# A PRIMER ON ARBITRABILITY

*By Richard Chernick, Esq.*

Drafters of arbitration clauses must understand the concept of arbitrability if the parties' objectives are to be achieved. Arbitrability is the portmanteau for several distinct concepts:

- Is the clause/agreement enforceable?
- What is the scope of the clause, *i.e.*, what disputes are subject to the parties' agreement to arbitrate?
- Who, in addition to the signatories, will be required or entitled to participate in the arbitration?

**Is there an agreement to arbitrate?**

The Federal Arbitration Act (FAA) requires a finding of an enforceable arbitration agreement before a court may compel arbitration. The FAA makes agreements to arbitrate valid, irrevocable and enforceable, "save on grounds as exist in law or equity for the revocation of a contract" (9 U.S.C. § 2). State arbitration statutes (e.g., California Arbitration Act, Code Civ. Proc. § 1281) are similar.

The existence of an agreement to arbitrate is determined under state contract law principles as to the formation of contracts. The savings clause (FAA § 2) further allows for the assertion of defenses to enforcement, also per state contract law, on grounds for "revocation" of contract (*e.g.*, fraud, duress, illusory agreement, illegal agreement, incapacity, apparent or actual authority, unconscionability). The FAA may preempt state law, however, where (1) it does not operate neutrally as to all agreements (see *Doctor's Assocs., Inc. v. Casarotto* (1996)) or (2) the state law is anti-arbitration and thus violates the underlying principle of the FAA that arbitration is a favored process (see *AT&T Mobility LLC v. Concepcion* (2011)).

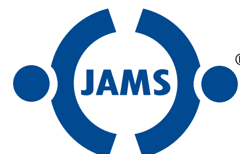
**What is the scope of the arbitration agreement?**

Arbitration is a favored process (see *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.* (1983) and Southland Corp. v. Keating (1989)). For this reason, once it is determined that parties have agreed to arbitrate, what is deemed arbitrable is broadly interpreted. Courts carefully examine the language a party uses in its arbitration clauses to determine contractual intent. The standard phrasing—all claims "arising out of or relating to…."—is referred to as a "broad form" clause and is commonly interpreted to include within it related statutory and tort claims as well as claims arising under the contract itself. Parties are free to create arbitration agreements that limit arbitration to a particular claim or event (e.g., "All disputes arising under the Post-Closing Adjustments provision of this Agreement shall be subject to arbitration by an experienced CPA selected by the parties.").

**Who are the proper parties to the arbitration?**

The signatories to an agreement containing an arbitration clause are obligated and entitled to arbitrate disputes arising under that agreement. Sometimes non-signatories are compelled to arbitrate a dispute based on their relationship with the parties to the agreement (*e.g.*, a successor, an assign, an agent, a third-party beneficiary or an affiliated corporate entity). Because arbitration is a contractual process, such





parties may not be compelled to arbitrate unless a court finds an enforceable agreement to arbitrate as to that person per FAA § 2 or the equivalent state arbitration law. There is extensive federal and state case law dealing with this issue, and it is again state contract law principles that control the outcome of such issues.

**Who decides whether a particular dispute is arbitrable: a court or an arbitrator?**

The FAA and equivalent state arbitration acts direct courts to determine the existence of an enforceable agreement to arbitrate (FAA § 2). There are at least two important qualifications to this principle: separability and delegation.

The separability doctrine specifies that an agreement containing an arbitration clause is separate from the agreement to arbitrate (*Prima Paint Corp. v. Flood & Conklin* (1967)). Thus, an attack on the agreement as a whole, such as a claim of fraudulent inducement, must be decided by the arbitrator. An attack on the arbitration agreement itself, however, such as a claim that the arbitration agreement was concealed, must be decided by the court.

The second qualifier to the court's power to determine arbitrability is known as delegation. Parties may delegate the power to determine arbitrability to the arbitrator if they either do so expressly in their arbitration or submission agreement, or choose institutional arbitration rules that give the arbitrator the authority to rule on arbitrability disputes. The delegation language must be clear and unmistakable (*AT&T Techs. v. Commc'ns Workers of Am.* (1986)). It may be expressed in the clause itself or based on the parties' incorporation of arbitral institutional rules. For example, an arbitration clause requiring arbitration by a specific ADR provider would effectively incorporate that provider's rules giving the arbitrator power to determine all jurisdictional matters.

Arbitrability is key to the successful implementation of arbitration clauses. Parties and their counsel should pay particular attention to this issue when drafting contracts, as it will prevent complications down the road if a dispute arises. ■

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