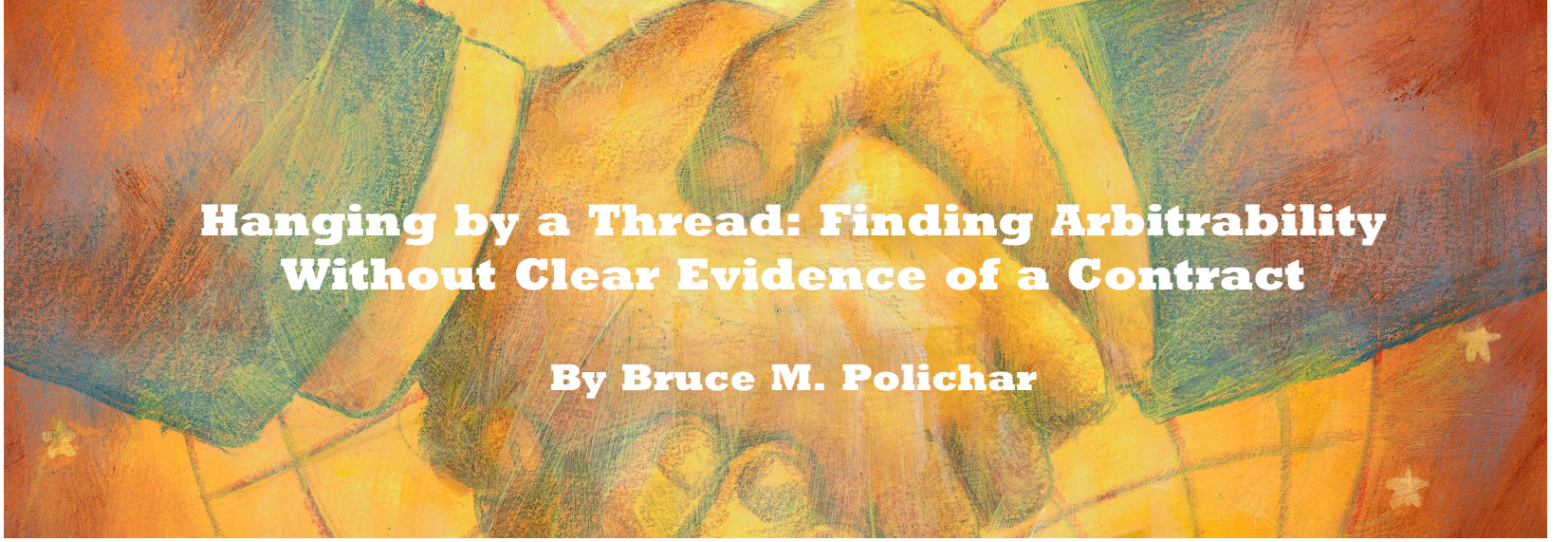

Hanging by a Thread: Finding Arbitrability Without Clear Evidence of a Contract

By Bruce M. Polichar

It is not unusual for business deals to fall apart just at the moment everyone thought they were concluded. Well, perhaps not everyone felt that way—actually about half of those involved did. The other half felt that it was just a potential deal that never came together. This scenario plays out in business every day and just as frequently spawns legal disputes over whether or not enforceable contractual rights and obligations have been created. If and how businesses may seek an arbitrated resolution of these disputes is the subject of this article.[1] Suggestions for drafting arbitration provisions to address these issues appear at the end of this article.

A classic example of disputed arbitrability arose in an international commercial arbitration I recently ruled on involving an American company, "Americo," and a European company, "Euroco."[2] The notice of arbitration that commenced the proceeding quickly generated a vigorous response from Euroco contending that no arbitration could take place inasmuch as the parties had never entered into a contract and, thus, there was no agreement to arbitrate. As is often the case, an arbitrator was being asked to make a threshold determination as to whether the matter could proceed at all—whether or not the dispute was arbitrable—or, to put it another way, whether the arbitrator and the arbitral institution under whose rules the proceeding was initiated had jurisdiction to conduct an arbitration. My initial inclination in reviewing the arbitrability challenge was to take a step back from trying to determine the overall scope of the possible agreement of the parties in assessing the arbitrability issues without becoming immersed in the potential merits of the larger contract claims.

Factual Background

A brief overview of the exchange between Americo and Euroco presents a factual situation that is quite common in commercial disputes, particularly those where arbitrability is challenged,[3] and highlight a body of very typical arbitration disputes in which the overall contractual context can be quite detailed but nevertheless inconclusive as to the parties' overall intentions to conclude a fully binding contract. Americo and Euroco negotiated and exchanged draft documents over many months in an attempt to reach a final and comprehensive agreement on their overall business arrangement. Americo argued that, by reason of alleged oral agreements reached between the parties concerning the business Euroco was to conduct for Americo in certain European territories, as well as certain draft deal memos intended to confirm the parties' agreement, a legally binding written agreement was entered into establishing jurisdiction to arbitrate before the "XYZ" arbitral institution. A surface review suggested that the parties may not have fully reached an agreement on the terms of the underlying transaction, but the exercise was to refrain from being drawn into any conclusions or leanings on that issue and to focus only on whether they had sufficiently agreed to confer jurisdiction on an arbitrator to resolve the dispute.

The version of the deal memo that Americo included in its notice of arbitration contains a provision that states the following: "In case of any dispute the parties agree to XYZ arbitration." The deal memo does not appear to have been signed by either of the parties. There appeared to have been various notes between the parties evidencing an exchange of comments and proposed modifications and revisions by each of the parties to the original draft of the deal memo.

The correspondence suggested that the parties concurred on numerous points—some potentially significant and material to the formation of a contract, and others seemingly much less important. There appeared to have been agreement on a number of negotiated points by the comment "okay" offered by one party or the other at various points in the course of the communications. One e-mail exchange contains a comment from Americo's negotiator that reads, "13. *In case of any disputes, we would like to use XYZ arbitration*." (Emphasis added.) Appended to that, and admittedly written by Euroco's negotiator, is the comment, "okay." Euroco acknowledged this "okay" comment in its arbitration challenge, but raised issues concerning its meaning, intent, and significance to this inquiry. On that same date Euroco's negotiator incorporated the XYZ arbitration clause into a revised draft of the deal memo and sent it back to Americo along with various other comments reflecting their ongoing negotiations. At some point, following this last written exchange, Euroco notified Americo that Euroco did not intend to proceed with the deal, and made no reference to any unacceptable terms or other reason for withdrawing from the discussions of a business arrangement. Sometime thereafter, Americo initiated the arbitration.

Procedural Discussion

In objecting to the tribunal's jurisdiction, Euroco argued

that, under XYZ's published rules and California law, a written contract between the parties agreeing to arbitration was a prerequisite to the conduct of an arbitration, and no such written agreement had been consummated by the parties.[4] The overall thrust of the challenge was that there was no contract upon which to base an agreement to arbitrate, i.e., no written agreement to arbitrate.

Analysis

The ruling on the motion to dismiss focused solely on the question of arbitrability and jurisdiction of the tribunal to proceed under the XYZ's rules. The larger range of questions concerning a comprehensive agreement between the parties, its contents if any, or any questions regarding any breach of such an alleged agreement was explicitly deemed outside the scope of the discussion and my ruling. The sole question addressed was: Did the parties agree to arbitrate? As noted below, this distinction is central to the applicable case law.

It is well established that arbitration is a matter of private contract, and arbitrability and the jurisdiction of an arbitration tribunal require that the parties entered into a written agreement to arbitrate.[5] The XYZ rule in question states that "the Arbitrator shall exercise all powers granted to commercial Arbitrators under the laws of the State of California, USA or the laws of the jurisdiction where the arbitration takes place … ." Under the XYZ's rules, all such arbitrations are conducted under California law unless the parties agree otherwise. With respect specifically to international arbitrations, the governing California law is found in the California Code of Civil Procedure §§ 1297 et seq. Section 1297.72 provides the following:[6] "An 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 telecommunications which provide a record of this 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 … ." [Emphasis added.][7]

The XYZ rule granting the arbitrator authority to rule on his or her jurisdiction was modeled on the California Code of Civil Procedure § 1297.161. The language of both provisions is almost identical. This section states the following: "The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."[8]

If the contract containing the arbitration agreement designates such rules of a named tribunal, then the court must defer to them and leave arbitrability and all other issues to the arbitrator. *Dream Theater Inc. v. Dream Theater*, 124 Cal. App. 4th 547 (2004) ("Just as they may limit by contract the issues which they will arbitrate … so too may they specify by contract the rules under which that arbitration will be conducted.") (Quoting *Volt Info. Sciences Inc. v. Leland Stanford Jr. Univ.*, 489 U.S. 468, 478–479 (1989).

The *Nicaragua* Line of Cases

Americo cited *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992), for the general proposition that "even the most minimal indication of the parties' intent to arbitrate international disputes must be given effect." The case is instructive with respect to the complex issues presented in cases such as *Americo vs. Euroco*. In any case in which the Federal Arbitration Act (FAA) applies, federal substantive law governs the question of arbitrability. *Simula, Inc. v. Autoliv Inc.*, 175 F.3d 716,719 (9th Cir. 1999); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Nicaragua* at 474–475. This means that the FAA applies to all cases involving interstate or international commerce. The ruling in *Nicaragua* is a pivotal decision on this issue (having been cited favorably in more than 100 subsequent state and federal decisions) and deserves careful analysis.

In *Nicaragua*, the newly installed Sandinista government had begun negotiations with a group of affiliated American and Nicaraguan corporate entities that made up Standard Fruit Company (Standard) with respect to an expansive new arrangement for the growing and export of the nation's economically critical banana crop. This followed an initial attempt by the rebels to nationalize the industry—an effort that they came to realize could be economically disastrous. While a written memorandum of agreement regarding certain aspects of the overall arrangement had been reached with some of the Standard-affiliated entities through an extended series of negotiations, additional implementing contracts were required to fully realize the overall understanding the contracting parties intended, and some of the Standard entities had not even signed the initial memo. However, the memo did contain a somewhat clumsy and incomplete arbitration provision which the parties intended to further refine and document in what ultimately became a failed series of further negotiations on the overall business arrangement between the parties. It read, very simply: *"Any and all disputes arising under the arrangements contemplated hereunder … will be referred to mutually agreed mechanisms or procedures of international arbitration, such as the rules of the London Arbitration Association."* The court noted that "Nicaragua admits that this is less than crystal clear, and in fact refers to an association that does not exist … . During the negotiations themselves, neither side could remember the name of the arbitration body in London." *Nicaragua*, 937 F.2d at 473.[9]

In reversing the district court's denial of Nicaragua's motion to compel arbitration, the Ninth Circuit carefully reviewed the provisions and policies of the FAA and the various federal court cases interpreting them. To begin with, the court stated that the FAA reflects the strong Congressional policy favoring arbitration by making arbitration clauses "valid, irrevocable, and enforceable." *Id.* at 475. Citing *Perry v. Thomas,* 482 U.S. 483, 489 (1983), the court in *Nicaragua* said that "the standard for demonstrating arbitrability is not a high one: in fact, a district court has little discretion to deny an arbitration motion." 937 F.2d at 475. The court noted that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of

arbitrability … . The only issue properly before the district court was whether the parties had entered into a contract evidencing a transaction involving commerce under the Act and committing both sides to arbitrate the issues of the contract's validity." *Id.* at 475.[10]

A Surgical Look at the Initial Evidence

We are all trained as lawyers, and certainly as quasi-judicial officers, to refrain from drawing conclusions until all of the evidence is in and carefully examined. However, that normally appropriate approach is exactly what the cases have historically warned against in assessing challenges to arbitrability based on claims of "no contract." Instead, an arbitrator must avoid delving into the merits of whether the parties had entered into a fully binding comprehensive agreement, and only seek out clear evidence of an agreement to arbitrate.

Nicaragua's reversal of the district court turned significantly upon the fact that the lower court had looked to the existence of a contract as a whole to determine arbitrability. This was squarely contrary to the Supreme Court's landmark ruling in *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). *Prima Paint* expressly held that courts may not consider challenges to a contract's validity or enforceability as defenses against arbitration. That case "demands that arbitration clauses be treated as severable from the documents in which they appear unless there is clear intent to the contrary. An arbitration clause may thus be enforced even though the rest of the contract is later held invalid by the arbitrator." *Nicaragua*, 937 F.2d at 476 (citing *Prima Paint* and *Teledyne Inc. v. Cone Corp.*, 892 F. 2d 1404, 1410 (9th Cir. 1990)). In a footnote in *Nicaragua*, the court stated:

> The district court reasoned that an arbitrator can derive his or her power only from a contract, so that when there is a challenge to the existence of the contract itself, the court must first decide whether there is a valid contract between the parties. *Although this appears logical, it goes beyond the requirements of the statute and violates the clear directive of Prima Paint.* Because of the presumption of arbitrability established by our Supreme Court, courts must be careful not to overreach and decide the merits of an arbitrable claim. Our role is strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator.

Nicaragua, 937 F.2d at 478 (emphasis added).

Euroco had argued that, while it did respond to Americo's request that disputes be resolved under XYZ arbitration with an "Okay," it only meant that it was agreeable if all the rest of the terms of the arrangement were fully finalized. However, this reservation or explanation of the assent to arbitration was not included in any of the communications between the parties, and appears only to have been raised in defense of the effort by Americo to engage the arbitration process. A statement that a party did not intend to arbitrate, made only after a dispute over arbitrability has arisen, when the circumstances demonstrate otherwise, is ineffective to avoid the obligation to arbitrate.[11]

Severability of the Arbitration Clause is Key

What was pivotal for my analysis in *Americo vs. Euroco* was the portion of *Nicaragua* and *Prima Paint* that requires the arbitrator to disregard the surrounding contract language as formulated in the communications exchanged by the parties, and "consider only issues relating to the making and performance of the agreement to arbitrate." *Nicaragua*, 937 F.2d at 477. The correct analysis, according to *Nicaragua*, is set forth in *Sauer-Getriebe v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983), in which the court said, "White argues that if there is no contract to buy and sell motors there is no agreement to arbitrate. The conclusion does not follow its premise. The agreement to arbitrate and the agreement to buy and sell motors are separate. Sauer's promise to arbitrate was given in exchange for White's promise to arbitrate and each promise was sufficient consideration for the other."

Thus, the court in *Nicaragua* concluded that in the absence of anything in the ambiguous arbitration clause that was included in the incomplete agreement between the parties showing that it was not intended to be severable, "we must strictly enforce any agreement to arbitrate, regardless of where it is found." 937 F.2d at 477. The arbitrator or a court "can only determine whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms." *Howard Elec. & Mech. V. Briscoe Co*, 754 F.2d 847, 849 (9th Cir. 1985). As noted above, and taking CCP Section 1297.72 as a guide, various types of writings evidencing the agreement to arbitrate are appropriate to evaluate the existence of the agreement. Similarly, the doctrine of severability of an arbitration clause is firmly based on both state and federal statutory and case law.

Policy and the Agreement to Arbitrate

"It is well established 'that where the contract contains an arbitration clause, there is a presumption of arbitrability.'" *AT&T Techs Inc., v. Communications Workers of America,* 475 U.S. 643, 650 (1986); *Comedy Club v. Improv West America*, 553 F.3d 1277 (9th Cir. 2009). The *Nicaragua* court discussed what, in fact, constitutes an agreement to arbitrate. It begins by emphasizing "the emphatic federal policy in favor of arbitral dispute resolution [which] applies with special force in the field of international commerce." 937 F.2d at 478 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 631 (1985) and *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972)). "The Federal Arbitration Act's presumption in favor of arbitration carries 'special force' when international commerce is involved." *Id.*; *see also Domke on Commercial Arbitration*, 3d (*Domke*) Sec. 7:4 (citing *Sandvik AB v. Advent Intern. Corp.*, 220 F.3d 99 (3rd Cir. 2000)).

> According to the Supreme Court, when international companies commit themselves to arbitrate a dispute, they are in effect attempting to guarantee a forum for any disputes. Such agreements merit great deference,

since they operate as both choice-of-forum and choice-of-law provisions, and offer stability and predictability regardless of the vagaries of local law. The elimination of all such uncertainties by agreeing on a forum acceptable to both parties is an indispensible element in international trade, commerce, and contracting. An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used for resolving the dispute.

Nicaragua, 937 F.2d at 478 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. at 518-519 (1974)).

"The fact that the United States has enacted the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards as part of the Federal Arbitration Act, 9 U.S.C. Sec. 201-208, is further evidence of this federal policy." *Nicaragua*, 937 F.2d at 478.[12]

Even where there are problematic issues about the clarity of an agreement to arbitrate, "the clear weight of authority holds that *the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes," and "the scope of the clause must also be interpreted liberally*." *Nicaragua*, 937 F.2d at 478 (emphasis added). "As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense of arbitration." *Id.* at 479 (citing *Moses H. Cone Mem'l Hospital*, *supra*). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hospital*, 460 U.S. at 24-25. "*If the purported agreement … is susceptible of an interpretation that would allow arbitration, any doubts … should be resolved in favor of arbitration*." *Howard Elec. & Mech. V. Briscoe,* 754 F.2d 847 (9th Cir. 1985) (emphasis added). "[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary … . The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Domke*, Sec. 7:5.

A commonly related issue in the various lines of arbitrability cases is the scope of the arbitration clause in terms of what issues are claimed to be subject to arbitration. Inasmuch as the most common types of arbitration clauses found in commercial agreements tend to be along the lines of "all matters arising hereunder," or various permutations of that sort of language, it seems odd that the courts have sometimes engaged in forced and hair-splitting exercises in deciding when to apply or reject arbitration in a particular contractual situation.[13] It is also very common practice in both pure commercial contracts and in collective bargaining agreements to explicitly *exclude* any specific issues that the contracting parties want to keep out of the arbitration process. As a matter of normal business practice, it is fair to say that when parties include an arbitration clause, they anticipate that arbitration will be the mechanism for resolution of any sort of dispute they may later encounter. Courts seem to turn a blind eye to real world practices when they perform micro-word surgery to "discover" some other intention in these cases. Nevertheless, this practice continues, and the law becomes more strained and makes the results more unpredictable on what should be a fairly easy issue.

A State Law Perspective

As regards consideration of arbitrability in *Americo v. Euroco*, the propositions articulated in the *Nicaragua* line of cases are, of course, consistent with California state court opinion as well. "Doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration." *Blatt v. Farley*, 226 Cal. App. 3d 621 (1960). "Under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Armendariz v. Foundation Health Psychare Services Inc.*, 24 Cal. 4th 3 (2000); *see also Horton v. California Credit Corp.*, 2009 WL 2488031 (S.D. Cal. Aug. 13, 2009). In light of the comprehensive statutory scheme regulating private arbitration, courts will indulge every intendment to give effect to such proceedings. *Woolls v. Superior Court,* 127 Cal. App. 4th 197 (2005). This is generally consistent with arbitration in most other jurisdictions, particularly where the Uniform Arbitration Act has been used as a foundation for state arbitration statutes. *See Domke*, Secs. 8:4 and 8:8.[14]

Thus, even though the proposal to submit the dispute to XYZ arbitration and the responsive "Okay" were exchanged between Americo and Euroco in the course of negotiating a preliminary agreement regarding the proposed business arrangement, such a preliminary agreement appears to be binding under both California and federal law regardless of whether a subsequent contract is finalized. *Hotel del Coronado Corp. v. Foodservice Equip. Assn.,* 783 F.2d 1323, 1325 (9th Cir. 1986); *Nicaragua* 937 F.2d at 479. Parties may identify the arbitrable claims indirectly by choosing a body of private arbitration rules, such as the XYZ Rules, that specifies the scope of arbitrable claims. *Zakarian v. Bekov*, 98 Cal. App. 4th 316 (2002). Given the policy favoring arbitration, doubts concerning the scope of arbitration are to be resolved in favor of arbitration. *Abramson v. Juniper Networks Inc.,* 115 Cal. App. 4th 638 (2004). "The standard for demonstrating arbitrability is not high," and such agreements are to be rigorously enforced. *Simula Inc. v. Autoliv Inc.,* 175 F.3d 716 (9th Cir. 1999). *Nicaragua* continues to be relied on by courts and is an important source on these issues almost twenty years after its issuance.

In light of such strong and clear judicial statements of policy regarding arbitration agreements in international commerce, the facts in the *Americo vs. Euroco* arbitration clearly supported a finding that Americo and Euroco, whatever other issues they may have been left open, reached a written agreement that disputes surrounding their dealings would be resolved through arbitration, and under the XYZ Rules. In the end, an analysis of the parties' communications made clear that they had agreed upon a forum and a body of rules for the resolution of any future disputes. Under applicable law, the arbitrator's jurisdiction included

the authority to rule on the issue of arbitrability itself, even though the overall posture of the parties' comprehensive agreement—if any—was hanging by a mere thread based upon the uncertainties that remained in the communications.[15]

Considerations in Drafting: Early Focus, Delegation and Scope are Critical

The situations that we have discussed start early on when business people are working out potential terms of an agreement. The consequences of casual communications about arbitration are not usually the focus of early-stage deal making, and the consequences of those communications are usually not apparent to the people trying to hammer out the basics of the deal. When the deal falls apart and litigators or arbitrators get involved, the parameters for dealing with the dispute may are already be fixed in place. It is important, then, that business people, as well as their corporate and outside counsel, are aware of how arbitrability issues may affect them, and recognize the importance of communicating clearly about how they want to handle disputes if they arise in the future. As noted in the recently published Protocols of the College of Commercial Arbitrators:

> Business users, guided by knowledgeable and experienced counsel, are in the best position to determine how and when arbitration will be brought to bear on business disputes, and what kind of arbitration process to prescribe. If business parties really want arbitration to be a truly expeditious and efficient alternative to court, they have to assume control of the process and not delegate the responsibility to outside counsel – in other words, principals and not agents, should act as principals. This must include not only choices made after disputes arise, but also active choice-making at the time of contracting. Ideally, it begins even earlier with strategic discussions regarding the management of conflict in which arbitration is considered among the variety of tools and approaches.[16]

There are three principal issues involved in the creation of a contractual arbitration provision: (i) whether arbitration is desired at all, and when to address that choice; (ii) the so-called delegation questions defining the arbitrator's authority to rule on arbitrability and jurisdiction; and, (iii) the scope of arbitral issues.

(i) Consider Arbitration as a Potential Forum Early in the Process

In most business dealings, negotiators will tend to focus on major commercial terms in the early stages of discussions and in the preparation of deal memoranda or draft agreements. Choice of forum issues tend to arise as afterthoughts or become important points only when a deal has failed to conclude or was concluded but has later gone sour, and the parties are seeking remedies. As we have seen, casual treatment of the question of where and under what rules disagreements are addressed may produce surprises that one or more parties may not be happy experiencing when a dispute subsequently arises. In-house corporate counsel (or other contract negotiators), need to determine early on in a business negotiation the issue of forum selection in the event the contracting process aborts, and to lay the groundwork accordingly. Likewise, it behooves outside advisors to counsel their clients on the importance of thinking through the arbitration issues even as they begin to consider new business dealings. This starts with the not-always simple issue of whether or not to adopt arbitration as the designated forum for dispute resolution.

Just as a specific choice of law provision will address the rule structure for future disputes, the designation of a particular forum or arbitral institution for dispute resolution may also serve to define a set of rules which, in themselves, affect issues such as authority to rule on arbitrability and the scope of the arbitration provision's coverage. It would therefore be prudent to look carefully at both a specific designation of governing law as well as the language of the arbitration provision to assure that the choices are complementary to the desired result, i.e., whether the choice of law is favorable to the selection of a particular arbitration institution and its rules. As noted earlier, there may be potential issues to consider on procedural as well as substantive matters concerning the interplay of state and federal law. The extent to which an arbitration clause can anticipate and can be negotiated so as to determine how those issues will be decided in future proceedings is open to some question as the law in this area is not stable.

These choices may arise as part of the early contract-negotiation process without being initially apparent, and counsel should identify and make clients aware of them as they begin the process of exchanging proposals and early-stage forms of agreement. Inasmuch as a focused approach to these issues is going to arise as soon as any form of agreement—interim or more formal—is exchanged, the nature of the communications among the parties deserves close attention. As seen from *Americo v. Euroco*, the arbitration issue may often arise very casually, but often has substantial impact on the outcome of the dispute. To the extent that participants in the deal-making process have reservations about pinning themselves down to various choices of forum and law, they may want to consider explicitly stating in their written exchanges that all terms, including dispute resolution provisions, remain conditioned upon finalization of a full and formal written agreement.

Another potential trap for the unwary is the equall common situation in which the parties negotiate a legally binding deal memo, and reference the possibility of moving to a more detailed formal agreement at a later date. Even though the deal memo might not contain any reference to arbitration, it is often the case that the parties will reference a particular long form agreement as the intended model for further documentation. In many industries parties are likely to reference an "industry model" long form agreement. These broadly used contract forms frequently contain arbitration protocols. If the parties negotiating the deal are not sure about whether to adopt arbitration in the early stages they would be well-advised to note that the arbitration provisions of the potential long form will also not come into

force and effect unless and until the long form is in fact fully adopted and executed by the parties.

(ii) Delegate Issues as Specifically Within the Authority of the Arbitrator

While courts often suggest that the question of whether a matter is clearly within the purview of the arbitrator is unequivocally a threshold issue for a court, I would submit that a survey of the cases makes this anything but clear and predictable. If a decision has been made to submit future potential future disputes to arbitration, one would be well-advised to adopt the language used by most of the major arbitral institutions, which tends to track the language of CPP 1297.161 noted above. I am not aware of any reported case in which a specific, explicit delegation of authority of the arbitrator to rule on his or her jurisdiction has been rejected by a court. Bear in mind, however, that the matter of delegation of arbitral authority, and the delineation of the scope or range of issues that fall within the authority of the arbitrator to rule, are often expressed in one comprehensive arbitration clause. In drafting these provisions it is important to analyze each of these arbitrability issues with a clear focus and careful choice of language. We have seen that the attempt to use broad and general language may not be sufficient to assure the desired scope of authority.

(iii) Consider Defining the Scope of the Arbitrator's Authority

A broadly worded arbitration clause is by no means certain to be honored and applied by a court, even with comprehensive, inclusive language employed. See *Granite Rock Co. v. International Brotherhood of Teamsters, 200* U.S. 321, 130 S. Ct. 2847 (2010) (The question of when a contract comes into existence is one for a court, not an arbitrator). Because the arbitrability issues discussed in this article were not addressed in *Granite Rock*, the line of cases from *Nicaragua* forward should be seen as governing the question. Thus, issues of who—court or arbitrator—should decide arbitrability, the inclusion or exclusion of any issue, including the formation, ratification/finalization, validity, enforceability or other application of the overall terms of the agreement, are subjects that might be wise to explicitly incorporate in the arbitration clause itself. After *Granite Rock,* the need for more specific delegation of authority to the arbitrator with respect to all issues that the parties expect to have arbitrated has become even more critical. However, one must also be cognizant of the current case law and Congressional exploration of certain subjects as possible exclusions from the arbitral forum, namely the issue of unconscionability and, potentially, contracts involving employment and consumer dispute-resolution mechanisms. If the drafter's desire is to achieve the most comprehensive, inclusive arbitrability coverage, he or she should consider adding to the customary broad language of the arbitration clause language, such as, "any and all matters arising under, related to, growing out of, or otherwise pertinent to the subject matter of this agreement, *including, but not limited to, all issues of any nature concerning the formation, ratification, validity, enforcement or breach of this agreement; save only those matters which, by law raise challenges specifically to this arbitration provision, and/or whose substantive subject matter has been removed from arbitral jurisdiction by statute."*

However, if the parties negotiating a commercial contract are only prepared to have disputes submitted to arbitration once the contract has been fully completed and executed, they would be well-advised to state that specifically in their negotiation communications from the very beginning. A failure to do so may well result in the application of arbitral jurisdiction under the principles that I have explored in this article. Similarly, negotiation communications might also address the question of where arbitrability is to be determined in the absence of a fully detailed arbitration clause that would normally be the place to fix a venue, either explicitly or by reference to a body of arbitration rules of a chosen institution.

Conclusion

The FAA is a relatively general statement of Congressional policy (with some simple procedural rules set out), intended to nurture and support the use of arbitration in interstate and international commerce.[17] In its most recent efforts to further define and flesh out the act, the Supreme Court may have unwittingly confused, destabilized and impaired Congress' core policy and purpose in creating the act. Under such circumstances it seems an appropriate and necessary moment for the Congress to take a fresh look at how its own intentions and expectations through the FAA have evolved in the case law. Those decisions which have shaped arbitration policy in ways that support Congressional policy should be considered for adoption into a revised FAA. Those that defeat the policy should be clearly put to rest. Meanwhile, in light of the recent cases, arbitrability has become more of an unsettled question. The expressions of the parties' expectations and intent must therefore be thought through carefully and expressed with precision.

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Endnotes

[1]Although the focus of this article is primarily on commercial disputes, the legal framework and analysis applies to arbitrability challenges broadly.

[2]The institutional rules referenced herein are quite consistent with those of most of the best-known international

arbitration organizations, and their application to these situations may thus be generalized.

[3]The situation also arises frequently in labor disputes as well as in consumer and employment cases.

[4]This correctly reflects the rules of virtually all arbitration tribunals as well as both state and federal statutory and case law. Euroco's response was treated as a motion to dismiss the proceedings, and additional arguments and authorities were submitted by the parties. Under the XYZ's rules, as well as the California Code of Civil Procedure § 1297.72, it is the province of the arbitrator to rule on issues of his or her jurisdiction and arbitrability. This also mirrors the rules of the other major arbitral institutions. In some states, such as California, there are separate sections of these laws dealing with domestic and international arbitrations. California Code of Civil Procedure, §§ 1280 et seq. (domestic), and §§ 1297.11 et seq. (international), which are largely, but not completely, the same. The particular facts of this challenge bring the Federal Arbitration Act strongly into play for guidance in handling such an international commercial dispute, because congressional policy is specifically focused on these issues when international business transactions are involved.

[5]Federal Arbitration Act, 9 U.S.C. 2; *AT&T Technologies Inc. v. Communication Workers*, 475 U.S. 643 (1986); *Moses H. Cone Memorial Hospital v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983); *Horton v. California Credit Corp.,* 2009 WL 2488031 (S.D. Cal. Aug. 13, 2009)*;* California Code of Civil Procedure §§ 1281 et seq., and § 1297.72; *Armendariz v. Foundation Health Psychcare Services Inc.,* 24 Cal. 4th 83 (2000).

[6]There is an interesting question of whether the rules intended "USA" to reference the Federal Arbitration Act or merely to identify California as a state within the United States for the benefit of non-American participants. The point would appear to be moot because the Federal Arbitration Act, by its terms, applies to both interstate and international commerce. 9 U.S.C. 1.

[7]It is interesting to note that there is virtually no case law interpreting California Code of Civil Procedure §§ 1297 et seq. Even though it may be helpful to refer to the § 1281 provisions and cases thereunder, it is perhaps more appropriate under the arbitral institution's rules to draw upon the Federal Arbitration Act, which governs the enforceability of arbitration agreements in all contracts involving both interstate and international commercial arbitration.

[8]The arbitrability clauses of most major international arbitral institutions use almost identical language in this regard. *See* Article 23.1 of the Rules of Arbitration of the London Court of International Arbitration, Article 6 of the Rules of Arbitration of the International Chamber of Commerce, and Rule R-7(b) of the American Arbitration Association Rules for Arbitration. The U.S. Supreme Court has long recognized the right of the parties to delegate the question of arbitrability to the arbitrator by contract. *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938 (1920); *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79 (2002). Likewise, the principle of severability of the arbitration clause as a stand-alone provision has been repeatedly confirmed, starting with *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). *See also, Sauer-Getriebe v. White Hydraulics, Inc.*, 71 F.2d 348, 350 (7th Cir. 1983). Most states follow a similar rule, and, "under the FAA, the parties' intentions regarding who decides the question of the arbitrability of an issue carries more weight than the presumption favoring arbitrability." *Domke on Commercial Arbitration*, Section 15:2.

[9]In all likelihood they contemplated the London Court of International Arbitration which had been a major center for international commercial arbitration for many years.

[10]That standard, in fact, was the one applied in ruling on the Motion to Dismiss in *Americo v. Euroco*.

[11]*See Carlile v. Berrie & Co.*, 2008 WL 453281 (C.D. Cal. Oct. 6, 2008) (claim that party did not intend to arbitrate claims is ineffective, relying on *Nicaragua* for the proposition that there is no discretion to deny arbitration where an agreement to arbitrate exists).

[12]It should be noted that the XYZ arbitral institution has been established and has operated for over 25 years, with specific recognition of the effects of the Convention upon arbitration awards entered pursuant to the XYZ Rules.

[13]"Where a contract provides for arbitration of 'any controversy or claim arising out of or relating to this agreement or breach thereof," such broad language covers contract generated or contract related disputes between the parties however labeled … " *Acevedo Maldonado v. PPG Industries Inc.*, 514 F.2d 614 (1st Cir. 1975).

[14]According to *Domke*, there is a body of state law that holds that, if the parties fail to agree on all of the terms of a contract, there is no contract and an arbitration clause cannot be invoked. *Domke*, Sec. 8:4. However, these cases do not arise under the FAA, and would not appear to be controlling where the doctrines stated in *Nicaragua* and the large body of cases following it apply. "The rules of contract interpretation employed under the FAA are the same as those under the CAA [C.C.P. Sec. 1280 et seq.], and the relationship of state and federal law is recognized in cases in other circuits." *Valencia v. Smyth*, 185 Cal. App. 4th 153 (2010).

[15]Without delving into the various exchanges between the parties, certain points raised in Euroco's opposition to the arbitration proceeding should be mentioned. Although Euroco asserted that at all times it was clear that its board approval was a requirement of a binding agreement, there is no mention of board approval in any of the communications that were provided to the arbitrator. There are various references in the correspondence stating a reservation to address possible additional revisions or additions to the pending deal memo—but no statement (or suggestion) of a condition precedent as to board approval. It is open to question whether some form of corporate approval was in fact a condition precedent to conclusion of a binding commercial contract. Even if that were the case, an arbitrator would have to further find that there was some clear understanding among the parties that the imbedded agreement to arbitrate was also conditional in order to conclude that the dispute was not arbitrable. *Nicaragua*, 937 F.2d at 477. It is worth noting that following my jurisdictional ruling denying the Motion to Dismiss the parties entered into a binding settlement agreement. As it was not submitted to me, I am unable to say whether it includes an agreement to arbitrate in the event that one of the parties claims a breach of the settlement agreement.

[16]*See* "Protocols for Expeditious, Cost-Effective Commercial Arbitration." College of Commercial Arbitrators, Copyright 2010, Section III, B. 1, page 15.

[17]It was driven initially by a need to overcome hostility in the courts toward the arbitral process which was seen by the judiciary as an encroachment on its historical territory.