To Arbitrate or Not to Arbitrate

March 2015 Headnotes: ADR/Trial Skills
by Angela C. Zambrano and Tiffanie N. Limbrick

Most companies have a corporate position on arbitration, either they love it, or they despise it. If you are representing a company that likes to arbitrate, you should think broadly about how you could get the case into arbitration. Note, you may be able to compel arbitration even though your client never signed an arbitration agreement, or where the arbitration agreement is not in the core contract in dispute. Before you march into court, stop and think about whether you can—and should arbitrate a dispute.

Why Arbitrate?

If the arbitration clause is drafted correctly, there are a number of reasons why arbitration can be ideal for corporate clients:

- You have an experienced decision maker who likely has background knowledge about your industry and/or type of dispute;
- You may resolve your dispute faster than in traditional litigation, especially since the bases for appeal are limited;
- You may avoid some of the cost of discovery (particularly e-discovery);
- Appeals are narrow, rare, and usually, finality can be achieved more quickly and at a lower cost and
- It can be confidential.

Ok, you convinced me—now how do I decide if I can compel arbitration?

In determining whether you can compel arbitration, determine:

- is there a valid agreement to arbitrate with the defendant and anyone involved in the dispute; and
- if so, could you argue that the dispute is covered by the agreement to arbitrate? Clear and unmistakable evidence of an agreement to arbitrate is required to compel arbitration because a party can only be forced to arbitrate a dispute to which they agreed to arbitrate. However, clear and unmistakable evidence that the parties agreed to submit to arbitration can be found in unassuming places:
  - Did the counter-party sign an agreement with arbitration clause with your co-defendants; or
  - Did the counter-party signed an agreement with an arbitration clause in a prior or related agreement between any of the parties?

In these instances, and others, we have successfully convinced the decision maker that the dispute should be resolved in arbitration.
The rationale for finding that a dispute between your client and a counter-party, with whom an arbitration clause was not been signed, but with whom your co-defendants have an arbitration agreement, is that the counter-party should be estopped from arguing that they are not bound by the arbitration clause as to all parties in the dispute. Estoppel can arise when an opposing party’s allegations: relate directly to the agreement containing the arbitration clause; consist of coordinated acts between the signatory and non-signatory defendants; are based on the same facts; and are inherently inseparable.

With respect to related agreements, courts generally construe agreements to arbitrate “all disputes between the parties” broadly, based on the Federal Arbitration Act. This means that in business relationships, one agreement containing an arbitration clause could support arbitration of a variety of disputes between the parties—including disputes under other contracts. Citing the strong presumption of arbitrability, courts have even enforced arbitration clauses in agreements that are expired or may be superseded.

In other words, think broadly about with whom and where the counter-party has agreed to arbitrate.

Ok—I will try to arbitrate, but who decides if the dispute will be arbitrated?

Assuming that the arbitration clause you found incorporates the rules of an arbitral association, the general answer is that the arbitrator will decide if a dispute will be arbitrated. For example, Rule 7 of the American Arbitration Association Commercial Arbitration Rules provides that the arbitrator “shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.” Other arbitral associations, including Judicial Arbitration and Mediation Services, have similar rules. Thus, if the arbitration agreement incorporates the rules of a particular arbitral association, there may be clear and unmistakable evidence that the parties agreed to submit the question of arbitrability to the arbitrator. However, without the incorporation of such arbitral rules, courts have found that a broad arbitration clause encompassing “all claims” is not clear and unmistakable evidence that the parties agreed to submit the question of arbitrability to the arbitrator.

In summary, consider the benefits of arbitration. Even if your client did not sign the arbitration agreement, it may be easier to compel arbitration than it first appears.

http://www.dallasbar.org/book-page/arbitrate-or-not-arbitrate