Avoiding Delay in Bifurcated Arbitration

Judge Abraham J. Gafni (Ret.)
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Bifurcation of a trial may be ordered by a court or requested by the litigating parties. Often, the first of the two hearings will address liability and the second, damages.

Some of the usual benefits of bifurcation are apparent. The initial hearing on liability alone will generally be shorter, involve fewer pretrial motions and be less costly. A finding of no liability should conclude all other issues. In addition, a decision on liability may suggest to both parties the basis upon which a final settlement may be reached.

When arbitration is involved, however, parties who agree on bifurcation anticipating some of the benefits noted above may suddenly find that it is no longer less expensive, speedier and relatively uncomplicated. This unexpected circumstance may result if a party unhappy with the arbitrator's finding on liability can delay the process through a motion to vacate that interim decision.

An example of such delay was recently reflected in *Egan Jones Rating v. Pruette*, (E.D. Pa, No-16-mc-105, Jan. 24).

The *Egan* case involved a contractual dispute between Egan and Pruette. The parties had agreed to arbitrate under the Federal Arbitration Act (FAA) and stipulated that the arbitration would be bifurcated into liability and damages phases.

The arbitrator first entered an award titled a "Partial Final Award of Arbitrator" addressed to liability alone. A second arbitration hearing was to be held on damages.

Egan petitioned the district court to vacate the arbitrator's "partial final award." Pruette moved to dismiss the petition, contending that the court lacked jurisdiction to review it.

The FAA, at 9 U.S.C. 10(a), allows a district court to vacate arbitration awards in limited circumstances. The court, however, may only consider the vacating of a final award but not a nonfinal one.

Was the arbitrator's "partial final award" such a final award which the court would be permitted to address? Egan claimed that it was because it completely resolved the issue of liability in accordance with the bifurcation agreement of the parties. Pruette disagreed as the issue of damages had not yet been decided and remained to be tried before the award might be considered final.

The district court recognized that cases considering the "complete arbitration rule," have held that "judicial review of incomplete arbitration awards is inappropriate in all but the most extreme situations." But, some courts have recognized an exception to the rule "where the parties agree to bifurcate the issues submitted to arbitration so that an award of liability is considered 'final' even though damages have not been determined." In support of this proposition it relied on several cases including *Hart Surgical v. Ultracision,* 244 F. 3rd 231 (1st Cir. 2001), and *Phillips 66 v. International Brotherhood of Teamsters*, Local 877, Civ. No. 2:13-4910 (D.N.J., Jan. 29).

The district court did note, however, that other cases, including one from the Eastern District of Pennsylvania, had reached a contrary result. In an unreported decision, *HET-JV v. Weston Solutions*, No. 13-mc-100, (E.D. Pa. June 4, 2013), "the court declined to review an 'interim decision' of an arbitration panel in which the proceedings were bifurcated into liability and damages phases, stating that it wanted to 'avoid the pitfalls of fragmented litigation that may result from review of an incomplete arbitration decision.'"

Finally, the court in *Egan* also acknowledged that "the Third Circuit has never addressed the specific issue of whether an arbitration award as to liability only is final when the parties formally agreed to bifurcate the matter into liability and damages phases at the arbitration."

Nonetheless, the court rejected the conclusion in *HET-JV* noting that it neither considered nor distinguished the U.S. Supreme Court decision in *Stolt-Nielsen v. AnimalFeeds International*, 559 U.S. 662 (2010). In *Stolt-Nielsen*, the Supreme Court had held that an arbitrator's decision finding a class action permissible was reviewable by the courts even though it was only preliminary and had not reached the issues of either liability or damages. The court further stated that "the principle contained in *Stolt-*

Nielsen that a partial arbitration award can be reviewed under proper circumstances should definitely be applied here"

The court found that the parties in the instant matter had specifically agreed to a bifurcated hearing with the expectation that initially the arbitrator would decide liability alone. The "partial final award" evidenced the arbitrator's intent to resolve the liability issues in accordance with the bifurcation agreement. Were the court "to find that this award was nonfinal, it would be going against the parties chosen method of resolving their dispute." In support of this position, it quoted another statement by the U.S. Supreme Court, that "the pre-eminent concern of Congress in passing the [FAA] was to enforce private agreements into which the parties had entered, and the concern requires that we rigorously enforce agreements to arbitrate even if the result is 'piecemeal' litigation ..." as in *Dean Witter Reynolds v. Byrd*, 470 U.S. 213,221 (1985).

It concluded, therefore, that it was required to "'rigorously enforce' the party's agreement as to the structure of the arbitration, and find the award in question to be final and therefore, reviewable."

It is unclear, of course, which of the conflicting Eastern District holdings in *Egan* and *HET-JV* will ultimately be adopted by the Third Circuit.

Realistically, however, one may question the *Egan* court's assumption that when the parties agreed to bifurcate the issues of liability and damages, they even focused on what might happen following the initial ruling on liability. Did they, in fact, contemplate that an unhappy party would be permitted to immediately file a petition to vacate and thereby delay any further consideration of the issue of damages for months or perhaps even years should a subsequent appeal be filed?

The uncertainty resulting from these two court decisions should cause parties to reflect carefully on whether bifurcation might be counter-productive by, possibly, undermining their original objectives in agreeing to this procedure.

Otherwise stated, after agreeing on bifurcation, identifying what will constitute a "final order" becomes critical. The arbitration agreement should leave no doubt in this regard. It should specifically recite not only whether an award relating to the first phase of a bifurcated hearing should be deemed a "final order" for purposes of court review but also whether a petition to vacate may be filed with the courts by either party before the arbitrator has issued final rulings as to all of the other issues. And, indeed, there may be circumstances where the parties prefer that a court review the first order relating to liability before they expend additional efforts on the damages claim.

Of course, it is possible that a court may not consider itself bound to entertain a motion to vacate an interim order even if allowed by the arbitration agreement. Conversely,

there may be egregious circumstances which impel a court to entertain a motion following such an order even though it is barred by the arbitration agreement.

In the absence of language specifically reciting an intention with respect to the right to seek court review of an interim order, however, a party, after achieving success in the first part of the bifurcated arbitration, may, unhappily, find itself compelled to respond not only to a motion to vacate but also to a subsequent appeal.

What should be clear, therefore, is that parties seeking to avoid such a delay should not simply await a court's future determination as to whether the first order in a bifurcated arbitration hearing should be deemed final for purposes of review. Rather, the arbitration agreement should state clearly that the award is not deemed final until the arbitrator has ruled on all outstanding aspects of the case. In such circumstances, a court will invariably enforce an express provision reflecting the parties' clear desire to avoid piecemeal review. •

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