Six Arbitration Agreements – And No Arbitration

Judge Abraham J. Gafni (Ret.)
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That federal policy favors arbitration agreements is well-recognized. Indeed, the Federal Arbitration Act (FAA) specifically provides that, "a written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy arising thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" Accordingly, all doubts must be resolved in favor of arbitration.

Arbitration provisions are valid, of course, only if they reflect the parties' intent. What happens, however, if the parties clearly intended to arbitrate any disputes arising out of their relationship, but thereafter entered into a multitude of agreements which contained conflicting arbitration provisions? Should such differing provisions result in a finding that there was no final binding agreement between the parties regarding whether and how the arbitration should be conducted?

That was the issue considered by a divided court in the case of *Ragab v. Howard,* No. 15-1444 (U.S.C.A., 10th Cir., 11/21/16).

Sami Ragab had entered into six separate contracts with the defendants which set forth their business relationship. These included agreements relating to consulting; membership interest purchase; operating; assignment of limited liability company - interest; employment and noncircumvention.

The agreements contained conflicting arbitration provisions. Examples of these conflicts included such factors as:

• Which rules will govern? The agreements refer variously to Colorado's Uniform Arbitration Act, the Rules of the Colorado Court and the American Arbitration Association (AAA) Commercial Arbitration Rules.

• How will the arbitrators be selected? Some provisions set out that the parties or, in the event of disagreement, the court will select the arbitrators; others direct arbitrator selection by the AAA.

• What prior notice is required to arbitrate? The agreements differ as to whether 10 days or 30 days is required.

• Who pays attorney fees and costs? The agreements differ as to whether each party is to pay its own costs or fees, or fees and costs may be awarded to the prevailing party.

Plaintiff Ragab sued defendants claiming misrepresentation for violation of several consumer credit repair statutes. These claims fell within the scope of all six agreements. On this basis, the defendants moved to compel arbitration. The district court denied this motion, however, "concluding that there was no actual agreement to arbitrate as there was no meeting of the minds as to how claims that implicated the numerous agreements would be arbitrated."

The issue facing the three-judge appellate court, therefore, was whether parties can be compelled to arbitrate when they have adopted a series of conflicting arbitration provisions. This issue had not yet been addressed in Colorado, but had been - considered in other jurisdictions.

Majority Position

The two-judge majority, relying on cases from other jurisdictions, and, in particular, *NAACP of Camden County East v. Foulke Management,* 24 A. 3rd 777, (N.J.Super Ct. App. Div. 2011), affirmed the district court. It concluded that the case before it was indistinguishable from the NAACP in which "the court found that, 'the - arbitration provisions ... were too plagued with confusing terms and inconsistencies to put a reasonable consumer on fair notice of their intended meaning'".

The majority dismissed the argument that NAACP was distinguishable in that it involved an elderly woman who was not well-educated. It concluded that even if the case had involved an individual versed in arbitration clauses, "the conflicting terms would have prevented her from understanding 'what the exact terms and conditions of that arbitration process would be.'"

It similarly rejected defendants' reliance on cases where courts had ordered arbitration even though the arbitration provisions were conflicting. It noted that in those cases, the agreements themselves indicated which of the arbitration provisions would supersede the others. In this case, however, "there is no language in the six agreements that suggests one contract overrides the others, and we cannot arbitrarily pick one to enforce because doing so could violate the other five."

Finally, the majority did recognize that courts have compelled arbitration where there is but a single provision requiring arbitration and no other arbitration-related terms are set out. It noted, however, that in such circumstances, statutes or courts could fill in the missing procedures. "But such a scenario is not relevant to this case, which involves

multiple, specific, conflicting arbitration provisions, and not one general or vague arbitration clause."

In short, it decided that there was no meeting of the minds that would support the formation of an agreement to arbitrate under Colorado law.

Dissent

The dissent recognized, of course, that the parties' intention to arbitrate was crucial. It found most convincing in this regard that the plaintiff who was now seeking to avoid arbitration had earlier instructed his own counsel to draft three of the arbitration agreements. This demonstrated with the greatest clarity that these parties to a commercial transaction fully intended to arbitrate all disputes.

It also acknowledged that the six agreements did differ as to how the arbitration should proceed. In the opinion of the dissent, however, these conflicting arbitration provisions should not have been deemed "essential terms" for the purpose of forming an arbitration agreement. Rather, they should have been considered as "nonessential terms" as this would allow the obvious intent of the parties to be effectuated.

It suggested two "easy workarounds" that would be consistent with the parties' intent to arbitrate:

• The plaintiff would be accorded the right to initiate arbitration under the terms of any one of the six agreements that he preferred, as all of the plaintiff's claims fall within the scope of all six agreements.

• The agreements should be considered in the same light as arbitration clauses that set forth no procedural details. These are regularly enforced because both the FAA and state statutory law provide all of the procedures whereby the terms under which the arbitration will be conducted can be determined. These statutory provisions include such items as arbitrator appointment, how arbitrators may determine procedural issues, discovery and attorney fees.

Either of these two approaches, the dissent suggests, would better reflect the intent of the parties than would "eradicating all six arbitration agreements root and branch and allowing the plaintiff to escape the consequences of a choice he once so clearly preferred but now simply regrets."

The dissent also contends that the "extra clarity" that might be required under New Jersey law in consumer cases, which often involve contracts of adhesion, should not apply in Colorado and other states where, as here, what is involved is a commercial contract actively negotiated by both sides to the transaction.

Thus, the dissent acknowledged that there may be circumstances that render an - arbitration provision void for lack of a meeting of the minds as to intent to arbitrate. Here, however, it would have found that plaintiff should not be permitted to walk away from six arbitration clauses, three of which he drafted with the assistance of counsel.

Conclusion

Which of the approaches reflected in the differing opinions of the judges of the U.S. Court of Appeals for the Tenth Circuit will eventually predominate nationally is, of course, not clear.

What should be apparent, however, is that in preparing and reviewing multiple business agreements, counsel should consider whether they may become interconnected through common claims and joint litigation. If that possibility exists, further attention should be given to how multiple arbitration clauses setting forth how disputes are to be resolved may be accommodated.

In such circumstances, great care must be taken to assure that the arbitration provisions:

• Are identical and consistent; or,

• Provide a procedure setting forth how the arbitration format will ultimately be determined; or,

• Identify which of the various arbitration provisions supersedes the others if more than one is implicated. •

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