ENFORCING ARBITRATION AGREEMENTS: THE CHOICE OF PROCEDURAL LAW

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The Federal Arbitration Act (FAA) applies generally to most arbitration agreements[1], but parties can choose to have the procedural law of the place of arbitration apply instead. On many issues, there is no material difference between these two statutes, but in certain areas, the differences can be material. One of these is where a party seeks to compel arbitration where there are other actions pending that are not subject to arbitration or where clams are made in the action sought to be compelled into arbitration and where non-signatory parties are also parties to the action.

The FAA, Chapter 1 (9 U.S.C. §§ 1-16) applies to domestic arbitrations. The California Arbitration Act (Cal. Code Civ. Proc. §§ 1280-1294.2) governs domestic arbitrations seated in California. The FAA's substantive provisions preempt inconsistent state law.[2] But parties may choose to be governed by state procedural law, in which case there would be no preemption.[3]

The two key provisions of these statutes relevant to this issue are FAA § 3 and CCP § 1281.2(c).

FAA § 3 provides the following:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, ***shall*** [author's emphasis] on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

CCP § 1281.2(c) provides that the court may deny a petition to compel arbitration, even when there is a valid, enforceable arbitration agreement, when the following occurs:

> A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.

If CCP § 1281.2(c) applies, the court has the following options:

- To refuse to enforce the arbitration agreement entirely and instead order intervention or joinder of all parties in a single action;
- To order intervention or joinder with respect to some or all issues;
- To order arbitration among the parties who have agreed to arbitration and stay the pending court action pending the outcome of the arbitration proceeding; or
- Conversely, to stay the arbitration proceeding pending the outcome of the court action.

The court also has discretion to deny arbitration altogether:

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> If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies[4].

The California rule plainly is designed to prevent inconsistent rulings and to bring all interested parties into a single proceeding when that is appropriate. The federal rule is designed to support arbitration of disputes even if it might result in multiplicity of proceedings arising out of the same set of facts and may possibly result in inconsistent rulings. The consequence of this is that whether a matter that is subject to arbitration actually proceeds to arbitration may well depend on whether FAA § 3 or CCP § 1281.2(c) applies.

Even though CCP §1281.2(c) may result in the complete denial of arbitration, that section is not preempted by federal law[5,6].

It is obvious that § 3 of the FAA will usually be applied in a federal court proceeding operating under federal procedural rules and equally obvious that—absent preemption—CCP § 1281.2(c) will usually be applied in a California state court proceeding operating under California state procedural rules. The more interesting questions are whether § 3 of the FAA can be applied in a California state court proceeding and whether CCP § 1281.2(c) can be applied in a federal court proceeding.

For the same reason that the Volt court ruled that §1281.2(c) is not preempted by the FAA, courts have held that parties to arbitration agreements are free to select either FAA § 3 or CCP § 1281.2(c) to apply to their arbitration agreements, regardless of whether a related proceeding is pending in federal or state court[7,8]. By similar reasoning, CCP § 1281.2(c) can apply in federal court proceedings if its terms are incorporated into the arbitration agreement[9].

Parties can control whether the federal or state rule will govern by addressing this issue in the clause, and a careful clause drafter will usually consider this issue in the drafting process. ■

1. *Allied Bruce-Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995).
2. *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011).
3. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 US 468 (1989).
4. These rules (federal and state) apply in domestic arbitrations; in international arbitrations, there is no difference between California and federal-based arbitrations. Whether under the FAA or the California International Arbitration Act, a court has no discretion to stay arbitration in favor of concurrent litigation. Indeed, Article II of the New York Convention, to which the United States is a signatory, mandates that courts "shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said [arbitration] agreement is null and void, inoperative or incapable of being performed." See FAA, Ch. 2. The California International Arbitration Act is found at Cal. Code Civ. Proc. §§ 1297.17, et seq.
5. See *Volt, supra*: "Unlike its federal counterpart, the California Arbitration Act…contains a provision allowing a court to stay arbitration pending resolution of related litigation. We hold that application of the California statute is not preempted by the Federal Arbitration Act (FAA or Act), 9 USC § 1, et seq., in a case where the parties have agreed that their arbitration agreement will be governed by the law of California."
6. See also *AT&T Mobility LLC v. Concepcion, supra*, 131 S Ct at 1749 (confirming Volt's "no preemption" holding).
7. See ***Cronus Investments, Inc. v. Concierge Services***, 35 C4th 376, 394 (2005) (§ 3 of the FAA does not apply to California state court proceedings unless the parties to the arbitration agreement "expressly designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law").
8. See ***also Rodriguez v. American Technologies, Inc.***, 136 Cal. App. 4th 1110 (2006) (relying on Cronus to apply § 3 of the FAA in a state court proceeding when the parties expressly incorporated the procedural provisions of the FAA into their arbitration agreement).
9. See *Security Ins. Co. v. TIG Ins. Co.*, 360 F3d 322 (2d Cir 2004); *Southern Cal., Ariz., Colo., and So. Nev. Glaziers, etc. v. Sardagna*, 7 Fed. Appx. 754 (9th Cir. 2001).

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