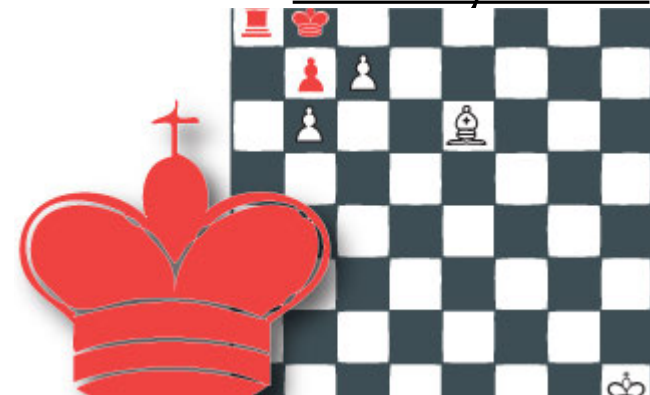


**FINESSING THE FINE PRINT:
GETTING WHAT YOU WANT & KNOWING WHAT
YOU'RE GETTING WITH AGREEMENTS TO
ARBITRATE & COVENANTS NOT TO COMPETE**

14 May 2014



WHY ARBITRATION?

- ◆ I put an arbitration provision in our contract because _____.
- a. We wanted to avoid wasteful and expensive discovery.
- b. Arbitration is faster.
- c. The outcome is more certain and predictable.
- d. We wanted to avoid a jury trial.
- e. It was in the form I used.

ARBITRATION—EFFICIENT?

- ◆ Cost?
 - How complex are the proceedings themselves?
 - How much discovery is allowed?
 - Where is the arbitration?
- ◆ Tribunal?
 - What are the rules that will govern and control?
- ◆ Speed
 - Maybe: 8 months is average duration of AAA commercial case
- ◆ Predictability: ??

ARBITRATION—FAIR?

- ◆ Extremely limited grounds for “appeal”
 - Corruption or fraud
 - Evident partiality or corruption of the arbitrator
 - Arbitrator “misbehavior” resulting in prejudice
 - Where the arbitrators exceeded their powers or so imperfectly executed them that a final and definite award was not made.

ARBITRATION—FAIR?

- ◆ Limited ability to “fix” by contract
 - FAA is due process floor: cannot contractually waive appeal
 - But cannot expand or define scope of review either
- ◆ Arbitration or Jury Waiver?
 - Rules of evidence

ONE SIZE DOESN'T FIT ALL

- ◆ How important is the case?
 - The more important the case, the greater the chances you'll be unhappy with arbitration
 - Routine, smaller, consumer, cases – frequently better
- ◆ What can you predict?
 - Will you or the other side have more witnesses?
 - Who is going to control the facts? (Who will be in greater need or discovery?)
 - Who will be cost constrained?

ONE SIZE DOESN'T FIT ALL

◆ Class Actions

- Arbitration agreement waiving right to class action is enforceable. *American Express v. Italian Colors Restaurants* (S. Ct. June 2013).
- Make sure to make the waiver express, simple, conspicuous

◆ Is confidentiality important?

YOUR CONTRACT CAN CONTROL

- ◆ Who are the arbitrators?
- ◆ What tribunal's rules?
- ◆ How many arbitrators?
- ◆ How are the arbitrators selected?
- ◆ Where will the arbitration be held?
- ◆ What discovery will be allowed?
- ◆ How long is the process?
- ◆ How confidential?

WHO MADE THE RULES?

CHOOSE YOUR RULES WISELY

◆ The “AAA Rules”

- Commercial Arbitration Rules
 - Large, Complex Commercial Disputes
 - Expedited
- Construction Industry Arbitration Rules
- Employment Arbitration Rules
- Labor Arbitration Rules
- International Dispute Resolution Procedures
- Optional Appellate Arbitration Rules
- Nonbinding Arbitration Rules
- Numerous specialized codes and protocols

CHOOSE YOUR RULES WISELY

◆ Compare JAMS

- Comprehensive Arbitration (with Expedited option)
- Streamlined Arbitration
- Class Action Procedures
- Construction Arbitration
- Employment Arbitration
- International Arbitration
- Consumer Minimum Standards
- Specialized codes and protocols

◆ Federal Arbitration Act

◆ Uniform Arbitration Act (RCW Ch. 7.04A)

CHOOSE YOUR RULES WISELY

By agreeing to AAA *rules*, absent specific agreement to the contrary, you agree that:

- ◆ The AAA will *administer* the arbitration
- ◆ The AAA or arbitrator may decide venue if unspecified
- ◆ The arbitrator decides whether a condition precedent is met or required
- ◆ Subject-matter jurisdiction (arbitrability) decided by arbitrator

BY AGREEING TO AAA RULES, YOU AGREE THAT...

- ◆ The arbitrator(s) shall be from AAA roster and selected by AAA, with limited party input
- ◆ Number of Arbitrators
 - One for claims of less than \$1 million
 - Three for claims of \$1 million or more
 - Unless AAA decides otherwise

BY AGREEING TO AAA RULES, YOU AGREE THAT...

◆ Arbitrator Disqualification

- The AAA—not a court—decides whether an arbitrator should be disqualified
- And you may have “arbitrated” the issue, limiting the scope of review

BY AGREEING TO AAA RULES, YOU AGREE THAT...

Discovery may be significantly limited

◆ Documents

- Arbitrator “may” require parties to exchange documents they intend to rely on
- Arbitrator “may” allow requests for production of “relevant and material” documents

BY AGREEING TO AAA RULES, YOU AGREE THAT...

Limited discovery (cont.)

- ◆ Third-party document subpoenas?
- ◆ Statutory authority under UAA broader than AAA rules
- ◆ Compare JAMS
 - “The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing....”

BY AGREEING TO AAA RULES, YOU AGREE THAT...

Limited discovery (cont.)

- ◆ Limited ability to take depositions
 - Only in “Large, Complex” and “exceptional” cases?
 - JAMS: presumption of one per side
 - UAA: No presumptive limits
 - Compare AAA employment rules – general authority by RFPs, depositions, or otherwise

BY AGREEING TO AAA RULES, YOU AGREE THAT...

- ◆ The arbitrator's discretion to hear motions for summary judgment is limited
- ◆ The arbitrator decides how to allocate expenses, including arbitrator fees
- ◆ No rules of evidence

GENERAL LIMITATIONS

◆ Preliminary/interim injunctive relief

- Delay in hearing
- Delay in enforcement
- Carve-out in agreements

“Either party may seek interim relief, including a temporary restraining order or preliminary injunction....”

...SO CHOOSE YOUR RULES
WISELY

DON'T JUST CHOSE THE RULES: MAKE THEM

In the agreement...

- ◆ Number of arbitrators
- ◆ Manner of selection of arbitrators
- ◆ Administration
- ◆ Venue
- ◆ Discovery – scope, manner

DON'T JUST CHOSE THE RULES: MAKE THEM

At the outset of the arbitration

- ◆ Arbitrator disclosures
- ◆ Disqualification standards and process
- ◆ Document discovery and depositions
- ◆ Case schedule

COVENANTS NOT TO COMPETE

COVENANTS NOT TO COMPETE—ENFORCEABILITY

- ◆ Disfavored restraints on trade
- ◆ Enforceable if:
 - Necessary for the protection of the business or goodwill of the employer
 - Imposes no greater restraint than is reasonably necessary
 - No undue injury to the public resulting from the loss of the service

COVENANTS NOT TO COMPETE—ENFORCEABILITY

- ◆ Choice of law—the color of the court’s pencil
 - **Red**: enforce or deny the NCA in its entirety
 - **Blue**: strike the unreasonable provisions, enforce the rest if grammatically viable
 - **Washington**: enforce to the extent reasonably possible to accomplish purpose
- ◆ Beware of California

COVENANTS NOT TO COMPETE—CONSIDERATION

- ◆ Consideration exists if non-compete required at time of hire
- ◆ If entered into after employment, must be supported by independent consideration
 - Raise, promotion, bonus
 - Fixed term of employment
 - Additional training, access to confidential information?
- ◆ Document it

WHAT ARE YOU TRYING TO PROTECT?

- ◆ Non-Solicit: customers / employees
 - E.g., “During the term of Employee's employment with Company and for one year following the date Employee's employment with Company ends for any reason, Employee will not, directly or indirectly, solicit, induce or attempt to induce any customer, partner, or affiliate of Company to do business with Employee, any of Employee's subsequent employers, or any other person or entity.”

WHAT ARE YOU TRYING TO PROTECT?

- ◆ During the term of Employee's employment with Company and for one year following the date Employee's employment with Company ends for any reason, Employee will not, directly or indirectly:
 - a. induce or attempt to induce, recruit, encourage, hire away or solicit to hire away from Company any employee, consultant, or independent contractor of Company or its subsidiaries, whether for or on behalf of Employee, any of Employee's subsequent employers, or any other person or entity; or
 - b. employ, or otherwise engage as an employee, independent contractor, or otherwise, any employee, consultant or independent contractor of Company.

WHAT ARE YOU TRYING TO PROTECT?

◆ Non-Compete: the business enterprise

- E.g., “During the term of Employee's employment with Company and for two years following the date Employee's employment with Company ends for any reason, Employee will not, directly or indirectly engage in, or invest in, own, manage, operate, finance, control; be employed by, associated with, or in any manner connected with; or render services or advice or other aid to any person or entity engaged in or planning to become engaged in any business whose products or activities compete in whole or in part with the business of Company as of the date of the termination of Employee's employment with Company, including [*specific competitive activities*], anywhere within the United states.”

WATCHING YOUR BACK – ONBOARDING

- ◆ When you're hiring – mitigating potential liability
 - Applicant subject to non-compete/non-solicit?
 - Job at issue versus prior employment
 - Prophylactic steps:
 - Hiring process
 - Offer letter
 - No retained information
 - Job structure / temporary limitations or firewalls



QUESTIONS?