

Setting the Scope of the Arbitrator's Authority

Judge Abraham J. Gafni (Ret.)

Published on August 18, 2020, in *The Legal Intelligencer*



Perhaps no arbitration issue has been litigated as frequently in recent years as the scope of an arbitrator's authority. Most often, this has involved "arbitrability," i.e., whether arbitrators may decide if they have the authority to decide the conflict as a whole, or any particular issue that has been brought before them. These issues may include rulings on prehearing dispositive motions, equitable relief, attorney fees and costs, punitive damages and the like.

Indeed, last month in this column (as authored by Charles Forer), attorney Bob, submitted a motion for summary judgment to his arbitrator. Unfortunately, in that hypothetical situation, because neither an arbitration agreement nor the incorporated rules of a dispute resolution provider included provisions relating to summary judgment motions, Bob was barred from seeking such relief. (See Forer, "Seeking Summary Judgment in an Arbitration Proceeding," *The Legal Intelligencer*, July 27, 2020).

But what if the arbitration agreement and the rules of the arbitration provider had contained provisions relating to summary judgment motions that were contradictory or ambiguous? How then would the matter be resolved?

Federal courts have repeatedly considered the effect of incorporated provider rules as they relate to arbitrability itself. See, e.g., *Richardson v. Coverall North America (Richardson)*, 18-3393 (3d Cir. April 28, 2020) (not precedential); *Blanton v. Domino's Pizza Franchising (Blanton)*, No. 19-2388 (6th Cir. June 17, 2020).

The court in *Richardson* made clear, however, that incorporation of the AAA rules may not always be determinative if a corresponding separate contract has also been executed. It noted that, "While 'virtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes 'clear and unmistakable evidence' that the parties agreed to arbitrate arbitrability, we need not determine whether such a rule always applies ... Even when an agreement incorporates the AAA rules, a contract might still otherwise muddy the clarity of the parties' intent to delegate."

Such muddying of “the clarity of the parties’ intent” as to arbitrator authority was recently considered in an unpublished opinion in the Minnesota Court of Appeals, *Faith Technologies (Faith) v. Aurora Distributed Solar (Aurora)*, (Minn. App. June 20, 2020).

In 2016, Aurora had entered into an engineering, procurement and constructions agreement (EPC) with Biosar Technologies (Biosar) to design and construct solar power generators. Biosar hired Faith to provide labor, materials and services for the contract.

The Aurora-Biosar EPC agreement:

- Required arbitration “of any controversy, claim or dispute between [Aurora and Biosar] arising out of or related” to the agreement;
- Prohibited the arbitrator from awarding nonmonetary, injunctive, or equitable relief;
- Adopted the Comprehensive Rules of JAMS (JAMS Rules);
- Provided that the agreement trumped any conflicting JAMS rule; and
- Required that the waiver of any right under the agreement be in writing.

The subcontract between Biosar and Faith similarly provided for the mandatory arbitration of all disputes arising out of the subcontract.

In 2017, Aurora and Biosar commenced a JAMS arbitration against each other. In addition, Biosar commenced a separate JAMS arbitration against Faith. JAMS consolidated the two arbitration proceedings.

In March 2018, “the three parties agreed to and filed with the district court a stipulation to stay litigation and submit all claims to binding arbitration ‘to finally and expeditiously resolve all their claims against each other in one forum.’” The stipulation provided that the JAMS rules and the Federal Arbitration Act (FAA) governed the dispute. Unlike the EPC agreement, however, the stipulation did not expressly provide that the EPC agreement trumped the JAMS rules. Moreover, contrary to the EPC agreement, the JAMS rules specifically allowed the award of equitable relief.

The arbitrator found that Aurora had “abandoned” the terms of the EPC agreement and awarded Faith equitable relief of \$30 million on its quantum meruit claim. Biosar received other relief as well.

When Faith and Biosar sought to enforce the award, the district court determined that the arbitrator had acted within the scope of his authority in awarding the requested equitable relief because:

- The stipulation, which was essentially a new agreement among three parties as it related to the claims among them, supplanted the EPC provisions and incorporated JAMS rules which allowed the arbitrator to award equitable relief;
- Any potential ambiguity on the scope of the stipulation required resolution in favor of arbitration; and,

- The district court must defer, under Section 10(a)(4) of the FAA, to the arbitrator's determination that the parties had intended to arbitrate all claims including the equitable claim of abandonment.

The appeals court agreed with the district court that it was bound by the arbitrator's conclusion that Aurora had waived the express prohibition on equitable relief in the EPC agreement by entering into the stipulation which incorporated JAMS rules allowing such relief. (In addition, of course, the stipulation and incorporated JAMS rules were writings that satisfied the no-waiver clause requirement that any changes be in writing).

Moreover, the appeals court found that even if the no-waiver clause, as it related to equitable awards, might be deemed to have been in effect when the arbitration began, it was waived under the JAMS rules when Aurora failed during the hearing to object to Faith's abandonment claim which served as the basis for the equitable relief.

The JAMS rules provided that "jurisdictional challenges ... shall be deemed waived unless asserted in a response to a demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability." As the district court noted, "Aurora never asserted that the issue of abandonment was outside the scope of the arbitrator's powers." Instead, "Aurora argued the legal and factual merits of Biosar's abandonment claim to the arbitrator."

Thus, the court recognized that the EPC agreement contained a no-waiver clause which, in the absence of a writing, should have prevented waiver of the bar on the award of equitable relief. "But, to the extent that the EPC agreement is inconsistent with the JAMS rules, the stipulation incorporates the JAMS rules and overrides any inconsistencies, including the no-waiver clause." In addition, by failing to assert the arbitrator's lack of authority over the abandonment claim until after the arbitration had concluded, Aurora had waived the no-waiver clause and the right to challenge the arbitrator's authority to award equitable relief.

But what if the arbitrator had determined that he was, in fact, barred from awarding such relief as the stipulation should not be understood as having supplanted the EPC agreement? In such circumstance, the district court, as well as the appellate court, unquestionably, still would have affirmed the arbitrator's determination that the ambiguous stipulation did not supersede the no-equitable-relief clause in the EPC agreement. Why? Because courts defer to arbitrators and will refuse to overturn awards in the absence of clear evidence that the arbitrators exceeded their powers. Therefore, it was the responsibility of the parties to carefully review the stipulation and designate which, if any, of the specific provisions of the EPC agreement would continue to override the JAMS rules into which they were being incorporated. In this way, they would have avoided ambiguity and muddying their intent. Moreover, if a party believed that any issue being presented in the pleadings or argument was beyond the scope of the arbitrator's authority under the stipulation, EPC agreement and JAMS rules, objection to such should have been raised as early as possible.

In short,

- Always compare the arbitration agreement, including any related documents, with the Rules of the ADR provider;
- Clarify how any inconsistency or ambiguity among them is to be understood; and,

- Object immediately to any claims believed to be beyond the scope of the arbitration documents.

Otherwise, based on arbitration statutes, rules and old-fashioned waiver principles, a refusal to reverse or vacate an arbitrator's authority or award will inevitably result. •

Abraham J. Gafni is a retired judge and mediator/arbitrator with ADR Options. He is also a Professor of Law Emeritus at the Villanova University Charles Widger School of Law.

Reprinted with permission from the August 18, 2020 issue of *The Legal Intelligencer*. © 2020 ALM Media Properties, LLC.

