Is Your Arbitration Agreement Up To Date?

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Introduction

As those of us who enforce arbitration agreements in consumer disputes – and particularly in consumer healthcare disputes – know, the plaintiff's bar will seize on any potential ambiguity to avoid an arbitration agreement. One area of ambiguity that often arises is the effect of a named arbitral forum's unavailability for administration of the arbitration. Was the naming of the forum in the agreement an "ancillary logistical concern" such that the agreement can be enforced, notwithstanding the forum's unavailability? Or was it "integral" to the agreement such that it can be presumed that the parties' intent to arbitrate was conditioned on the availability of the forum? It is not unusual for one court to determine that the forum designation was an ancillary logistical concern while another court interpreting the exact same agreement determines that the forum designation was integral to the agreement.

In a recent case, the Georgia Court of Appeals determined that an agreement providing for resolution of disputes "exclusively by binding arbitration … and not by lawsuit or resort to court process" was conditioned on the availability of the National Arbitration Forum because the agreement required arbitration "in accordance with the National Arbitration Forum Code of Procedure." While there are some flaws in the court's decision, ultimately, this and similar decisions – right or wrong – should be viewed as a warning to review and update arbitration agreements to avoid such challenges altogether. A small change to an agreement can make a big difference in its enforceability.

Miller v. GGNSC Atlanta, LLC

The Georgia Court of Appeals recently concluded that an arbitration agreement calling for arbitration in accordance with the procedural rules of a now-unavailable arbitral forum could not be enforced due to the forum's unavailability. *Miller v. GGNSC Atlanta, LLC*, 2013 Ga. App. LEXIS 655, 2013 WL 3658836 (July 16, 2013).

The relevant arbitration agreement provided:

> It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereinafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement, and not by lawsuit or resort to court process. This agreement shall be governed by and interpreted under the Federal Arbitration Act, U.S.C. Sections 1-16.
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> In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective.

Miller, 2013 Ga. App. LEXIS 655 at *2-3 (footnotes omitted).

The National Arbitration Forum (NAF) was unavailable to administer the arbitration of the parties' dispute because it previously had entered into a consent judgment "under which the NAF agreed that it would not administer, process, or 'in any manner participate in' any consumer arbitration filed on or after July 24, 2009." *Id.* at *4-5. The plaintiff argued that the Arbitration Agreement was, therefore, impossible to perform and void.

The court framed the issue as "whether the Arbitration Agreement is void because of impossibility of performance - i.e., because neither the NAF, as the chosen arbitral forum, nor, consequently, its Code of Procedure is available to the parties." *Id.* at *8. The court acknowledged the applicability of Section 5 of the Federal Arbitration Act, which provides that "if for any … reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator … , who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein." *Id.* at *10, n.8 (quoting 9 U.S.C. § 5). But the court noted a judicially-created exception to Section 5 that asks whether the appointment of a specific arbitrator is an "integral term" or an "ancillary logistical concern," before deciding whether to comply with the statutory mandate that "the court shall designate and appoint an arbitrator." *Id.* at *10-13. It therefore asked, "does the language of the Arbitration Agreement indicate that the parties intended to arbitrate their claims only if the NAF was available to administer that arbitration?" *Id.* at *13.

The court determined that the Arbitration Agreement did indicate that the parties intended to arbitrate their claims only if the NAF was available and that the trial court, therefore, was not bound by the FAA's mandate that it "shall designate and appoint an arbitrator."

First, the court concluded that "an arbitration agreement's express designation of a single arbitration provider weighs in favor of a finding that the designated provider is integral to the agreement." *Id.* at *14 (quoting *Rivera v. American Gen. Fin'l Svcs.*, 259 P.3d 803, 812-13 (N.M. 2011) and citing *Smith Barney, Inc. v. Critical Health Systems of North Carolina*, 212 F.3d 858, 862 (4th Cir. 2000)).[1] The court noted that the Arbitration Agreement at issue "provides that any disputes between the parties '*shall* be resolved *exclusively* through binding arbitration' conducted 'in accordance with the [NAF] Code of Procedure, *which is incorporated into this Agreement*….'" *Id.* at *15 (emphasis in original). The court concluded that Rule 1(A) of the NAF Code of Procedure permitted only the NAF to administer the Code, and therefore, this language indicated that the parties "contracted to arbitrate only before the NAF." *Id.*[2]

Second, the court concluded that the NAF Code indicated the parties' intent was to arbitrate only if the NAF and its Code were available for the parties' use. Rule 48(D) provided "that the NAF may decline to arbitrate the parties' claims if their agreement 'has substantially modified a material portion of the Code.'" *Id.* at *18-19. The court reasoned that this provision "demonstrates, therefore, that both the NAF and its Code are an essential part of the agreement to arbitrate." *Id.* at 19. Rules 48(D) and (E) stated that the parties "may seek legal and other remedies," and the court concluded that this

1 As the court acknowledged, Section 5 requires appointment of a substitute arbitrator when the arbitrator named by the parties is unavailable. Inasmuch as Section 5 is triggered when a specifically designated arbitrator is unavailable to arbitrate the dispute, it is perplexing that courts would consider the designation of a specific arbitration provider as a factor against applying Section 5. The court's reliance on *Smith Barney* to avoid appointment of a substitute arbitrator is suspect since that case involved not a failed forum, but a party's attempt to use a forum other than the specified forum when the specified forum was still available. *Smith Barney*, 212 F.3d at 862 ("Here Critical Health has the choice of three fora. We can see no reason to pass over the three specified fora and allow arbitration to proceed in a fourth unspecified arena.").

2 The court made no effort to resolve the potential ambiguity relating to whether "exclusively" referred to arbitration generally (to the exclusion of litigation) or more specifically to arbitration under the NAF Code of Procedure (to the exclusion of arbitration by another administrator or under another set of rules). Certainly, if the parties had intended that the unavailability of the NAF or its Code of Procedure would invalidate the entire agreement (rather than resulting in appointment of a substitute arbitrator under Section 5 of the FAA), they could have specifically said so. *See, e.g., Meskill v. GGNSC Stillwater Greeley, LLC*, 862 F. Supp. 2d 966, 973 (D. Minn. 2012) (arbitration agreement requiring arbitration "in accordance with the [NAF] Code of Procedure" did not mandate that the NAF conduct the arbitration, even where NAF rules provided that arbitrations using its rules and procedures could only be administered by the NAF and noting that "if the parties had contemplated the NAF would be their exclusive arbitral forum, they could have easily said so – there would be no need for them to do so obliquely by specifying that the arbitration must be conducted by the NAF's rules"). Likewise, the court provided no explanation for why or how Rule 1(A) of the NAF Code of Procedure would prohibit an independent arbitrator from applying the NAF Code of Procedure, particularly in light of the incorporation of the Code into the Arbitration Agreement and the NAF's inability to administer the arbitration. Additionally, the court concluded that the NAF Code of Procedure "differs in many significant respects" from the rules of other arbitration fora, but it did not identify any differences that it believed were integral to the Arbitration Agreement or that could not be applied by another arbitrator.

meant the right to pursue traditional litigation. *Id.* at *18-19.[3]

Finally, the court determined that it could not sever the provision in the Arbitration Agreement designating the NAF because "the designation of the NAF as the arbitral forum is an integral term of the agreement." *Id.* at *24. In reaching this conclusion, the court relied on the same factors that it did in determining that it could not appoint a substitute arbitrator under Section 5 of the FAA. *Id.*

Therefore, the court found that the Arbitration Agreement was unenforceable.

Conclusion

As indicated in the notes, the court's analysis is suspect, particularly in light of contrary conclusions reached by other courts that seem to be more in line with the language of the agreement, the Federal Arbitration Act, and recent United States Supreme Court precedent.

But, ultimately, whether the court got it right or wrong in this case should not be the primary focus. Rather, this case should be a cautionary tale. This was not a poorly written arbitration agreement. At most, there was some ambiguity regarding the effect of the unavailability of the forum whose rules were selected. Some courts have found this exact agreement enforceable. Still, notwithstanding the favored status of arbitration agreements as illustrated by a number of U.S. Supreme Court cases over the last few terms, opponents of arbitration will use every potential ambiguity and uncertainty in an arbitration agreement to avoid the agreement. And, even if the party seeking to enforce the arbitration agreement ultimately is successful, the cost of enforcing the agreement in the trial court and through one or more levels of appeal will mitigate one of the key benefits of arbitration – the prompt and efficient resolution of disputes.

Minor revisions can make all the difference. For example, while the agreement in this case should have been enforced as written, the following small changes (illustrated by the redline below) would have eliminated the challenge:

> It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereinafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration,[4] ~~to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement~~ and not by lawsuit or resort to court process. No other provision shall be considered integral to this agreement to arbitrate, and the failure of any other provision shall not invalidate this agreement to arbitrate.

There is no magic bullet when it comes to countering the creativity of the plaintiff's bar in avoiding arbitration agreements. But a well-crafted arbitration agreement stands as a solid foundation to improve your chances for moving your cases promptly and efficiently into arbitration. Make your arbitration agreements easier to enforce. Review and update your agreements regularly to remove any potential obstacles to their enforcement.

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3 It is unclear whether the court considered the possibility that an "other remed[y]" under these provisions might be the appointment of a substitute arbitrator under Section 5 of the FAA (which was expressly incorporated into the Arbitration Agreement).

4 Simply by separating the election to arbitrate from the details of the arbitration (location, procedural rules, etc.), it becomes more difficult for the plaintiff to argue that these details were intertwined with, and integral to, the election to arbitrate. The addition of the last sentence in that provision offers additional clarification that the election to arbitrate stands independently of the enforceability of any of the provisions relating to the details of how the arbitration will be conducted. The details of how the arbitration will proceed (location of hearing, rules, etc.) can then be spelled out in separate (severable) provisions within the agreement.

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