

Outside Counsel

Navigating Federal and State Law In a NY Arbitration

New York is often thought of as a center for commercial arbitration, whether for straightforward contract disputes, or for more specialized matters involving, for example, real estate, construction or banking issues. Regardless of the nature of the dispute, counsel handling an arbitration in New York must be mindful of the federal and state laws that will apply, and more importantly, when one will apply over the other.

What Law Applies

The Federal Arbitration Act (9 U.S.C. §1, *et seq.*) (“FAA”) or New York’s CPLR (Article 75) – or a combination of both – may govern a New York arbitration. While the FAA pre-empts and displaces conflicting state law, the FAA’s and CPLR’s provisions are largely consistent. Therefore, both federal and New York law may be involved to the extent they do not conflict.

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The FAA applies to a transaction involving interstate commerce. This reach is broadly interpreted. The FAA may apply even if the parties did not contemplate an interstate commerce connection. Moreover, the specific transaction need not

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have had a substantial effect upon interstate commerce, as long as the *type* of activity at issue has the requisite substantial effect.

As a result, the FAA will typically apply to the vast majority of commercial arbitrations in New

York because the activity at issue will often affect interstate commerce. The CPLR will alone apply, conversely, to disputes that do not involve or affect interstate commerce, such as, for example, professional malpractice disputes or disputes involving exclusively New York-based real estate.

Differences Between The FAA and CPLR

Despite the overall consistency of the FAA’s and CPLR’s provisions, counsel must still be aware of differences between them, and the results that flow from those differences.

For example, under the FAA, the arbitrator will determine if a particular claim is barred by the statute of limitations, while under the CPLR, the court will do so. The FAA permits an award of legal fees to the prevailing party, but the CPLR does not, unless the arbitration agreement itself or an applicable statute allows for it. The FAA does not expressly allow a party to seek judicial provisional relief once the arbitration commences; under the CPLR, however, parties can seek interim relief

from the court if the arbitral award would be rendered ineffectual without the relief. Certain deadlines also differ, such as those to confirm an award or, conversely, to vacate or modify an award.

Differences between the FAA and CPLR extend to aspects of discovery. For instance, though the FAA does not authorize pre-hearing discovery subpoenas, the Second Circuit has held that an arbitrator may subpoena a witness to bring documents to a preliminary hearing, prior to the merits hearing. The CPLR permits a court to order discovery to aid in arbitration, but only in “extraordinary circumstances.”

Even in FAA-governed arbitrations, parties may invoke CPLR provisions that do not conflict in order to fill procedural “gaps.” For example, the CPLR enables New York courts to grant interim emergency relief, such as preliminary injunctions and orders of attachment in aid of arbitrations. Since, as noted, the FAA is silent on the availability of such types of court-ordered interim emergency relief, even when the FAA governs an arbitration, the parties may invoke the benefits of these CPLR procedures.

Other Procedural Rules

It is critical to remember that arbitration organizations and forums, such as the AAA or JAMS, typically empower an arbitrator with wide authority over the arbitral process. Their rules may allow the arbitrator, either upon a party application or his or her own initiative, to direct and oversee pre-hearing documentary

discovery and depositions. Their rules will also enable the arbitrator to issue whatever interim measures “deemed necessary,” including emergency injunctive relief or similar measures, to protect and conserve property during the arbitration.

Arbitrability

Both federal and state law require that the court, rather than the arbitrator, determine initial issues as to arbitrability, such as the existence, validity and scope of the parties’ arbitration agreement. Under both, any doubts concerning arbitrability should be resolved in favor of arbitration.

Because arbitration is a creature of contract, questions as to arbitrability are determined by state law. As a result, courts will apply ordinary state law principles governing contract formation when assessing the validity and scope of an arbitration clause. Courts may also treat an arbitration provision as severable from the contract in which it appears, and enforce the clause according to its terms, unless the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself.

Despite the default rule that the court is to determine the arbitrability of a dispute, both federal and state law allow parties to agree that the arbitrator is to decide such matters. In light of the strong presumption that courts should decide such issues, however, parties may overcome this presumption only if their agreement provides clear and

unmistakable evidence that they agreed that the arbitrator, rather than the court, is to make such determinations.

Often parties incorporate by reference into their agreement the rules of an arbitration organization, such as the AAA, and mutually agree that those rules will govern their arbitration. Such rules typically authorize the arbitrator to determine such gateway issues concerning arbitrability. For example, the AAA’s rules empower an arbitration tribunal to rule on its own jurisdiction, including the existence, validity and scope of the arbitration agreement.

Substantive Law

Where parties explicitly include a governing law provision that applies specifically to the arbitration clause, New York courts will generally apply the law that the parties chose to decide questions concerning the existence, formation and validity of the arbitration agreement. If the parties did not specify the substantive law governing the arbitration agreement, New York courts will apply a conflict of laws analysis to determine the relevant law to apply. If choice of law is indeed an issue, to avoid a protracted dispute, a practitioner should clarify with opposing counsel and the arbitrator or tribunal which substantive law is to govern.