HILL BETTS & NASH LLP

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ARBITRATION: A BETTER RESOLUTION

Federal Arbitration Act

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The FAA

Historical Perspective – Hostility to Favoritism

- **The 1925 enactment** of the FAA reversed centuries of judicial hostility and ushered in a strong federal policy favoring arbitration.

- **Antiquity and the Mists of Time** – "The origin of arbitration is lost in obscurity" E. Wolaver. *The Historical Background of Commercial Arbitration*. 83 U.Pa.L.Rev. 132 (1934).

- **Common Law Hostility to Arbitration** – Executory contracts to arbitrate were revocable and unenforceable.

- **Post-FAA:** "An arbitration agreement is placed on the same footing as other contracts where it belongs." *Kulukundis Shipping Co. v. Amtorg Trading, Corp.*, 126 F.2d 798, 985 (2d Cir. 1942).

The FAA

9 U.S.C. Chapter 1, §§1-16

- **§2** – "**A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to [arbitrate]**…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract."

- **Judicial Favoritism –** The FAA did more than place arbitration agreements on an equal footing with other contracts.

- **Motion to stay court proceedings under §3 or to compel arbitration under §4 –** a court must be satisfied that the parties agreed to arbitrate.

- **Scope of Arbitration Agreement –** "The existence of a *broad agreement* to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute;" "Issues relating to the scope, application and enforceability of the arbitration provisions" are to be left to arbitrators, unless reserved for court. *Horton v. Dow Jones & Co., Inc.,* 18-cv-4027 (EFC #48).

- **Justice Kavanaugh's First Decision –** *Henry Schein v. Archer & White Sales, Inc.,* 139 S.Ct. 524, 202 L.Ed.2d 480 (2019), upholds the sanctity of the parties' agreement to arbitrate "gateway issues," (whether a dispute is arbitrable), which must be enforced even if the assertion that a dispute is arbitrable is itself "wholly groundless." (Reversing Fifth Circuit).

- **Awards are Binding §§9-11 –** It is extremely rare that an award is overturned; FAA provides limited grounds; it is not enough to show that the arbitrators committed an error of fact or law – "even a serious error." If the award offers "even a barely colorable justification for the outcome reached," it will be upheld. *Andros Compania S.A. v. Marc Rich & Co., A.G.,* F.2d 691, 704 (2d Cir. 1978).

New York Convention

9 U.S.C. Chapter 2, §§201-208

- **Interplay between the FAA and New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) –** The FAA is not the exclusive law applicable in U.S. proceedings to enforce or challenge an award.

- **§202** – Convention applies in U.S. proceedings to (1) "foreign" awards (made in a signatory country other than U.S.); and (2) "non-domestic" awards (made in U.S. but (a) under foreign law; or (b) having some relation with foreign state(s)).

- **Enforcement –** "Domestic" awards (made in the U.S. between U.S. parties) and "non-domestic" awards can be confirmed or *vacated* under the FAA. However, U.S. court has "secondary" jurisdiction with respect to "foreign" awards and only empowered to recognize and enforce them (no power to vacate). *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 71 (2d Cir. 2017); *Zurich American Insurance Co. v. Team Tankers A/S*, 811 F.3d 584 (2d Cir. 2016).

- **§203 –** U.S. District Courts have subject-matter jurisdiction; and, under §205, there is a right of removal from state court at any time before trial.