Don’t Ignore the Procedural Requirements in Arbitration

Judge Abraham J. Gafni (Ret.)
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Contracting and disputing parties agree to arbitration for varying reasons. These may include the right to select the arbitrator, the privacy of the procedure, and the earlier resolution of the matter with potentially lesser expense by reason of flexible rules of discovery and evidence. Unquestionably, equally important to many parties is that arbitration awards are almost always final as the circumstances under which a party may seek to appeal are very limited. Moreover, this finality is generally reflected in court reluctance to vacate or reverse an arbitration award.

Accordingly, when a party feels that there is a basis upon which it may seek to have an arbitration award vacated, particular care should be taken to scrupulously conform to the applicable statutes as well as the procedural rules of both courts and arbitration providers as judges will not hesitate to deny such motions unless such requirements have been met.

Recently, a party found that its motion to vacate an arbitration award was denied not based on any substantive issue, but simply because its motion had not been timely served. See *O’Neal Constructors v. DRT America,* 991 F.3d 1376 ((11th Cir., April 1, 2021).

The matter involved a contractual dispute. The contract provided:

“Any claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the agreement.” (AAA Construction Rules).

On Jan. 7, 2019, the arbitration panel issued a final award consisting of two parts. Part one awarded a sum in favor of O'Neal and against DRT based upon the underlying dispute. Part two related to a claim for O'Neal's attorney fees which the arbitration panel determined DRT was required to pay. DRT paid the first part of the award but refused to pay the second part relating to attorney's fees. Accordingly, O'Neal, on April 4, 2019, filed a complaint in the state court seeking to confirm the award. This case was removed to the federal court on April 11.

On April 5, 2019, in a separate case in the state court, DRT filed a motion to vacate that part of the arbitration panel's decision awarding of attorney fees. That same night DRT's counsel emailed to O'Neal's counsel a "courtesy copy" of DRT's signed and dated 20-page memorandum in support of its motion to vacate. Subsequently, on April 30, 2019, DRT had the U.S. Marshal serve DRT'S federal court motion to vacate the award of attorney fees on O'Neal at its corporate headquarters.

The two cases were consolidated. The district court confirmed the arbitration award and denied the motion to vacate. This denial was based on the conclusion that O'Neal had not consented to service by email; and that even if it had, the email was insufficient in that it only included a copy of the memorandum in support of the motion but not a copy of the motion itself.

In affirming the ruling of the district court, the circuit court analyzed the interaction of the Federal Arbitration Act, 9 U.S.C. (FAA), the Federal Rules of Civil Procedure (F.R. Civ. P.) and the AAA Construction Rules.

Section 12 of the of the FAA imposes strict procedural requirements on parties seeking to vacate arbitration awards. It provides:

"Notice of the motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party, or his attorney as prescribed by law for service of notice of motion in an action in the same court."

The three month date specified by the AAA within which DRT was required to give the notice of its motion to vacate was April 8, 2019. The question, therefore, was whether DRT's email of April 5, satisfied the FAA's requirement of a timely valid service of the motion, as the service of the motion by the U.S. Marshall was clearly beyond the three month requirement.

As noted in Section 12 of the FAA, service was required to be made as prescribed by the federal rules in the U.S. District Court for the Northern District of Georgia where O'Neal was resident. Moreover, Fed. R. Civ. Procedure 81(a)(6) (B) provided that the federal civil rules would govern arbitration proceedings unless the arbitration laws provided otherwise.

The appellate court recognized that Pa. R. Civ. P. 5(b)(2)(E), does allow service "by other electronic means that the person consented to in writing." The advisory committee note to that rule states in this regard, however, that the written consent "must be express and it cannot be implied from conduct." The court a concluded, that, "Under Rule 5 service by email, which is an other 'other electronic means' permitted by the rule was appropriate if but only if O'Neal had expressly consented in writing to be served by email."

DRT contended, however, that such consent could be found in the agreed-upon AAA Construction Rules as Rule 44 of those rules did allow for email service of a motion to vacate.

The appellate court, while not necessarily agreeing that the AAA Construction Rules were applicable to post-arbitration motions such as a motion to vacate, found that the plain language of Rule 44 did not allow for email service of the motion.

Rule 44 of the AAA Construction Rules, titled “Service of Notice” had two sections:

Section (a) allowed for service of all “notices … necessary or proper for the initiation or continuation of an arbitration under these rules; or for any court action in connection therewith “on a party by mail addressed to the party or its representative at its last known address or by personal service …” DRT argued that this subsection clearly applied to motions to vacate. The court rejected the relevance of this subsection, however, in that it nowhere provides for service by email.

Subsection (b), however, does provide for email service as it states:

“The AAA, the arbitrator and the parties may also use overnight delivery, electronic fax transmission (fax), or electronic mail (email) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by other methods of communication.”

The court rejected the argument that subsection (b) applied to motions to vacate as it authorized email service only with respect to service of “the notices required by these rules.” As the court noted, “Notice of a motion requesting a court to vacate an arbitration award is nowhere required or provided for in the AAA Construction Rules. It is instead required by Section 12 of the Federal Arbitration Act.” Thus, the “district court was correct to hold that DRT did not serve in a proper and timely way notice of its motion to vacate and, as a result, that motion was to be denied and the arbitration award confirmed.”

In addition, the appellate court did not find it necessary to comment on the district court’s ruling that the email notice was also insufficient in that it only included DRT’s memorandum but not a copy of the motion itself.

What this situation clearly reflects is that parties must not assume that merely because they have agreed to arbitrate a dispute rather than litigating in court, the procedural requirements relating to them may be ignored or viewed as extremely flexible. Particularly because courts are not generally inclined to vacate arbitration awards, counsel must be careful to assure that when seeking such relief, they have ascertained that procedural standards apply and have fully complied with them. •

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