NAF's unavailability was, in fact, a "mechanical breakdown in the arbitrator selection process," which would constitute a "lapse" and empower the courts to select a substitute arbitrator under Section 5 of the FAA.

But, of course, attorneys drafting an arbitration agreement should consider not only these conflicting interpretations of the FAA, but also whether the arbitration may be subject to a state arbitration statute rather than the FAA.

For example, attention might be given to the court appointment of arbitrators under Pennsylvania's Arbitration Act at 42 PS Section 7305 which contains language that differs from and is more specific than Section 5 of the FAA. It states that a court has authority to act if "a prescribed method fails or for any reason cannot be followed." It also refers to "when an appointed arbitrator… is unable to act." This language would appear to compel an understanding that in circumstances similar to those in the NAF cases, the court should have authority to appoint a substitute arbitrator because NAF was, in fact, "unable to act" and the prescribed method had failed for a particular "reason," i.e., the consent judgment following the prosecution of the matter by the Minnesota Attorney General.

In summary, then, parties, quite properly, should include sufficient procedural detail in their arbitration agreement so that there is limited opportunity for a party objecting to the arbitral forum to interpose roadblocks that would undermine the attempt to provide a fair, expeditious and economical dispute resolution procedure. These details might include, in addition to the selection of the arbitrator or arbitration forum, such matters as timing of the arbitration-by when must it commence and by when must it be completed, what discovery might be required and by when must it be produced, are certain witnesses required to appear in person, and, how quickly must the arbitrator render a decision.

Often, however, when the time for arbitration arrives, some of these requirements, as in the NAF case, may no longer be attainable. Timing of the hearing or decision may not be possible because of conflicting schedules, illness may prevent timely personal appearances and parameters for discovery may be unrealistic in light of the material to be produced. Will these obstacles be deemed of sufficient significance that they undermine and eliminate the requirement of arbitration?

Obviously, no agreement can provide for all of the circumstances that may arise

in the future with respect to an as yet unknown dispute. What the NAF cases reflect, however, is that in drafting these agreements, careful attention should be given not only to which conditions are critical to the agreement but also to alternative procedures that should be included if initial expectations may not be satisfied. •

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