CAN I DO THAT? THE PANEL'S AUTHORITY TO ENFORCE PROCEDURAL RULES AND PREVENT DELAYS

By

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I. Introduction

There are key words in arbitration clauses that we are all used to reading. We see clauses that tell us that arbitrators are relieved of all judicial formalities. We see clauses that tell us that arbitrators need not follow the rules of evidence. And sometimes we see clauses that expressly allow the panel to adopt such procedures as it sees fit to resolve the parties' dispute. Indeed, the Supreme Court itself has noted that even where clauses are silent on the scope of procedural powers, "it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement."[i]

While we intuitively accept that arbitrators have wide discretion in *setting* arbitration procedures (as long as it does not conflict with anything agreed to by the parties in the contract), there seems to be a little more discomfort around the arbitrators' ability to *enforce* those same procedures. In a reinsurance dispute community like ours, there can be a variety of reasons for that – the refusal to believe an attorney is trying to obstruct; the desire to ensure fairness even if it means bending too far; or even the protection of relationships between arbitrators and the counsel who appoint them. What you *should* do in the face of obstructive behavior and what you *can* do are different questions. Here, we will talk about what you *can* do – in other words, what the legal framework is for assessing arbitrator authority.

II. The FAA: Deference, Deference, Deference

One way to figure out what you *can* do is by identifying the parameters of what you *cannot* do. In the arbitration world, that usually starts and ends with the grounds for vacatur under the Federal Arbitration Act ("FAA") or equivalent state arbitration laws. For our purposes, we will focus on the FAA.

The Supreme Court has stated that it views the FAA "as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[ii] It has interpreted the four bases for vacatur listed in Section 10 as being exclusive because "[a]ny other reading opens the door to the full-bore legal and

evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."[iii]

So what does this mean for our purposes? While few arbitrators begin their decision-making process by asking themselves "what I can do to avoid vacatur," asking oneself "would this be subject to vacatur" gives you the outermost boundaries of what cannot be done.

The grounds for vacatur under the FAA are well known to most. Courts may only vacate an arbitration award:

1) where the award was procured by corruption, fraud, or undue means;
2) where there was evident partiality or corruption in the arbitrators, or either of them;
3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; 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.[iv]

Parties who have taken issue with arbitration procedures have focused on the third item on this list: "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy."

Guilty of misconduct. What does that mean? This is not the kind of misconduct that comes from corruption or fraud, as set forth in Section 10(a)(1) of the FAA. Rather, misconduct here means "not bad faith, but misbehavior though without taint of corruption or fraud, if born of indiscretion."[v] So the conduct was bad, but not with the added element bias or corruption. How do you figure out if behavior constitutes "misconduct?" By looking to the consequence of the action – did it render the process unfair. In assessing arbitration procedures under the "guilty of misconduct" standard, courts have noted that since arbitrators are not bound by formal rules of procedure and evidence, "the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing." [vi] Fundamental fairness, in turn, "requires only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators."[vii]

Notice and opportunity are the cornerstones of this analysis. Notice ensures that parties are aware of the procedures that will be applicable to the proceedings. Opportunity ensures that the parties have a chance to present evidence consistent with those procedures.

III. Using Notice and Opportunity to Avoid Delaying Tactics

Now that we are armed with the concept of "fundamental fairness," and its companions "notice" and "opportunity," we can apply these terms to our task: ensuring that the arbitration process runs smoothly and that delaying tactics are properly addressed.

A. Assessing Notice

The easiest and most straightforward use of "notice" is a tool that almost every arbitration panel uses: a scheduling order. The use of a scheduling order is one of the universally accepted ways of demonstrating that a party had notice of what the deadlines were, and what the consequences of missing that deadline are. Courts who have reviewed challenges to arbitration awards because of claims of procedural misconduct have frequently pointed to scheduling orders as the clearest indicator of a fundamentally fair process.

For example, in *E.Spire Communications, Inc. v. CNS Communications*[viii], a party challenged an arbitration award on the grounds that the arbitration panel prohibited it from introducing exhibits or calling witnesses at the hearing after the party had failed to meet the deadline for disclosing those exhibits and witnesses to the other side. In finding that the panel had not committed misconduct by refusing to allow the party to belatedly identify evidence, the Fourth Circuit noted that the party "was on clear notice from the Scheduling Order of the deadlines and that the deadlines in the Order would be 'strictly enforced.'"[ix] This decision is consistent with other courts that have concluded that an arbitral panel does not engage in misconduct by enforcing its scheduling order.[x]

What *E.Spire Communications* teaches us is that a party who is on notice of what they are supposed to do, and what deadlines they have to meet, will have a hard time arguing that they were deprived of a fundamentally fair process when arbitrators crack down on delays. Does this mean all arbitrators have to do is stick to its deadline and all will be fine? Well, not entirely. As in everything in the law, there are always exceptions. Notice is an indicator of a fundamentally fair process, but in the end, it is the process itself that matters. If the refusal to grant an adjournment deprives the party of a fundamentally fair hearing, a court may vacate the award.

That being said, Courts have shown a willingness to defer to the arbitrators' decisions as to whether or not to push deadlines or delay a hearing as long as a reasonable justification is provided for the arbitrators' decision. *Bisnoff v. King*[xi] provides an example. In *Bisnoff*, the petitioner sought an adjournment because of an alleged heart condition that he said precluded him from participating in the arbitral proceedings. The panel denied his request in part because it had learned that the petitioner, despite his professed incapacity, had been working at a high-stress job for 30 hours a week without issue. The panel offered other options (such as videotaped testimony) but the petitioner declined and neither he nor his attorney attended the hearing. On a petition to vacate under Section 10(a)(3), the Court upheld the award and stated that the refusal to grant an adjournment did not constitute misconduct. The Court stated that the Panel had articulated a clear and reasonable justification for its decision – *i.e.*, that it did not find credible petitioner's illness claims – and the Court would not second guess that credibility determination.

Compare this with the result in *Tempo Shain Corporation v. Bertek, Inc.*[xii], where the Second Circuit did vacate an award because the arbitrator did not adjourn a hearing when a crucial witness' wife suffered a reoccurrence of cancer. There, the arbitrator did not give a reasonable justification for refusing to delay the case. As the *Bisnoff* Court held, "the essential proposition for which *Tempo Shain* stands is that, absent a reasonable basis for its decision, a refusal to grant

an adjournment of a hearing, due to a medical emergency, constitutes misconduct under the Federal Arbitration Act if it excludes the presentation of evidence material and pertinent to the controversy thus prejudicing the parties in the dispute and making the hearing fundamentally unfair."[xiii] Note the "absent a reasonable basis" part – providing a justification for refusing to delay is key.

One final example is one based on a situation which arbitrators may hear a lot: unavailability of counsel. In *Alexander Julian, Inc. v. Mimco, Inc*.,[xiv] a party sought to vacate an award because his chosen counsel was unavailable on the day of the hearing due to a commitment in another case in federal court. The panel refused to reschedule the hearing because it found that any delay would be prejudicial to the other side, and because it believed there was sufficient advance notice for the complaining party to use substitute counsel. The Second Circuit agreed, finding that the arbitration panel had provided "at least a barely colorable justification" for denying the motion to adjourn. Busy lawyers beware.

B. Assessing Opportunity

As noted above, scheduling orders are powerful tools to demonstrate a fair process. Sometimes, a slavish adherence to a schedule might not always result in a fundamentally fair hearing. The *Alexander Julian* case provides a good summary of what courts fundamentally care about:

> In evaluating an arbitrator's decision to deny a postponement, courts consider whether there existed a reasonable basis for the arbitrator's decision and whether the denial created a fundamentally unfair proceeding. A fundamentally unfair proceeding may result if the arbitrators fail to give each of the parties to the dispute an adequate opportunity to present its evidence and argument. Arbitrators need not follow all the niceties observed by the federal courts. They need only grant the parties a fundamentally fair hearing.[xv]

In this instance, the Court was speaking about the postponement of a final hearing. But the lesson applies equally to interim deadlines. Think of "opportunity" as "did the parties have a chance to do what they needed to do" and apply it to every step of the arbitral proceeding:

- Did the parties have a chance to weigh in on the initial schedule?
- Did the parties have a chance to weigh in on amending that schedule?
- Did the parties have a chance to put in their overall case?

If the answer is "yes," then the process is likely to be viewed as having been fundamentally fair. There are ways arbitrators can "paper the record" to highlight this fairness.

For the initial schedule, an agreed-upon schedule is obviously the easiest way to show that the parties had a chance to weigh in on the process.[xvi] If a dispute arises, provide an explanation as to why certain dates were chosen over others. If a party is looking to amend the deadlines, solicit written submissions from the party as to why a delay is needed and provide written reasons for why an extension is being granted or denied.[xvii] Remember what the Second Circuit said – "at

least a barely colorable justification" goes a long way. And finally, arbitrators have to assess the overall process and determine whether they believe the parties have had enough time to complete discovery and prepare their case. That assessment will be given great deference by the Court.

IV. Conclusion

There is no bright-line rule as to what constitutes sufficient notice or sufficient opportunity. An arbitrator's duty to be fair and impartial extends to decisions on delays and adjournments just as it does to the overall process. But arbitrators should not shy away from pushing back on delay tactics. The courts' admonition that it will not second guess an arbitrators' ruling applies equally to procedural rules as long as the overall process provides for a fundamentally fair hearing.

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[i] *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp*., 130 S. Ct. 1758, 1775 (2010).

[ii] *Hall St. Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 588 (2008).

[iii] *Id.* (internal quotations and citation omitted).

[iv] 9 U.S.C. 10(a) (2016).

[v] *Sherrock Bros. v. DaimlerChrysler Motors Co*., LLC, 260 Fed. Appx. 497, 501 (3d Cir. Pa. 2008).

[vi] *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 625 (6th Cir. 2002), citing *National Post Office v. U.S. Postal Serv.*, 751 F.2d 834, 841 (6th Cir. 1985). *See also Wachovia Sec., LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012); *Tempo Shain Corp. v. Bertek, Inc*., 120 F.3d 16 (2d Cir. 1997).

[vii] *Id. citing Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, 2000 U.S. App. LEXIS 1909 (6th Cir. Feb. 8, 2000).

[viii] 39 Fed. Appx. 905 (4th Cir. 2002)

[ix] *Id.* at 910.

[x] *Trans Chem. Ltd. v. China Nat'l Machinery Import & Export*, 161 F.3d 314, 319 (5th Cir. 1998), *aff'g* 978 F. Supp. 266, 307 (S.D. Tex. 1997).

[xi] 154 F. Supp. 2d 630, 639 (S.D.N.Y. 2001).

[xii] 120 F.3d 16 (2d Cir. 1997).

[xiii] *Bisnoff*, 154 F. Supp. 2d at 638 (S.D.N.Y. 2001).

[xiv] 29 Fed. Appx. 700 (2d Cir. 2002).

[xv] *Id.* at 703 (internal citations and quotations omitted).

[xvi] *See Doral-Financial Corp. v. Calixto Garcia-Velez*, 725 F.3d 27 (1st Cir. 2013).

[xvii] *See Century Indemn. V. AXA Belgium*, No. 11-c-v-7263 (JMF), 2012 U.S. Dist. LEXIS 136472 (S.D.N.Y. Sept. 24, 2012).