

Chapter 6

Commencing the Arbitration

David C. Singer*

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§ 6:1 **Procedural Rules Governing Commencement of Arbitration**

Parties entering into an arbitration agreement are free to choose the substantive and procedural law that they wish to govern their arbitration and may craft their own rules and procedures.¹ When parties contractually agree to submit to arbitration but fail to specify the

* Krista Bolles, an associate at Dorsey & Whitney LLP, assisted with the preparation of this chapter.

1. See *Emp'rs Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937, 942 (7th Cir. 1999).

procedural law that will govern the arbitration, the procedural law of the forum in which the parties have agreed to conduct the arbitration will apply.²

The Federal Arbitration Act (FAA) contains the basic legal principles applicable to arbitration in the United States but does not provide any guidance on the drafting, serving, or filing an arbitration demand. Under state law, which supplements the FAA, a claimant generally must serve the arbitration demand or notice of intention to arbitrate on the other party or parties to the dispute. For example, New York State has specific procedures for initiating an arbitration proceeding:

A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested.³

Parties sometimes begin the arbitration process by seeking a court order compelling arbitration. The FAA specifies the manner in which service of a petition to compel arbitration and notice of a motion to vacate, modify, or correct an arbitration award must be made.⁴ Under the FAA, a petition to compel arbitration must be served in accordance with Rule 4 of the Federal Rules of Civil Procedure.⁵

§ 6:1.1 Revised Uniform Arbitration Act

The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Arbitration Act (UAA) in 1955.⁶ Of the forty-nine U.S. jurisdictions that had arbitration statutes in 2000, thirty-five had adopted the UAA and fourteen had adopted substantially similar legislation.⁷ In 2000, the NCCUSL promulgated

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2. *See, e.g.*, Federal Arbitration Act, 9 U.S.C. §§ 1–16; N.Y. C.P.L.R. §§ 7501–7514.
 3. N.Y. C.P.L.R. § 7503(c); *see also* REVISED UNIF. ARBITRATION ACT § 9 (2000) (containing similar provisions).
 4. 9 U.S.C. §§ 4, 12.
 5. *Id.* § 4.
 6. *See* REVISED UNIF. ARBITRATION ACT Prefatory Note (2000).
 7. *Id.*

the Revised Uniform Arbitration Act (RUAA).⁸ The RUAA has been adopted by eighteen states and the District of Columbia.⁹

To avoid the development of two different sets of rules for arbitration agreements under state arbitration law, one for agreements under the UAA and another for agreements under the RUAA, the RUAA contains several provisions that address when it will apply and eventually replace the UAA.¹⁰ For example, the RUAA provides that it will govern all agreements entered into after the effective date of a state's adoption of the RUAA.¹¹ Additionally, the RUAA permits state legislatures to select a subsequent "delay date" by which the RUAA will govern all arbitration agreements, regardless of when they were entered into—including agreements made prior to a state's enactment of the RUAA.¹² As explained in a comment to the RUAA, "Section 3 of the RUAA provides for a transition period during which both the UAA and the RUAA apply and also a date after the effective date on which the RUAA will apply to all arbitration agreements no matter when the parties entered into them."¹³

While the RUAA is a default act that applies where parties to an arbitration have not specifically agreed with respect to a particular issue, certain provisions of the RUAA, including with respect to notice of the initiation of an arbitration proceeding, are nonwaivable.¹⁴ Notably, under the RUAA, parties may not "agree to unreasonably restrict the right under Section 9 to notice of the initiation of an arbitration proceeding."¹⁵

The RUAA provides a method for initiating an arbitration proceeding, including both the means of giving notice and the content of such notice:

A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties, or in the absence of an agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.¹⁶

8. *Id.*

9. *See* National Conf. of Comm'rs on Unif. State Laws, Legislative Fact Sheet—Arbitration Act (2000), [www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration Act \(2000\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(2000)).

10. *See* REVISED UNIF. ARBITRATION ACT §§ 3, 31, 32, 33.

11. *Id.* § 3.

12. *Id.* §§ 3, 31, 32, 33.

13. *Id.* § 31, cmt.

14. *See id.* § 4.

15. *Id.* § 4(b)(2).

16. *Id.* § 9(a).

A party waives any objection to lack or insufficiency of notice by appearing at an arbitration hearing and failing to make the objection at the outset of the hearing.¹⁷ Thus, under the RUAA, both the method of giving notice of the commencement of an arbitration and the contents of such notice are subject to the parties' agreement, provided, however, that any restrictions the parties impose on the method or contents of notice of commencement are reasonable.¹⁸

§ 6:2 **Applicable Rules of Arbitral Institutions**

§ 6:2.1 **American Arbitration Association**

The American Arbitration Association (AAA) provides procedural rules to govern arbitrations, including the AAA Commercial Arbitration Rules and Mediation Procedures. With respect to service of an arbitration demand, the AAA Commercial Rules provide:

Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, . . . may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.¹⁹

The AAA Commercial Rules also provide a process for initiating an arbitration: "Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ('claimant') filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration."²⁰ Arbitration filings with the AAA must include the following information: the name and address—including telephone number, fax number, and email addresses—of each party and any known representative for each party, the locale requested if the arbitration agreement does not specify one, and "a statement setting forth the nature of the claim including the relief sought and the amount involved."²¹ The initiating party may submit a dispute to the AAA online through AAASWebFile or by filing a demand with any AAA office, and must simultaneously provide a

17. *Id.* § 9(b).

18. *See id.* §§ 4(b)(2), 9(b).

19. AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 43(a) (effective Oct. 1, 2013).

20. *Id.* R. 4(a).

21. *Id.* R. 4(e).

copy of the demand and any supporting documents to the opposing party.²²

Some claimants file only the summary AAA form, failing to take the opportunity to provide a separate statement containing a full narrative of the claims. This is not a best practice, because the AAA staff would not have information from which to identify suitable arbitrators. Similarly, the arbitrators will not have sufficient information to prepare for the preliminary hearing.

§ 6:2.2 JAMS

JAMS (formerly the Judicial Arbitration and Mediation Services, Inc.) is another private alternative dispute resolution provider with various procedural rules for conducting an arbitration. Although no rule addresses service of a demand for arbitration specifically, the JAMS Comprehensive Arbitration Rules and Procedures provide for both electronic and nonelectronic service of documents:

Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. . . . For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail.²³

Prior to the start of an arbitration, a claimant must provide JAMS with contact information for all parties, along with evidence that the demand for arbitration has been served on all parties.²⁴ Finally, a demand for arbitration must afford all other parties reasonable and timely notice of the claimant's claims, a short statement of its factual basis, and a statement of the remedies sought.²⁵

§ 6:2.3 International Institute for Conflict Prevention and Resolution

The International Institute for Conflict Prevention and Resolution (CPR) is another private arbitration provider. CPR's 2013 Administered Arbitration Rules provide that notices "may be given by registered

22. *Id.* R. 4(f)–(g).

23. JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES R. 8(c), (e) (effective July 1, 2014).

24. *Id.* R. 5(b).

25. *Id.* R. 5(a)–(b).

mail, courier, telex, facsimile transmission, email or any other means of telecommunication that provides a record thereof.”²⁶ To commence an arbitration, a claimant must deliver to the respondent a notice of arbitration with an electronic copy to CPR at the same time.²⁷ Additionally, a notice of arbitration under these rules must include the names and addresses of the parties and their counsel, a demand that the dispute be referred to arbitration pursuant to CPR’s Administered Arbitration Rules, the arbitration clause or agreement involved, a statement of the general nature of the claimant’s claim, the relief or remedy sought, and, when applicable, the name and address of the arbitrator designated by the claimant.²⁸

§ 6:3 Case Law Addressing Service and Contents of Arbitration Demands

§ 6:3.1 Consent to Jurisdiction and Due Process

When parties select in an arbitration agreement the state in which the arbitration will be held, they implicitly consent to the jurisdiction of the court in that state with authority to compel the arbitration.²⁹ Accordingly, because personal jurisdiction is established through consent, requirements for service of process may be relaxed, as service under these circumstances serves only to provide the other side with notice of the proceedings.³⁰ For example, the court in *Novorossiysk Shipping* stated:

By agreeing to arbitrate in New York, parties must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York. To hold otherwise would be to render the arbitration clause a nullity. . . . Indeed, where a party has consented to jurisdiction, the sole purpose of process is to provide notice that proceedings have commenced. Moreover, in the context of arbitration, the standards for service are liberally construed.³¹

26. INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION, 2013 ADMINISTERED ARBITRATION RULES (effective July 1, 2013) R. 2.1.
 27. *Id.* R. 3.1.
 28. *Id.* R. 3.2.
 29. *See, e.g.,* *Novorossiysk Shipping Co. v. China Pac. Prop. Ins. Co.*, 2006 U.S. Dist. LEXIS 80659, at *3–4 (S.D.N.Y. Apr. 17, 2006).
 30. *See id.*; *Lawn v. Franklin*, 328 F. Supp. 791, 794 (S.D.N.Y. 1971) (“Where there is advance consent to the jurisdiction by contract the service of process may be made by any method consistent with due process.”).
 31. *Novorossiysk Shipping Co.*, 2006 U.S. Dist. LEXIS 80659, at *3–4 (citations and internal quotation marks omitted).

In *Waterspring, S.A. v. Trans Marketing Houston, Inc.*,³² the court applied the same reasoning regarding service of a petition to compel arbitration where parties have contractually consented to jurisdiction. In *Waterspring*, a party moved to vacate an arbitration award, arguing the demand for arbitration was insufficient because it was not addressed to a particular corporate officer.³³ The arbitration provision provided for “service upon any officer . . . wherever he may be found, of a written notice specifying . . . a brief description of the disputes or differences which such party desires to put to arbitration.”³⁴ Additionally, the agreement provided that service of the demand would not be effective until actual notice was received by an officer of the respondent.³⁵

Addressing a motion to vacate the award, the court explained:

An agreement to arbitrate in New York constitutes a consent to submit to the personal jurisdiction of the courts of New York, and such consent includes consent to service by any method consistent with due process. Due process requires that service be reasonably calculated to apprise respondent of the suit. As the parties agreed to arbitrate in New York, the sole function of service [of the arbitration demand] is to give notice to respondent that proceedings have been commenced against it. For example, registered mail has been held a sufficient means of giving this notice. Moreover, no unfairness results when actual notice has been given.³⁶

The court held that service of the demand for arbitration, which was made by facsimile and mail, was “reasonably calculated to apprise [the respondent] of the demand.”³⁷

In *Employers Insurance of Wausau v. Banco de Seguros del Estado*,³⁸ a defendant filed a motion to vacate an arbitration award rendered against him on the grounds of insufficient service of the notice of both

32. *Waterspring, S.A. v. Trans Mktg. Houston Inc.*, 717 F. Supp. 181, 186 (S.D.N.Y. 1989).

33. *Id.* at 185.

34. *Id.* at 183.

35. *Id.* at 182, 185.

36. *Id.* at 186 (citations and internal quotation marks omitted).

37. *Id.* at 186–87 (“Facsimile is a widely accepted means of communication in business in the United States. It is reliable and immediate.”) Additionally, with respect to the demand itself, the court concluded that, because service of the demand under the arbitration agreement was not effective until actual notice was received by an officer of respondent, “the absence of a specific reference to a named officer is harmless.” *Id.* at 187.

38. *Emp’rs Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937, 942 (7th Cir. 1999).

the arbitration demand and a subsequent motion to compel arbitration. The defendant argued that, although the demand for arbitration and the motion to compel arbitration were provided to his designated agent for service of process, he never received notice of the arbitration and that the motion to compel was not properly served on its agent for service of process in accordance with state or federal law.³⁹ The defendant also argued that the motion to compel was insufficient because it failed to properly list his name in the caption.⁴⁰

The parties' arbitration agreement provided for arbitration in Wisconsin, but did not specify what procedures would be used in an arbitration, including any special commencement notification procedures to be followed.⁴¹ The court found that the Inter-American Convention on International Commercial Arbitration applied and provided the potential grounds for vacating an arbitration award.⁴² The court held that, because the parties had not specified any special procedure to be followed for service, the Convention granted the parties the due process rights of the forum state.⁴³ The court noted, with respect to due process, that "the right to adequate notice is one part of a fundamentally fair hearing."⁴⁴

The court concluded that the state's statutory service of process requirements did not need to be met in order to satisfy due process, particularly in light of the parties' advance consent to jurisdiction.⁴⁵ The court observed that actual notice may be inferred from the agency relationship created between the defendant and his designated agent for service.⁴⁶ The court held that service upon the defendant satisfied the federal due process standard of "notice reasonably calculated" under the circumstances to apprise a party of the proceeding, and concluded: "In the circumstances before us, Wausau was merely required to inform Banco, or one of its registered agents, of its motion to compel arbitration against the syndicate, or of its wish to conduct arbitration."⁴⁷

39. *Id.* at 941.

40. *Id.* at 943.

41. *Id.* at 939, 942.

42. *Id.* at 942.

43. *Id.*

44. *Id.* (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.")).

45. *Id.* at 943–44.

46. *Id.* at 944.

47. *Id.* at 944–45.

§ 6:3.2 **Inadequate Notice of an Arbitration Proceeding As Grounds for Vacating Award**

Many cases have held that an arbitration award may not be confirmed, and should be vacated, if the award debtor was not given adequate notice of the arbitration proceeding.⁴⁸ For example, in *Ikerd v. Warren T. Merrill & Sons*, the respondent corporation—but not its president, who had signed an arbitration agreement on behalf of the corporation—was served with a demand for arbitration in the manner prescribed by the arbitration agreement.⁴⁹ The arbitrator nevertheless rendered an award against the president individually.⁵⁰ Upon a motion to confirm the award, the court modified the award so that it was only against the corporation and not its president:

As an arbitration award, once confirmed, leads to a judgment which has the same force and effect as a judgment in a civil action, there must be jurisdiction over any person against whom an award is to be made. . . . Personal jurisdiction requires: (1) due process, that is, that there be notice and an opportunity to be heard; and (2) compliance with the statutory jurisdictional requirements of process. Put more simply, what is required is due process and service. There must be present a reasonable method of notice and a reasonable opportunity to be heard; actual knowledge of the proceeding alone is not enough. In order for a judgment to be entered against a person, he or she must be made a party to the proceeding according to law.⁵¹

The corporation was properly served with the demand for arbitration.⁵² The president therefore had knowledge of the proceeding and the nature of the claims asserted, and even participated in the proceeding on behalf of the corporation.⁵³ Nevertheless, because the president was never personally served with the arbitration demand nor made a party to the arbitration proceeding, the court held that the arbitrator lacked jurisdiction over the president. The court concluded that “[t]he failure to serve a demand for arbitration on a person precludes a judgment from being made against that person in a contractual arbitration proceeding. . . . These requirements that a person be named a party and served are fundamental to due process.”⁵⁴

48. *Ikerd v. Warren T. Merrill & Sons*, 9 Cal. App. 4th 1833, 1842–43 (1992); see also *Barbera v. AIS Servs., LLC*, 897 N.E.2d 485, 489–90 (Ind. Ct. App. 2008).

49. *Ikerd*, 9 Cal. App. 4th at 1842–43.

50. *Id.* at 1837.

51. *Id.* at 1842 (citations omitted).

52. *Id.* at 1843.

53. *Id.*

54. *Id.*

Similarly, in another case governed by the FAA, *Barbera v. AIS Services, LLC*,⁵⁵ the court held that insufficient service of an arbitration demand under the procedural rules the parties had selected constituted a violation of due process requiring that the arbitration award be vacated. The parties' arbitration agreement provided for arbitration through the National Arbitration Forum (NAF).⁵⁶ The notice of claim and notice of arbitration had been sent by regular mail and Federal Express to the plaintiff's home address, but there was no acknowledgment that they were received by the plaintiff.⁵⁷ The court concluded that service of process of the notice of claim and notice of arbitration were not sufficient under the NAF Code of Procedure, which permitted various methods for service of process including personal service and service by certified mail with a return receipt requested.⁵⁸ The court held: "The lack of sufficient service of process denied Barbera the opportunity to meaningfully participate in the arbitration proceedings, thus denying him due process. Therefore, we reverse the order confirming the arbitration award and remand with instructions to vacate the arbitration award."⁵⁹

In contrast, in *Gingiss International, Inc. v. Bormet* (a case that might be considered an outlier), the parties expressly agreed that the AAA Commercial Rules would govern their arbitration, and service of an arbitration demand was made in accordance with those rules.⁶⁰ Notwithstanding service in conformance with the AAA Commercial Rules, the award debtors sought vacatur, arguing lack of proper notice. Although the improper service argument was clearly without merit, the Seventh Circuit rested its decision on the notion that "[i]nadequate notice is not one of . . . [FAA § 10(a)] grounds, and the Bormets' claim therefore fails."⁶¹

55. *Barbera v. AIS Servs., LLC*, 897 N.E.2d 485, 489–90 (Ind. Ct. App. 2008); *see also* *Choice Hotels Int'l, Inc. v. SM Prop. Mgmt., LLC*, 519 F.3d 200, 208 (4th Cir. 2008) ("We hold that the Arbitration Award, having been made without notification of the initiation of arbitration proceedings being sent to the Franchisees' Designated Representative, as required by the Franchise Agreement, did not draw its essence from the Franchise Agreement.").

56. *Id.* at 486.

57. *Id.* at 488.

58. *Id.*

59. *Id.* at 489–90; *see also* *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co.*, No. B272170, 2018 WL 2455092 (Cal. Ct. App. June 1, 2018) (holding that the Hague Service Convention does not permit Chinese citizens to be served by mail, and does not allow parties to privately agree on alternate methods of service of petitions brought in court in connection with arbitration).

60. *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 332 (7th Cir. 1995).

61. *Id.*

Similarly, the court in *Venture Cotton Coop. v. Neudorf*⁶² held that compliance with the applicable procedural rules for service of a demand for arbitration, by which the parties agreed to be bound, satisfied due process, even though attempts at service had failed and the defendant may not have received actual notice of the arbitration. Several attempts were made, in accordance with the procedural rules the parties had chosen, to serve the defendant with notice of the arbitration; however, each attempt had failed.⁶³ The court noted the arbitration panel's observation that the defendant's behavior appeared "evasive" and concluded:

This court has stated that parties in an arbitration proceeding have due process rights to notice and a meaningful opportunity to be heard. We assume for argument's sake that due process standards do apply in this context. . . . Due process generally requires that notice be reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. Due process is satisfied when notice procedures are followed in compliance with the rules under which the parties agreed to be bound.⁶⁴

While the court proceeded under the assumption that due process standards applied based on controlling precedent, it noted that "[o]ther courts that have concluded that private arbitration does not involve state action requisite for a constitutional due process claim."⁶⁵ The court also held that there was no statutory basis under the FAA to vacate the award:

Even if the committee's interpretation of the Association's rules was debatable, vacatur would not be appropriate because a mere disagreement over proper interpretation does not rise to the level of manifest disregard. The trial court could not deny confirmation of the arbitration award under FAA section 10(a)(4) based on a contention that the arbitrators erred when they determined proper notice had been given and *ex parte* proceedings were permitted under section 5b.⁶⁶

62. *Venture Cotton Coop. v. Neudorf*, No. 14-13-00808-CV, 2014 Tex. App. LEXIS 10318, at *12 (Tex. Ct. App. Sept. 16, 2014).

63. *Id.* at *16.

64. *Id.* at *12 (internal quotation marks and citations omitted).

65. *Id.* at *12-13 n.2 (citing *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995); *Fed. Deposit Ins. Corp. v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir.1987); *Elmore v. Chi. & Ill. Midland Ry.*, 782 F.2d 94, 96 (7th Cir. 1986)).

66. *Id.* at *11.

Significantly, in both *Gingiss* and *Venture Cotton Coop.*, the courts seemed to express some skepticism towards the defendants' claims that they did not receive actual notice of the arbitration proceedings, and they deferred to arbitrators' procedural rulings regarding giving notice to nonappearing parties.⁶⁷

§ 6:4 Payment of Fees

Arbitration institutions typically require that a claimant seeking monetary damages quantify such alleged damages in its initial demand for arbitration. This enables the filing fee charged by the arbitration institution to be calculated based upon the value of damages claimed. The same applies to a respondent asserting a counterclaim for monetary damages; a respondent that asserts a counterclaim typically is required to submit an administrative filing fee based on the amount of the counterclaim asserted. Generally, the payment of the required administrative filing fee is a prerequisite to commencement of an arbitration or assertion of a counterclaim.

67. *Id.* at *12; *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 332 (7th Cir. 1995).