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Professional Perspective

Tips for Drafting Consumer Arbitration Agreements

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Before Congress passed the Federal Arbitration Act in 1925, courts routinely refused to enforce arbitration agreements. Nearly a century later, consumer arbitration agreements with class action waivers are commonplace and regularly enforced according to their terms, if not fraudulent or unconscionable, though there have been recent efforts to limit such agreements. This article provides an overview of the current state of the law governing consumer arbitration agreements with class action waivers, and gives practical suggestions on drafting them to maximize the likelihood of enforcement.

Current State of the Law

The FAA makes written arbitration agreements in the context of transactions involving interstate commerce "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Only generally applicable contract defenses, such as fraud, duress, or unconscionability, can invalidate an arbitration agreement under the FAA. See, e.g., *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010). State policies or laws that target arbitration specifically are impermissible, and the FAA preempts conflicting state laws under the Supremacy Clause.

Because the FAA is a congressional declaration of a liberal federal policy in favor of arbitration, the Supreme Court has instructed that all doubts regarding the scope of arbitrable issues should be construed in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The FAA also strictly limits judicial review of arbitrator decisions. 9 U.S.C. § 10(a).

The Supreme Court ushered in the current era of enforcing broad arbitration agreements with class action waivers in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341-43 (2011), which held that the FAA preempts state law rules and doctrines that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. The Court has consistently reaffirmed its support for individual arbitration agreements in consumer contracts through a series of subsequent decisions. See, e.g., *Lamps Plus, Inc. v. Varela*, 587 U.S. __, __ (2019) (slip op. at 8-9, 12-13) (holding the FAA permits class-wide arbitration only when affirmatively agreed to in an arbitration agreement); *Epic Sys. Corp. v. Lewis*, 584 U.S. __, ¬¬__ (2018) (slip op. at 11, 25) (rejecting argument that right to "engage in other concerted activities" under National Labor Relations Act invalidated provision in employment agreement requiring individual arbitration of employee claims).

However, there are efforts to turn the tide against arbitration. In Oct. 2019, California adopted a new statute, Assembly Bill 51, that attempts to ban employers from requiring employees to agree to arbitrate claims under the California Fair Employment and Housing Act or the California Labor Code. While AB 51 will likely be at least partly preempted by the FAA, it may foreshadow similar efforts in other states to limit the use of arbitration clauses.

Similarly, in Sept. 2019, the House of Representatives passed the Forced Arbitration Injustice Repeal Act, which would amend the FAA to ban pre-dispute arbitration clauses and class action waivers with respect to consumer, employment, antitrust and civil rights disputes. The FAIR Act bogged down in the Senate Judiciary Committee and a recent Statement of Administration Policy issued by the White House suggested the Act would be vetoed even if it passed out of Congress. However, an electoral shift of the balance of power could result in the passage of a similar law in the future.

In addition, claims for public injunctive relief (i.e., an injunction that benefits the public at large by changing or eliminating certain acts or practices, but does not directly benefit the plaintiff who has already been injured by such practices and is aware of them) may still be available to claimants in some courts, notwithstanding their entry into an arbitration agreement and class action waiver. For example, in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 433 (9th Cir. 2015), the Ninth Circuit held that California's "*Iskanian* rule," which barred contractual waivers of claims under California's Private Attorneys General Act, did not conflict with the FAA and was not preempted. More recently, in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 830-31 (9th Cir. 2019), the Ninth Circuit held that the FAA does not preempt California's "*McGill* rule," which renders contractual waivers of litigants' rights to pursue public injunctive relief unenforceable under California law.

In general, an understandable, conspicuous, and consumer-friendly arbitration clause is more likely to be enforced, particularly if these steps are followed:

- A conspicuous notice at or near the start of the consumer terms and conditions should state that they include an arbitration clause and class action waiver that will impact any dispute resolution, and direct the consumer where to find that provision.

- A descriptive title for the arbitration clause (e.g., "Dispute Resolution, Binding Arbitration, and Class Action Waiver"), should state that the Federal Arbitration Act and federal arbitration law applies to the agreement, and include a plain English description of what arbitration is and what the consumer is giving up. In particular, it should warn consumers that the dispute will not be in court, it will be in front of a neutral arbitrator instead of a judge or jury, it will be subject to different rules than in court, and there will be very limited court review of any results.

- The clause should state that it applies bilaterally and describe the claims it covers. It should apply to claims brought by both sides, not just to claims the consumer brings. It should also clearly explain the scope of claims subject to arbitration, e.g., "You and COMPANY agree that all disputes or claims between us shall be resolved in binding individual arbitration, including but not limited to claims or disputes arising out of or relating to (i) our relationship, (ii) these terms and conditions, and (iii) your purchase or use of our [PRODUCT/SERVICE]."

- The language should exclude from arbitration all small claims and any other types of claims you wish to exclude. The AAA and JAMS both require consumer arbitration agreements to provide the option for either party to pursue small claims in small claims court instead of arbitration. Other potential exclusions include intellectual property claims and claims solely for injunctive relief.

  Exclusions should be drafted carefully and narrowly to minimize the risk of later challenges that the exception applies more broadly than intended. See, e.g., *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 497 (5th Cir. 2017) (holding that arbitration agreement did not apply to antitrust claims seeking damages and an injunction because the agreement contained a carve-out for "actions seeking injunctive relief," which excluded any action seeking injunctive relief from *arbitration*), rev'd on other grounds, 139 S. Ct. 524 (2019).

- The clause should state whether the arbitrator will decide "gateway" questions of whether a valid arbitration agreement exists and whether it covers the present dispute. Gateway issues are ordinarily for a court to decide, but parties can agree to delegate them to the arbitrator through a clear and unmistakable delegation. In several circuits, parties may be held to delegate gateway issues to the arbitrator by incorporating the AAA or JAMS arbitration rules, which give the arbitrator power to rule on his or her own jurisdiction, the existence and scope of an arbitration agreement, and the arbitrability of claims. See, e.g., *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F. 3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.") (collecting cases).

- The clause should tell consumers who will be conducting the arbitration and what rules will apply, e.g., "The arbitration will be administered by the American Arbitration Association (AAA) and will be governed by the AAA Consumer Arbitration Rules, which you can find at www.adr.org." It should include contact information for where the consumer should serve their arbitration demand. Designating the AAA or JAMS rules may in some courts delegate disputes over the formation and validity of the arbitration agreement to the arbitrator. If there are particular issues the parties want to delegate to the arbitrator, or reserve for the court, the clause should expressly say so.

- The arbitration process should be accessible to consumers. It should be agreed that the arbitration will be conducted in the consumer's hometown or county of residence, and with other options for participating, e.g., by phone or conducting a "desk arbitration" on written submissions. One-sided clauses that require consumers to travel or incur undue expense may be struck down as unconscionable or run

afoul of AAA or JAMS consumer clause requirements or state law. See, e.g., Vermont Senate Bill No. 18 (enacted June 19, 2019) (creating a rebuttable presumption that a term in a standard form consumer contract that sets venue for suit outside of Vermont is substantively unconscionable). The clause might also designate the number of arbitrators who will hear the dispute (the JAMS Comprehensive Arbitration Rules and the AAA Consumer Arbitration both default to a single arbitrator if the arbitration agreement does not specify a different number of arbitrators).

- It is recommended to assume primary responsibility for arbitration costs and avoid fee shifting in most cases. To avoid unconscionability challenges, and to ensure compliance with AAA and JAMS requirements, there should be an agreement to pay all filing, administration, and arbitrator fees for claims under a certain dollar threshold, by reimbursing the consumer for those amounts, unless the arbitrator determines the claims were frivolous.

  Above the stated dollar threshold, the agreement should provide that arbitration fees and costs shall be paid pursuant to the applicable rules. The threshold should be carefully considered—too low a threshold risks a finding of unconscionability by potentially making arbitration cost prohibitive for low-dollar claims. For similar reasons, it is better to agree to not seek attorney fees and costs in arbitration unless the arbitrator determines the claims were frivolous.

- The clause should include an obvious and clearly-stated agreement to bring claims only on an individual basis, waive the right to bring any class, consolidated, or representative action, including any action in the capacity of a private attorney general, and not combine the individual proceeding with any other proceeding, unless everyone agrees.

  For further assurance, the clause should state that the arbitrator is authorized only to award relief on behalf of the individual parties and only to their extent of their individual claims. The law is favorable to class action waivers now but that could change, so make sure your arbitration clause says what happens if the class action waiver becomes unenforceable. In most instances, if a class action waiver is invalidated, the company will want the entire arbitration clause invalidated and the claims determined in court because a class arbitration is subject to far more limited judicial review.

- Finally, the clause should include a provision for the survival of the remainder of the arbitration clause if any portion is invalidated or changed, and consider a jury waiver if the arbitration clause is invalidated or terminated and the parties end up in court.

Steps After Drafting

The draft arbitration agreement should be compared against the AAA and JAMS standards for consumer arbitration clauses. The AAA Consumer Due Process Protocol sets out 15 principles that the AAA looks for in consumer arbitration agreements. The AAA retains discretion to decline administration of arbitration demands where the arbitration agreement materially violates the AAA Consumer Due Process Protocol. The AAA also requires businesses to register their consumer arbitration agreements with the AAA Consumer Clause Registry, a publicly-accessible database of consumer arbitration clauses.

JAMS also has its own JAMS Consumer Arbitration Minimum Standards, a set of 10 standards for consumer arbitration clauses. Among others, these include requirements that the arbitration clause be reciprocal on both parties, that the consumer have the same available legal remedies in arbitration or retain the right to pursue them in court, that the consumer have a right to an in-person hearing in his or her hometown, and requirements about payment of fees and fee shifting. Even if the agreement does not designate AAA or JAMS to administer the arbitration, these standards are still a good guide in assessing the overall reasonableness of the clause.

Conspicuous Presentation and Express Agreement

Poor presentation may undo the benefits of a properly drafted arbitration clause. Courts have refused to enforce consumer arbitration agreements where consumers did not have reasonable notice of them and therefore there was no mutual assent to arbitration. In physical-world transactions, best practices include actually providing a copy of terms and conditions to

customers (e.g., through a conspicuous billing insert), often combined with electronic notice by providing an electronic copy or hyperlink and calling attention to key portions, including the arbitration agreement.

In electronic consumer transactions, courts distinguish between two categories of online agreements: "clickwrap," where a user must affirmatively assent after being presented with terms of use (e.g., click "I agree"); and "browsewrap," where the terms of use containing the arbitration agreement are hyperlinked and accessible on another page, but no affirmative assent to them is required. Some courts also discuss a third hybrid category of "modified clickwrap," where users must affirmatively assent to terms of use but those terms are only hyperlinked and not presented before obtaining assent.

In general, clickwrap agreements are more readily enforced, while browsewrap agreements are more often challenged on the basis they were not conspicuous enough. Compare, e.g., *Metter v. Uber Techs., Inc.*, Case No. 16-cv-06652-RS, 2017 WL 1374579, at *1, *3–4 (N.D. Cal. Apr. 17, 2017) (refusing to enforce arbitration agreement because it was not sufficiently presented to consumers on Android version of Uber app), with *Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985, 990–91 (N.D. Cal. 2017) (finding arbitration agreement was sufficiently conspicuous on iPhone version of Uber app to be enforced).

When incorporating an arbitration provision into online terms of use, terms of use should be presented directly and conspicuously to consumers and affirmatively obtain their consent. If a browsewrap approach is preferred, the hyperlink to the terms of use should be conspicuous and working, and a modified clickwrap process can be included that affirmatively obtains consent to the hyperlinked terms.