ADR Study Group Meeting

Peter K. Rundle – September 29, 2015

Crafting Awards to Preserve Confidentiality

Below is an outline of the narrow issue of confidentiality as it relates to drafting arbitration awards. It is a subset of the broader questions of confidentiality in arbitration, which might involve: arbitration clause drafting; proceedings; documents and testimony; deliberations; and, confirmation and vacatur filings. While there may be some interplay among these different elements, the focus of our discussion will be (1) whether we have tools at our disposal to shield confidential information that might otherwise appear in our awards, and (2) whether and under what circumstances we should employ those tools, if we find them to be available. The perspective for our discussion is that of the arbitral tribunal, as opposed to that of the drafter of the arbitration clause, the arbitration advocate, or the court called upon to decide confirmation and vacatur issues.

I began outlining this discussion mindful of the following: (1) With few, if any, exceptions, our awards are "reasoned;" (2) The parties appearing before us frequently seek protective orders – often stipulated – to protect confidential and proprietary information, and we regularly sign them; and (3) We do not often consider how and whether we should ease the natural tension between the confidentiality of arbitration and our practice of providing reasoned awards to the parties.

The outline below provides an overview of (a) the requirements that we must follow in crafting arbitration awards, (b) some of the issues that may arise when we are confronted with the suggestion that we deviate from our standard operating procedure for crafting well-reasoned awards, and (c) some suggestions on how to resolve those issues.

Our ADR Study Group serves our interests best, I think, when there is a lively exchange of ideas. We will certainly not have time to get through this outline in one meeting and, therefore, I suggest that we use the outline as a tool to develop points of discussion and debate. I look forward to everyone's thoughts on Tuesday. Many thanks.

1. Confidentiality in Arbitration – General[i]

   a. AAA Statement of Ethical Principles:

      "Confidentiality

      An arbitration proceeding is a private process. In addition, AAA staff and AAA neutrals have an ethical obligation to keep information confidential. However, the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. Where public agencies are involved in disputes, these public agencies routinely make the award public."

   b. The U.S. Supreme Court seems to presume that arbitrations are confidential. In *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 686 (2010), Justice Alito cited the AAA class arbitration rule that "the presumption of privacy and confidentiality" did not apply to class actions, and noted that such "fundamental changes" distinguished bilateral and class-action arbitrations. *See, also* Justice Scalia's comment in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1750 (2011) that confidentiality "becomes more difficult" with class-action arbitrations.

   c. Limits of Compelled Confidentiality:

      i. At one time, AT&T included the following provision in its consumer contracts: "Neither you nor the company may disclose the existence, content or results of any arbitration or award, except as may be required by law [or] to confirm and enforce the award." In *Ting v. AT&T*, 319 F.3rd 1126, 1151 n.16 (9th Cir. 2003), the Court held this provision to be unconscionable under California law. "*[S]ee also Pokorny v. Quixtar, Inc.*, 601 F.3d 987 (9th Cir. 2010). The Ninth Circuit, joined by some state courts, concluded that confidentiality either gives rise to or contributes to a contract's

unconscionability. *See, e.g., Schnuerle v. Insight Commc'ns Co.,* 376 S.W.3d 561, 578-79 (Ky. 2012)." J. Resnik, *Diffusing Disputes and the Erasure of Rights,* The Yale Law Journal 124:2804 (2015) at 2895, n. 454.

2. What the Award Must Contain.

    a. Statutes, *Etc.*

        1. *Code of Civil Procedure, Section 1283.4*: "The award shall be in writing and . . . shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy."

            a. An award which fails to determine all submitted issues is subject to vacatur. *See, e.g., Mossman v. City of Oakdale* (2009) 170 Cal.App.4th 83.

            b. Arbitrators need not find facts or give reasons for their awards [with some exceptions noted, *infra*]. *See, United Steelworkers of Am. v. Enter. Wheel & Car Corp.,* 363 U.S. 593 (1960); *Case v. Alperson* (1960) 181 Cal.App.2d 757.

            c. Reasoned awards required in Group Health Service Plan arbitrations (*Health & Safety Code, Section 1373.21*), and in compelled arbitrations under the Fair Employment & Housing Act (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 106-107).

        2. *FAA (9 U*.S.C., *Section 10)*: The award may be vacated ". . . (a)(3) where the arbitrators were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy . . .; or (4) where the arbitrators exceeded their powers, or so imperfectly

executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

3. *UNCITRAL Model Law, Article 31(2)*: "The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30."

    a. Some countries, such as Belgium, France & Brazil, mandate that arbitration awards be reasoned, notwithstanding any agreement to the contrary by the parties.

    b. Some countries' statutes provide for the annulment of unreasoned awards rendered at their seat. *E.g.,* Netherlands, Belgium, England, Italy.

    c. *See,* Chartered Institute of Arbitrators' Practice Guideline 18: *Guidelines for Arbitrators on the Formalities for Drafting an Arbitral Award* (attached).

ii. The Parties' Arbitration Clause.

1. If the parties' arbitration agreement specifies a form for the award (*e.g.,* reasoned award; findings of fact & conclusions of law), the arbitrator is obligated to produce a conforming award.

    a. Awards may be vacated under the FAA where they do not comport with parties' agreement. *See, Biller v. Toyota Motor Corp.* (9th Cir. 2012) 668 F.3rd 655, 666; *Cat Charter, LLC v. Schurtenberger* (11th Cir. 2011) 646 F.3rd 836, 839, 842 (relying upon *9 U.S.C., Section*

10(a)(4)); *Western Employers Ins. Co. v. Jeffries & Co., Inc.* (9th Cir. 1992) 958 F.2d 258, 262.

iii. Provider Rules.

1. *AAA Commercial Rule 46(b)*: "The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."

2. *AAA Consumer Rule 43(b)*: "The award shall provide the concise written reasons for the decision unless the parties all agree otherwise. Any disagreements over the form of the award shall be decided by the arbitrator."

3. *AAA Employment Rule 39(b)*: "An award issued under these rules shall be publicly available . . . ." *Rule 39(c)*: "The award . . . shall provide the written reasons for the award unless the parties agree otherwise."

4. *AAA/ICDR Article 30(1)*: "The Tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given."

5. *JAMS Comprehensive, Construction Rule 24(h) & Streamlined Rule 19(g)*: ". . . . Unless all Parties agree otherwise, the Award shall . . . contain a concise written statement of the reasons for the Award."

6. *JAMS Employment Rule 24(h)*: "The Award shall . . . contain a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the Award is based. The Parties may agree to any other form of Award, unless the Arbitration is based on an arbitration agreement that is required as a condition of employment."

7. *JAMS Consumer Minimum Standard 10*: "The award will . . . provide a concise written statement of the essential findings and conclusions on which the award is based."

8. *JAMS International Article 32(2)*: "The Tribunal will state the reasons on which the award is based, unless the parties have agreed that no reasons are to be given."

9. *CPR Rule 15.2 (Administered and Non-Administered)*: "All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise."

10. Reasoned awards are mandatory in arbitrations administered under the rules of the following providers: ICC (Art. 25(2)); ICAC (Art. 41(1)); CIETAC (Art. 43(2)); ICSID (Rule 47(1)(i)); NAI (Art. 49(2)(e)).

11. Unless the parties otherwise agree, reasoned awards are required in arbitrations administered under the following rules: UNICITRAL (Art. 31(2)); LCIA (Art. 26(1)); AAA/ICDR (Art. 27(2)).

iv. Accepted / Best Practice {I expect this to be the subject of lively debate and, therefore, I have offered a topical guide only}

1. Reasoned Award

a. Why?

i. "Simply put, it is regarded as an essential aspect of the judicial process – and the related adjudicative process of arbitration –

that the decision-maker be required to explain his or her reasons. This is necessary in order to constrain the power of the decision-maker (reducing the risk of arbitrary, whimsical, or lazy decisions), to enhance the quality of the decision-making process (by requiring thoughtful, diligent analysis) and to provide the parties with the opportunity not only to be heard, but to hear that their submissions have been considered and how they have been disposed of." G. Born, International Commercial Arbitration, Ch. 22, pp. 2453-54 (emphasis added; citations omitted).

b. What constitutes a reasoned award?

2. Simple ("Unreasoned") Award

a. Under what circumstances?

b. Common?

c. Problems?

i. "Significant questions arise concerning the recognition and enforcement of an unreasoned foreign award that is made in a place where local law permits unreasoned awards (*e.g.,* the United States). . . . [O]ne may anticipate that unreasoned awards will attract objections under Article V(2)(b)'s [New York Convention] public policy exception where the parties have not affirmatively agreed to waive a statement of reasons by the arbitrators (as can occur under the FAA): in these circumstances,

> an unreasoned award arguably deprives the parties, without their agreement, of a fundamental procedural protection. A few national courts have denied recognition of unreasoned awards in these circumstances. . . . . Given these considerations, the better view is that unreasoned awards should be subject to non-recognition, absent express or implied agreement that no reasons are required, even where unreasoned awards are permitted under the law of the arbitral seat." G. Born, International Commercial Arbitration, pp. 2458-2459 (citations omitted).

3. Findings of Fact and Conclusions of Law

    a. Ever?

    b. When and Why?

4. Something Altogether Different

    a. Examples?

3. Some Suggestions.

    a. Are we in search of a solution to a problem that does not exist?

        i. What does the arbitration clause say? Is the proceeding confidential? Such language in the parties' agreement might support a motion to seal filed in confirmation / vacatur proceedings. *See,* L. Solomon, *How to Keep Confidential Arbitral Awards Confidential Even When Seeking to Enforce/Vacate Them* (attached); JP Duffy & EA Bevan, Review of *The Decapolis Group, LLC v. Mangesh Energy,*

Ltd., in which U.S. District Court in Texas granted motion to seal (attached), and District Court's Memorandum Opinion & Order (attached). If it says nothing about confidentiality, can we assume the converse – that the parties did not intend those proceedings to be private? Is this an issue for the courts to deal with? Are we planting the seeds for a backlash against arbitration; *i.e.,* the arbitration process needs more judicial scrutiny?

b. Subject to the mandatory requirements that may exist pursuant to statute, provider rule, *etc.*, party autonomy and choice is paramount.

c. If the parties do not request you to change your practice, should you suggest that the circumstances of the case might warrant it?

    i. I look forward to a discussion on this issue: My inclination is to not raise the issue because the "solution" proposed to the issue I raise may actually create an unforeseen problem. I would leave it to the advocates to raise any issue they may have concerning the proposed form of award. That is, "if it ain't broke, don't fix it."

d. If there is not unanimity among the parties about the form of the award, provide your standard reasoned award.

e. If the parties request that the award deviate from your standard reasoned award, encourage them (without interjecting your own views) to consider the issues that may be created by such deviation.

f. If the parties seek a rather unique form of award, obtain their stipulation to the form of the award, having them draft a form for your review and approval.

g. If you are considering rendering a simple award, paired with some other document in which you set forth your findings or reasons, only do so if:

i. The parties have sought it;

ii. The parties have stipulated to it in writing; and

iii. The parties' stipulation includes a confidentiality provision adequately protecting the "reasoning" document from disclosure or filing.

1. Absent a confidentiality order (maybe in spite of one), the losing party will certainly file the "reasons" in connection with vactur proceedings, or in opposition to the winner's petition to confirm. Why deviate from standard practice if it gets the parties – and you – nothing in return?

[i] I have drawn substantially from the following two resources:

- J. Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights,* The Yale Law Journal, Vol. 124, No. 8 (June 2015), p. 2804, and
- G. Born, *International Commercial Arbitration*, Kluwer Law International (2009).