TEXTUAL ARBITRATION LAW

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Law Course 683: Advocacy in Arbitration Experience
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I. What are the main textual legal sources?

A. Federal Arbitration Act (9 USC §1, *et seq*, February 12, 1925, P.L. 68-401)

1. Chapter 1-Domestic

2. Chapter 2-1958 New York Convention implementation.

3. Chapter 3-1975 Panama Convention implementation.

4. Jurisdiction is based upon the Constitution's commerce clause.

a) FAA 9 USC §1 provides: "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction;

"commerce", as herein defined, means ***commerce among the several States or with foreign nations***, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the

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> District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. [emphasis added]
>
> So, if the transaction has nothing to do with the United States except the arbitration takes place here, is the Federal Arbitration Act applicable?

5. Federal Arbitration Act cases cannot be brought in Federal Court based upon Federal law (28 USC §1331); they must be brought on some other basis, such as diversity (28 USC §1332).

B. Connecticut's "old arbitration" act.

1. Currently only applies to agreements to arbitrate concluded before October 1, 2018.

2. Codified at Connecticut General Statutes §52-408, *et seq*.

C. Connecticut's enactment of the Uniform Law Commission's Revised Uniform Arbitration Act (commonly called RUAA) is codified at Connecticut General Statutes §52-407aa, *et seq*. It contains some modifications from the uniform act.

1. Originally concluded by the Uniform Law Commission in 2000, enacted in Connecticut in 2018 (PA 18-94).

2. Presently enacted in 23 states: Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Kansas, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Utah, Vermont, Washington and West Virginia.

   Please note it is ***not*** in force in New York, California, Illinois, Delaware and Texas.

3. Was intended to replace the 1955 Uniform Arbitration Act, which Connecticut never adopted.

4. It was intended to address certain issues that were never addressed in the 1955 Act:

   a) Who decides the arbitrability of a dispute?

   b) What criteria are used to determine the arbitrability of a dispute?

   c) Whether a court or arbitrators may issues provisional measures?

   d) How does a party initiate an arbitral proceeding?

   e) May arbitral proceedings be consolidated?

   f) Are arbitrators required to disclose facts reasonably likely to affect impartiality?

   g) Are arbitrators or an arbitration organization immune from civil actions (and to what extent)?

   h) Can arbitrators or representatives of arbitration organizations be required to testify in another proceeding?

   i) Can arbitrators order discovery, issue protective orders, decide motions for summary dispositions (such as motions to dismiss and motions for summary judgment), hold prehearing conferences and otherwise manage the arbitration process?

   j) Can a court enforce a pre-award ruling by an arbitrator?

   k) May an arbitrator award attorney's fees, punitive damages or other exemplary relief?

l) May a court award attorney's fees and costs to arbitrators and arbitration organizations?

m) May a court award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award?

n) Which sections of the RUAA would not be waivable, an important matter to insure fundamental fairness to the parties, will be preserved, particularly in those instances where one party may have significantly less bargaining power than another?

o) The use of electronic information and other modern means of technology in the arbitration process.

5. Applies to agreements to arbitrate concluded on or after October 1, 2018.

6. The RUAA does not apply retrospectively in Connecticut because of our interpretation of the Constitution's contract clause. The RUAA envisioned two repeal dates,[2] the last of which would have affected all agreements to arbitrate. Therefore, Connecticut will have two sets of arbitration rules for domestic arbitrations for a substantial period of time (not having selected a final repeal date).

D. 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[3]

E. 1975 Inter-American Convention on International Commercial Arbitration ("Panama Arbitration Convention").[4]

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[2] *See* RUAA sections 3, 30, 31 and 32.

[3] 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

[4] 1438 U.N.T.S. 249.

F. 1985 UNCITRAL Model Law on International Commercial Arbitration (fairly clean enactment at Connecticut General Statutes §50a-100, *et seq*.)

1. UNCITRAL is the United Nations Commission on International Trade Law.

2. The Model Law was amended in 2006, which focused on interim measure of protection (domestically simply called provisional measures).

3. Connecticut has not enacted the amendments.

4. The Model Law applies to arbitrations within Connecticut when:

a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different countries;

b) One of the following places is situated outside the country in which the parties have their places of business:

(1) The place of arbitration if determined in, or pursuant to, the arbitration agreement;

(2) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected;

OR

c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

5. Article 22 regarding language was neither proposed nor enacted in Connecticut.

II. What are the major points of agreement with any of these texts?

A. The parties are free to agree to arbitrate (there is an assumption there are no contracts of adhesion between commercial parties, but there is a different assumption when dealing with consumers). Generally speaking, any defense to a contract is available to an agreement to arbitrate.

This overruled a common law doctrine that courts would not allow the parties to agree to oust their jurisdiction. This was a particularly political point in early labor union struggles were they faced judges in the employer's "pocket" resulting in labor unrest (and violence).

B. The agreement to arbitrate is specifically enforceable (a breach is not limited to damages; an agreement to arbitrate shall be specifically enforced). There are usually no damages in the eye of the law.

C. An agreement to arbitrate may be enforced even though it was concluded before the dispute in question arose. The old rule was agreements to arbitrate were enforceable only regarding existing disputes.

D. An arbitration award shall be enforced as if it is a judgment (although there are very limited defenses).

III. Each text has its quirks as compared to other texts.

A. Don't forget the general rules:

1. The Constitution's supremacy clause.

2. The more specific controls over the more general.

IV. Examples of various issues.

A. Number of arbitrators:

1. FAA 9 USC §5 has the default of a single arbitrator.

2. Although §52-411 refers to an arbitrator and an umpire, it is silent on the number to be appointed.

3. RUAA §52-407kk refers to "an arbitrator", which suggests the default is one, unless the parties have otherwise agreed.

4. 1958 New York Convention and its implementing legislation is silent on this point. 9 USC §206 merely provides "Such court may also appoint arbitrators in accordance with the provisions of the agreement."

5. 1975 Panama Convention Article 3 provides: "In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission."

   The impending legislation at 9 USC §303(b) requires the courts to apply this provision.

   IACAC Article 5 provides: "If the parties have not previously agreed on the number of arbitrators (i.e., one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed."

6. UNCITRAL §50a-110 provides there will be three arbitrators, which is the custom in international arbitration.

7. The arbitration rules the parties pick may resolve this issue. Sometimes this is left up to the internal policies of the arbitral institution supervising the arbitration.

B. What is an agreement to arbitrate?

1. The easy part is to have a signed written agreement.

2. FAA 9 USC §4 merely refers to "a written agreement for arbitration" without further explanation.

3. §52-408 is bit broader:

> An agreement in any written contract, or
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> in a separate writing executed by the parties to any written contract,
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> to settle by arbitration any controversy thereafter arising out of such contract, or out of the failure or refusal to perform the whole or any part thereof, or
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> a written provision in the articles of association or bylaws of an association or corporation of which both parties are members to arbitrate any controversy which may arise between them in the future, or
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> an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or
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> an agreement in writing between the parties to a marriage to submit to arbitration any controversy between them with respect to the dissolution of their marriage, except issues related to child support, visitation and custody,
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> shall be valid, irrevocable and enforceable,
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> except when there exists sufficient cause at law or in equity for the avoidance of written contracts generally.
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> When this additional ground was pointed out to the drafters of the RUAA after the final language was approved, their solution was to put in comment 6 that a written provision in the articles of association or bylaws of an association or corporation of which both parties are members is an agreement to arbitrate (even

though the black letter act does not actually say that and the parties did not know they were agreeing to arbitration).

4. RUAA §52-407ff provides "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable, except upon a ground that exists at law or in equity for the revocation of a contract."

5. 1958 New York Convention Article 2(2) provides: "The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

   Needless to say, telegrams no longer exist. Instead of amending a convention with 168 parties (which would be a monumental undertaking), UNCITRAL issued a "recommendation" which encourages States to apply article II(2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive."

   In addition, the Recommendation encourages States to adopt the revised article 7 of the UNCITRAL Model Law on International Commercial Arbitration. Both options of the revised article 7 establish a more favorable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the "more favorable law provision" contained in Article VII (1) of the New York Convention, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".

6. 1975 Panama Convention Article 1 provides: "the agreement shall be set forth in an instrument

signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications."

7. UNCITRAL §50a-107(2) provides: "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

   Once again, telex and telegrams no longer exist. However it allows "other means of telecommunication which provide a record of the agreement," which is pretty broad.

C. Does the agreement to arbitrate need to be signed?

1. Not under the FAA, the old Connecticut arbitration statute, the RUAA, or 1958 New York Convention.

2. Although the 1975 Panama Convention does not require it, a signed written agreement is mentioned as a safe harbor in Article 1.

3. UNCITRAL §50a-107(b) refers to an agreement signed by the parties as a safe harbor.

D. If the parties do not specify what arbitral rules apply, what happens?

1. 1975 Panama Convention Article 3 provides: "In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the

Inter-American Commercial Arbitration Commission."

2. The implementing legislation requires US government approval before ICAC rules are effective in the USA, 9 USC §306(b).

E. Enforcement of preliminary measures.

1. Not mentioned in the FAA. FAA 9 USC §9 provides "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order…" So arbitrators will try to "shoe horn" awards into the enforcement scheme by calling interim measures "partial awards."

Note the parties must use specific language the award is enforceable for it to be enforceable.

2. §52-417 provides: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order confirming the award. The court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

While I have not seen any court deny enforcement, it is possible under this language for there to be no Superior Court where enforcement is possible (when the defendant is out of state, but has personal property assets in the state). The

argument is this is a venue provision and not a jurisdictional provision.

3. RUAA § 52-407rr provides: "If an arbitrator makes a pre-award ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under section 52-407ss. A prevailing party may make a motion to the court for an expedited order to confirm the award under section 52-407vv, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies or corrects the award under section 52-407ww or 52-407xx."

4. The obligation to enforce a 1958 New York Convention award appears in the implementing legislation at 9 USC §207, which provides: "Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."

5. The obligation to enforce a 1975 Panama Convention award appears in the implementing legislation at 9 USC §207, which imposes a reciprocity condition and provides: "Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention."

6. UNCITRAL §50a-135(1) provides: "An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this section and of section 50a-136."

This means the Connecticut law on enforcing a foreign arbitral award is broader than under applicable treaties of Federal law.

F. RUAA §52-407nn(a) provides "An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity."

G. RUAA §52-407nn(a) provides "In a judicial, administrative or similar proceeding, an arbitrator or representative of an arbitration organization ***is not competent to testify*** and may not be required to produce records as to any statement, conduct, decision or ruling occurring during the arbitration proceeding to the same extent as a judge of a court of this state acting in a judicial capacity." [emphasis added]

1. Note it is a question of competency (which cannot be waived), not a question of privilege (which can be waived).

2. RUAA §52-407nn(e) provides "If a person commences a civil action against an arbitrator, arbitration organization or representative of an arbitration organization arising from the services of the arbitrator, organization or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court ***shall award*** to the arbitrator, organization or representative ***reasonable attorney's fees and other reasonable expenses of litigation***." [emphasis added]