Crossing the Line: New Developments in the Law of Arbitral Jurisdiction

October 29, 2015 – 2:00 p.m. to 3:30 p.m. ET

PROGRAM SUMMARY

Speakers: Mitchell L. Marinello and Matthew J. Singer

What are the limits of an arbitrator’s power? Where does an arbitrator’s authority end, and where does the court’s begin? These are fundamental questions, but the answers are often nuanced, and the relevant legal doctrines are in a state of flux. This program will cover recent legal developments relating to arbitral jurisdiction, including: who decides whether a non-signatory can be bound to an arbitration agreement, who decides certain defenses to arbitration, who decides whether arbitration can proceed on a class basis, and how to properly preserve a jurisdictional objection?

AGENDA

2:00 p.m. Welcome and Introduction of Speakers (5 minutes)

2:05 p.m. Arbitral Jurisdiction (75 minutes)
  • who decides whether a non-signatory can be bound to an arbitration agreement;
  • who decides defenses to arbitration;
  • who decides whether arbitration can proceed on a class basis;
  • who decides the preclusive effect of arbitration awards;
  • how to properly preserve a jurisdictional objection.

3:20 p.m. Conclusion and Questions (10 minutes)

3:30 p.m. Evaluation (5 minutes)

3:35 p.m. Adjourn
Mitchell L. Marinello

Mitch is a trial lawyer with over 30 years of experience in handling business and professional disputes in the courts and through arbitration and mediation. He provides his clients with services ranging from skilled representation in court to practical advice on how to comply with the law, improve business practices, or resolve a dispute quickly at a reasonable cost.

For ten years, Mitch served as the Managing Partner of Novack and Macey and the Editor of *Litigation Review*, a legal periodical published by the firm. Mitch is the firm’s representative to the IAG International, an international association of attorneys and accountants. He recently was elected to a three-year-term on the IAG Management Committee, the Association’s board of directors.

Mitch is a Director of the Chicago Chapter of the Federal Bar Association, a member of the Civil Practice Committee (past Chair) of the Chicago Bar Association, and a member of the Litigation Section of the American Bar Association where he serves as Vice Chair of the ADR Committee and Editor of its Website. Mitch recently was selected to be a member of the American Bar Foundation.

Mitch has been selected by his peers as an Illinois *Super Lawyer* in each of the past ten years. He has been awarded Martindale-Hubbell’s AV® Preeminent Peer Review Rating, its highest rating for ethical standards and legal ability. Mitch also has been chosen by his peers as a Leading Lawyer in Commercial Litigation each year since 2004. Mitch recently was named to the Board of Directors of the Resolution Systems Institute (RSI), an organization dedicated to enhancing ADR systems in the courts. He is a Fellow of the College of Commercial Arbitrators and serves as Co-Chair of its Outreach Committee. He was appointed to the Illinois Chapter of the National Academy of Distinguished Neutrals.

The Illinois Institute of Continuing Legal Education (IICLE) often looks to Mitch for his expertise in civil practice and recently recognized him for his exceptional volunteer service as an author of IICLE’s civil practice materials.
Matthew J. Singer

Associate, Novack and Macey LLP

**BIOGRAPHY**

Matthew J. Singer concentrates his practice in commercial litigation. He graduated from Harvard Law School, *Magna Cum Laude*, in 2012, where he won Dean’s Scholar Prizes for Civil Procedure and Property.

During law school, Matt served as a judicial extern to a Boston Municipal Court Judge, the Honorable Lawrence E. McCormick, and as an intern in the United States Attorney’s Office in New Haven, Connecticut. He also assisted low-income clients as part of a clinical program at Harvard Law School’s Legal Services Center.

Before joining Novack and Macey, Matt served as a staff law clerk in the United States Court of Appeals for the Seventh Circuit. In that role, he assisted all the Seventh Circuit’s judges with appeals implicating important issues of federal law. He was also an Adjunct Professor of Advocacy at Loyola University Chicago School of Law. In 2008, he was a campaign manager for the Iowa House Truman Fund, where he managed all campaign activities for two victorious State Representative races.

Matt earned a Bachelor of Arts degree with High Distinction from the University of Michigan and a Master of Public Policy degree from the University of Michigan’s Ford School of Public Policy. Matt also was a sports editor at *The Michigan Daily* student newspaper, where he covered Michigan’s football and basketball teams.
Case Citations

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AAA Webinar
October 29, 2015 at 2:00 p.m.


Slide 15: Covington v. Aban Offshore Ltd., 650 F.3d 556 (5th Cir. 2011); Bel-Ray Company v. Chemrite, Ltd., 181 F.3d 435 (3d Cir. 1999); Flink v. Carlson, 856 F.2d 44, 46 (8th Cir. 1988); Alexander v. Chesapeake Appalachia, LLC, 839 F.3d 544, 553 (N.D.N.Y. 2012); Snap-on Tools Corp. v. Mason, 18 F.3d 1261, 1267-68 (5th Cir. 1994).


Slide 24: Howard Univ. v. Metropolitan Campus Police Officer's Union, 512 F.3d 716, 720-21 (D.C. Cir. 2008).

Slide 26: Nat'l Ass'n of Broadcast Employees & Technicians v. ABC, 140 F.3d 459, 462-63 (2d Cir. 1998).

Slide 30: Trustmark Insurance Co. v. John Hancock Life Insurance Co., 631 F.3d 869 (7th Cir.2011); Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co., 671 F.3d 635, 638 (7th Cir. 2011).

Slide 35: Benihana Inc. v. Benihana of Tokyo, LLC, No. 12-841 (2d Cir. April 28, 2015); McDonnell Douglas Fin. Corp. vs. Pa. Power & Light Co., 858 F.2d 825, 832 (2d. Cir. 1988); In re Mary Ann Sussex, 781 F. 3d 1065 (9th Cir. 2015); Aerojet-General Corp. v. AAA, 478 F.2d 248, 251 (9th Cir. 1973).


Slide 54: DK Joint Venture 1 v. Weyand, 649 F.3d 310, 317 & n.9 (5th Cir. 2011).


Slide 59: JP Morgan Chase & Co. v. Conegie ex rel. Lee, 492 F.3d 596, 600 (5th Cir. 2007).

Slide 60: Ragone v. Atl. Video at Manhattan Ctr., 595 F.3d 115, 128 (2d Cir. 2010).


Slide 65: Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local No. 24, 357 F.3d 546, 554 (6th Cir. 2004).


Slide 72: Publicis Communication v. True North Communications, Inc., 206 F.3d 725 (7th Cir. 2000).

Slide 77: Citigroup, Inc. v. Abu Dhabi Inv. Auth., 776 F.3d 126, 127 (2d Cir. 2015); Bhd. of Maint. of Way Employees v. Burlington N. R. Co., 24 F.3d 937, 940 (7th Cir. 1994).


Slide 81: Shell Oil Co. v. CO2 Comm., Inc., 589 F.3d 1105, 1109-10 (10th Cir. 2009).
AAA Policy on Class Arbitrations

July 14, 2005

On October 8, 2003, in response to the ruling of the United States Supreme Court in Green Tree Financial Corp. v. Bazzle, the American Arbitration Association issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In Bazzle, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties’ agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association.

Commentary to the American Arbitration Association's Class Arbitrations Policy

February 18, 2005

It has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement. The Association's practice has been neither to commence administration of a case nor to refer such a matter to an arbitrator until a court decides that it is appropriate to do so. The Association's determination not to administer class arbitrations where the underlying arbitration agreement explicitly precludes class procedures was made because the law on the enforceability of class action waivers was unsettled; the Association takes no position as to whether such clauses are or should be enforceable.

In a recent review of this practice by the Association's Executive Committee it was agreed that this practice should be maintained in light of the continued unsettled state of the law. Courts in different states and different federal circuits have reached differing conclusions concerning the preclusion of class actions by agreement and "gateway" issues generally. However, the courts that have confronted the question have generally concluded that the decision as to whether an agreement that prohibits class actions is enforceable is one for the courts to make, not the arbitrator. In fidelity to its Due Process Protocols, the Association will continue to require all proceedings brought to it for administration to meet the standards of fairness and due process set forth in those protocols, but the Association will not seek to make decisions concerning class action agreements that the courts appear to have reserved for themselves.
The Executive Committee also determined at the same meeting to proceed forthwith in the creation of a special committee to explore the possibility of identifying counsel who could assist parties who cannot afford to pay for an attorney in arbitral proceedings. This effort would supplement the Association’s current ability to provide arbitrators who will serve pro bono, or for a reduced fee, in appropriate cases.

The Association will continue to monitor developments in this rapidly evolving intersection of arbitration and the courts.
Click here to go to the Commercial Arbitration Rules

Click here to go to the Commercial Arbitration Rules
Effective 10/1/13

Click here to go to the Construction Arbitration Rules

Click here to go to the Employment Arbitration Rules

Click here to go to the Labor Arbitration Rules