

Strafford

Presenting a live 90-minute webinar with interactive Q&A

Successful Construction Arbitration: Forum Selection, Forensic Experts, Damages and Attorney's Fees

Consolidation and Joinder Rules Under State Law and FAA, Structuring Case Management, Discovery and Motion Waivers

WEDNESDAY, DECEMBER 9, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

James M. Dash, Member/Manager, **Carlson Dash**, Chicago

Jonathan S. Safron, Attorney, **Carlson Dash**, Chicago

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Successful Construction Arbitration

Planning for Favorable Outcomes
From Time of Contracting
To Dispute Resolution

James M. Dash
Jonathan S. Safron

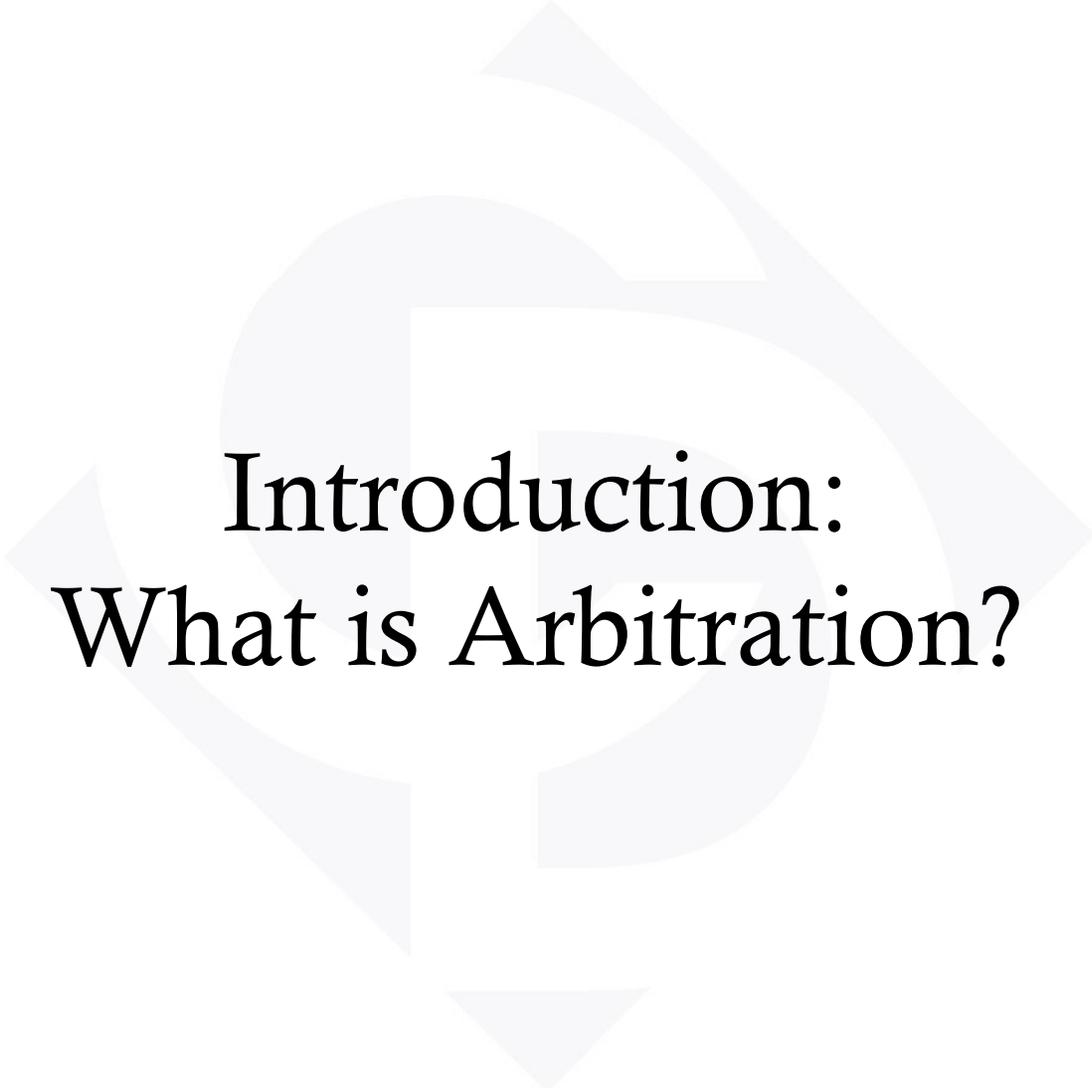


Outline

Introduction: What is Arbitration?

Overview of Landscape—FAA, UAA, RUAA and their Interplay

- I. Structuring Arbitration Provisions
- II. Case Management
- III. State Arbitration Laws and FAA
- IV. Appeals
- V. Court Intervention
- VI. Recovery of Attorneys' Fees; Damages and Limiting Costs



Introduction: What is Arbitration?

What is Arbitration?

- Disputes- nothing new for mankind
- Evolution since “bigger club wins”
- Courts = publicly-available Third Party Neutral; mostly paid for by taxes
- State sponsors court apparatus, pays for decision-maker, enforcement
- Arbitrator = private TPN, acts in lieu of judge & jury, with either privately agreed-upon or published rules



Private TPN Has Limited Authority

- Arbitrator's authority is limited by state, federal rules
- Far less authority than that of a judge – e.g., jurisdiction, subpoena power
- Only parties that have agreed can be forced to arbitrate ... sort of
- Statutes make arbitration clauses enforceable (within limits)
- Federal Arbitration Act, within its scope, preempts state law – collateral effects on venue, applicable law statutes

Federal Arbitration Act (FAA)



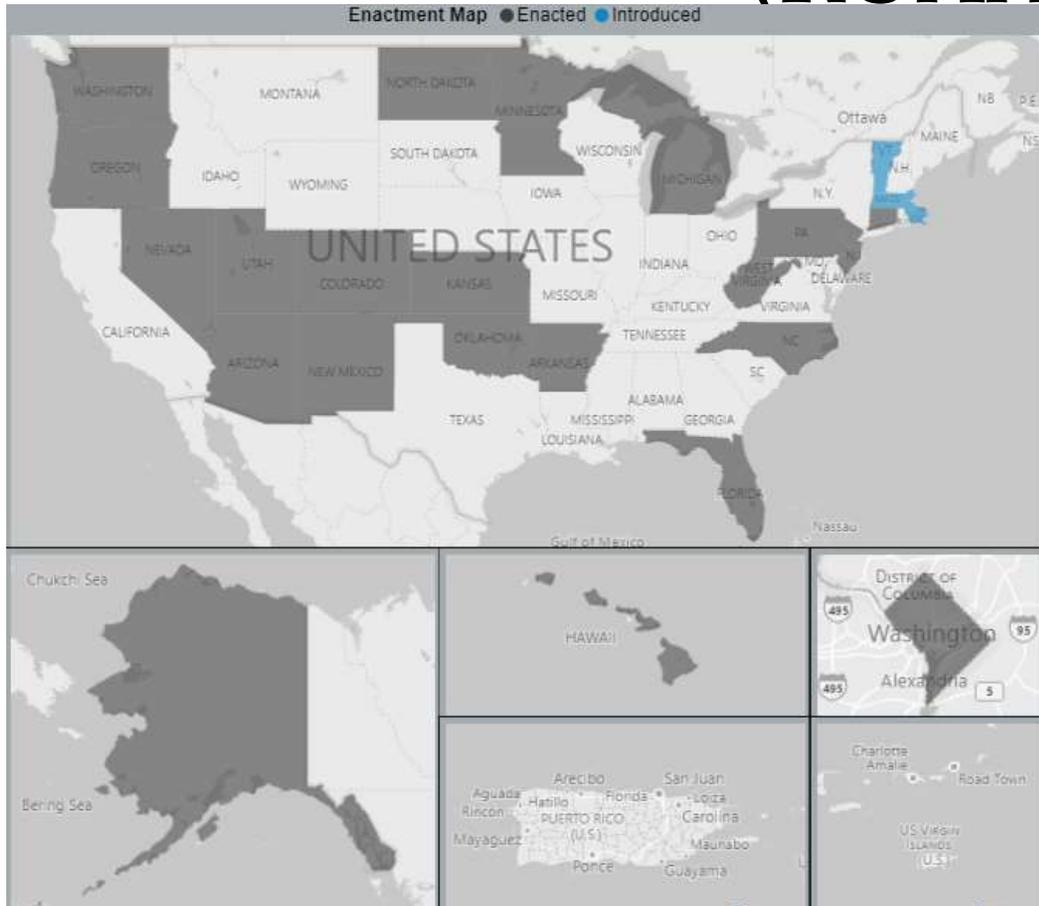
- Codified at 9 U.S.C. § 1
- Predicated on exercise of Commerce Clause powers granted to Congress
- Section 2 of FAA serves to preempt non-procedural state law

Uniform Arbitration Act (UAA)



- UAA originated in 1955; adopted in some form by 35 states
- 14 states - substantially similar legislation

Revised Uniform Arbitration Act (RUAA)



- RUAA - enacted in 21 states and Washington D.C.; introduced in 2 more state legislatures

I. Structuring Arbitration Provisions

A. What authority should you give an arbitrator?

- Decision of arbitrability: court vs. arbitrator – the parties can decide this question
- What if the clause is silent? (What jurisdiction are you in?)
- Interests of courts and arbitrators, case loads and financial incentives – and the consequences of being wrong

B. Avoiding multiple dispute resolution proceedings

- Ask client: What other contracts are out there? (Blank slate?)
- Worst-case: inconsistent decisions, all against your client
- Red flag- where client signs an upstream party's agreement
- Limit scope; include strong mandatory consolidation clause

C. Choice of Law

- Refer to III. State Arbitration Laws and the FAA
- Preemption by FAA- might get another forum's law to apply
- Title IX U.S.C. 1- commerce def'n is pretty broad
- FAA governs unless contract contains explicit choice of law
- In *Dialysis Access Center LLC v. RMS Lifeline Inc.*, First Circuit struck down generic choice of law provision in favor of FAA

D. Rules and Neutrals

- AIA – as of 2017, no longer default to AAA
- Quality of neutral – among top factors to consider
- Scope out local pool of arbitrators for specialists and likely judges who would hear such cases
- Consider setting discovery limits, case deadlines in clause

II. Case Management

A. Pausing Litigation (If Ongoing)

- More participation in litigation without asserting arbitration clause = higher likelihood of waiver
- At outset of litigation, alert judge that arbitration is ongoing
- Staying litigation pending arbitration – tried-and-true strategy

B. Discovery

- Arbitration clause setting limits will cut costs here
- Focus on exchange of necessary information for the neutral
- Minimize discovery costs where possible

C. Preliminary hearing

- You and your client can feel out the neutral; counterparty
- Set deadlines if not already addressed
- Ensure scheduling order is cost-effective

D. Motion waivers

- Formal rules of evidence do not apply
- Motion practice disfavored for lack of import
- Cost-benefit analysis; manage client expectations

E. Hearing process

- Arbitrators, like judges, are human, so act as if you were in court and have client present
- Monitor time limits and costs for witness attendance
- Can some of disputes be settled ahead of hearing?

III. State Arbitration Laws and FAA

A. FAA Basics



- Arbitration agreement must be in writing
- No default rules; no restriction on appointment of TPN
- § 7 – arbitrators empowered to summon witnesses, enforceable by US District Court

B. State Law/ UAA/ RUAA Basics



- UAA originated in 1955; adopted in some form by 35 states
- 14 states - substantially similar legislation

IV. Appeals

A. Grounds for Challenging Decisions- FAA

- May challenge enforcement on ground of ‘evident partiality or corruption’; other arbitrator misconduct; in cases where arbitrators exceeded powers. 9 U.S.C. § 10(a)
- Referred to as ‘vacating’ or ‘setting aside’ award. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (FAA ‘set-aside’ process is limited by statute; not a pseudo-appeal)
- ‘Grounds for vacatur of an arbitration award ... are not waivable, or subject to elimination by contract.’ *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F.3d 1262, 1267 (9th Cir. 2013)

B. State/UAA/RUAA Review Distinctions

- § 12 and § 13 – grounds for vacating, modifying or correcting award. Otherwise- § 11 -after award made, any party may apply to court for order confirming award.
- Some states- FAA ‘set-aside’ grounds not exclusive; *e.g.* may add public policy, other common law theories
- CA, TX, NJ allow parties to stipulate in arbitration agreement that converts ‘set-aside’ to a pseudo-appellate process

V. Court Intervention

Limited Court Intervention During Arbitration

- Historically: no intervention until award is issued; may decide threshold issues such as arbitrability, whether clause is valid
- Court may not intervene in selection of arbitrators under either FAA or state law (with few exceptions)
- Although some state law allows court enforcement of arbitrator subpoenas, practical difficulty in enforcing against out-of-state, non-party witnesses

VI. Recovery of Attorneys' Fees; Damages and Limiting Costs

A. Recovery of Attorneys' Fees

- Only clear answer- prevailing party may recover when prevailing party attorneys' fees *at arbitration* provided for in contract
- No inherent power or implied authority to award attorneys' fees under FAA; varies by situation, jurisdiction as to whether “bad faith exception” to American Rule applies to arbitration
- § 25(c) of UAA- discretion to award attorneys' fees to prevailing parties in contested judicial actions to confirm, vacate, modify or correct an award

B. Damages

- Choice of TPN is critical to ensuring an arbitrator with the right subject matter knowledge
- Parties should remain open to settlement at all times- recall that any submission to TPN, no matter how qualified, is far from a 100% certainty for your client
- Useful to know state laws (i.e. whether the forum state has UAA provisions regarding vacating, modifying, correcting award) prior to drafting arbitration clause

C. Limiting Costs

- Limits to discovery and motion practice can trim the overall expenses
- Managing client expectations as to professional courtesy to the other side, TPN; maintaining decorum in “courtroom setting” can smooth over potential stumbling blocks before they occur
- Consider travel issues with witness sequencing; perhaps opt for teleconferencing where possible/effective

Contact Information

For further information, contact Jim and Jonathan:

James M. Dash

jdash@carlsondash.com

(312) 648-6214

Jonathan S. Safron

jsafron@carlsondash.com

(312) 648-6216

Acknowledgments

The presenters would like to thank the authors of the following works, which guided our research and outline:

United States: Arbitration Q&A

<https://www.arnoldporter.com/-/media/files/perspectives/publications/2017/11/comparative-legal-guide-united-states-arbitration.pdf>

Thad Dameris, Anton A. Ware, and Amy Endicott

The Top 10 Ways to Make Arbitration Faster and More Cost Effective

https://www.adr.org/sites/default/files/document_repository/the-top-10-ways-to-make-arbitration-faster-and-more-cost.pdf

American Arbitration Association