Using Arbitration Agreements to Reduce the Costs of Litigation and the Risk of Class Action Claims

A properly drafted arbitration clause with a class action waiver should be enforceable and can be a good and useful line of defense against expensive and costly litigation, especially class action lawsuits, write **Jay N. Varon** and **Jennifer M. Keas** in Foley & Lardner's **Consumer Class Defense Counsel** blog.

Their article explains how arbitration works, what type of arbitration agreements are generally enforceable, what features that have or can cause problems, and how such provisions can reduce the risk of class actions.

They also discuss the possible effect or non-effect that could come from the Consumer Financial Protection Bureau's proposed arbitration rule.

Read the article.

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Insight on Waiving

Contractual Right to Arbitration

Bass, Berry & Sims attorney Chris Lazarini provided insight on factors a court should consider when determining whether a party has waived a contractual right to arbitration, the firm reports on its website.

“The factors, which are tied to potential prejudice to the non-moving party, include: (1) the time elapsed between commencement of litigation and the request for arbitration, and (2) the extent to which the moving party has participated in the litigation process,” according to **Lazarini’s article**.

His article examines the issue as presented in the case *Chehebar vs. Oak Financial Group, Inc.*, No. 14-2982 (E.D. N.Y., 3/7/17)

Read the article.

Arbitration Clauses Extending to Non-Signatory Affiliates: Are They Enforceable?

Image by NY Photographic

A recent decision of the New Jersey Appellate Division considered the enforceability of arbitration agreements by non-signatories, writes **Marissa Tillem** in Proskauer Rose's **Minding Your Business** blog.

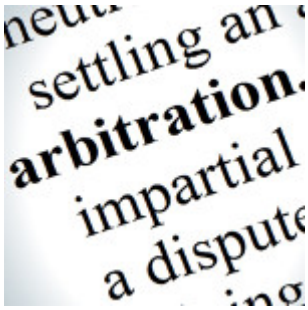
She discusses a case in which the plaintiff filed a putative class action complaint against defendant alleging violations of New Jersey's Truth-In-Consumer Contract, Warranty and Notice Act, as well as the state's Lemon Law.

The panel determined, among other things, that by signing a lease agreement, plaintiff agreed to arbitrate her dispute not only with the underlying signatories of the lease, but with any of its affiliates. Now the plaintiff will need to decide whether to pursue her claims in arbitration, Tillem explains.

Read the article.

Is 'Class Arbitration' an

Oxymoron?



"Class arbitration" – the utilization of a class action mechanism in an arbitration proceeding – is considered by some to be the unicorn of ADR; desirable but elusive, writes **Gilbert Samberg** on Mintz Levin's blog, **ADR: Advice from the Trenches**.

"Another view is that it is the Frankenstein's monster of ADR – an anomalous hybrid of disparate parts that comprise a disconcerting and ultimately nonviable creation," he writes. "And so let us ask, is 'class arbitration' an oxymoron? Should it be viable given the essential nature of arbitration? And whither the emperor's jurisprudential clothes?"

The Mintz Levin post is one in a series of posts concerning the concept, its theoretical roots, the current state of the law, implementation of the mechanism, the significance and effects of a class arbitration award, etc.

Read the article.

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Clear Arbitration Provision

Deemed Enforceable

In his **Petes' Take** blog for Porzio, Bromberg & Newman, **Peter J. Gallagher** describes a New Jersey case in which a court ruled that a clear arbitration provision, negotiated by a sophisticated party while represented by counsel, is enforceable.

In Columbus Circle NJ LLC v. Island Construction Co., LLC, the appellate court held that the arbitration provision in the AIA contract used in this case satisfied the requirements to explain to the signer the possible consequences of giving up the right to adjudication in a court of law, Gallagher explains.

"By its terms, the provision required plaintiff to choose between arbitration and 'litigation in a court of competent jurisdiction,' therefore, when plaintiff chose 'arbitration,' it did so 'with full knowledge that arbitration [was] a substitute for the right to have [its] claim adjudicated in court.' Moreover, the Appellate Division noted that neither the LLC nor its sole member was 'an average member of the public,'" according to Gallagher.

Read the article.

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Drafting Arbitration Clauses in Construction Contracts

Many construction lawyers who specialize in transactional work acknowledge that they do not spend much time considering or negotiating the arbitration clauses in construction contracts, points out
Patricia H. Thompson in a post on the **website of JAMS**.

She addresses the question: Should an arbitration clause be just a boilerplate provision, taken "off the shelf," or should it be specifically negotiated and crafted for the particular construction project and to accommodate the parties' requirements?

The post lists some of the major questions to consider, such as: Should arbitration be mandatory or permissive? Should there be one or three arbitrators, should they all be neutral, and should they have particular qualifications or professional expertise? Should the arbitrator's power be broader or more limited than otherwise provided by relevant statutes or rules?

Read the article.

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Health Law: Is Your Arbitration Agreement Enforceable?

A recent decision of the Arizona Court of Appeals provides guidance for evaluation of the enforceability of arbitration agreements in the health care field, reports Snell & Wilmer in its **Health Law Checkup** blog.

Andrew Sniegowski explains that Gullett *v. Kindred Nursing Centers West, LLC* arose out of the plaintiff's claims that a rehabilitation center had abused and neglected his father, who lived there for the last month of his life. The plaintiff argued that the arbitration agreement was substantively and procedurally unconscionable.

The court determined that the agreement was substantively valid, but it remanded the case for further proceedings in the trial court limited to the issue of procedural unconscionability.

Read the article.

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Court: Arbitration Agreement Included In Product Manual Is Unenforceable

A recent ruling in a New Jersey federal count stated that a contractual term, like an arbitration clause, is binding only when the terms are reasonably conspicuous, rather than in a manner that de-emphasizes its provisions.

Writing in Carlton Fields' **Reinsurance Focus**, shareholder **Jeanne Kohler** described the case involving a Samsung smart watch. The suit accused the company of deceptive marketing and pricing. Samsung moved to compel arbitration, based on an arbitration provision on page 97 of a 143-page "Health and Safety and Warranty Guide" in the watch box.

The appellate court wrote that the clause "did not appear to be a bilateral contract, and the terms were buried in a manner that gave no hint to a consumer that an arbitration provision was within."

Read the article.

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Court Finds Contract and Arbitration Clause Unenforceable Due to Fraud in the Inception

The Ninth Circuit, in an unpublished opinion, has found that a contract, and therefore an arbitration clause within it, was unenforceable due to fraud in the inception, despite the fact that both parties had ample opportunity to review the contract in its entirety, reports **Reinsurance Focus**, a publication of **Carlton Fields Jorden Burt, P.A.**

"This result was required, the court found, because, assuming the allegations of the complaint to be true, the plaintiff did not know that by signing the contract it was agreeing to be a victim of defendants' scheme," writes **Jason Brost**.

The court cited a California Court of Appeals decision for the proposition that it was enough that defendants, as the party drafting the contract, drafted the contract "'in such a way as to not apprise' the other party of its intentions."

Read the article.

11th Circuit: Arbitration Clauses Are Like Makeup – They Only Cover So Much

In a pun-laden opinion, the Eleventh Circuit Court of Appeals affirmed a district court's ruling that the Kardashian sisters Kim, Kourtney and Khloe could not rely on the doctrine of equitable estoppel to compel plaintiff Kroma Makeup EU, LLC to arbitrate its claims, **reports TheTMCA.com**.

Those claims involved allegations of trademark infringement and tortious interference with contract.

As the court put it, "there is a wrinkle in this case: the arbitration clause which the non-party to the agreement is seeking to enforce is explicitly limited to disputes between the parties."

TheTMCA.com reports:

> The Eleventh Circuit first clarified that although federal law generally governs arbitration agreements, the "issue of whether a non-signatory to an agreement can use an arbitration clause in that agreement to force a signatory to arbitrate a dispute between them is controlled by state law," and that the parties "agree that Florida law controls on that issue."

Read the article.

When an Arbitration Clause Sounds Permissive But Is Not: Does 'May' Really Mean 'Must'?

Narges Kakalia of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo asks and then answers some pointed questions about arbitration in an article on the firm's ADR Advice website.

"Is an arbitration clause mandatory or permissive when it provides that either party to the contract *may* elect to submit a dispute to binding arbitration? What if the contract also provides that the right to arbitrate is not exclusive of any other rights that a party has to pursue legal action in an appropriate forum? Such an arbitration clause certainly sounds permissive. But courts have invested a lot of ink addressing the question, and (spoiler alert!) they have more or less consistently come to the conclusion that such a clause makes arbitration mandatory if any party chooses it," she writes.

She explains that many litigants and their lawyers misinterpret the real meaning fo the word "may" in this context.

Read the article.

Justices Will Hear Challenges to Mandatory Employee Arbitration

Image by NY Photographic

The U.S. Supreme Court has agreed to decide whether companies can use employment contracts to prohibit workers from banding together to take legal action over workplace issues, **reports *The New York Times***.

Adam Liptak writes that the court will consider three cases that follow a series of Supreme Court decisions endorsing similar provisions, generally in contracts with consumers. The question for the justices in the new cases is whether the same principles apply to employment contracts.

“In both settings, the challenged contracts typically require two things: that disputes be raised through the informal mechanism of arbitration rather than in court and that claims be brought one by one,” Liptak writes. “That makes it hard to pursue minor claims that affect many people, whether in class actions or in mass arbitrations.”

Read the *NYT* article.

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Contract Drafting for Dispute Resolution

John M. Newman of the Cecil C. Humphreys School of Law at the University of Memphis has compiled a guide to drafting for dispute resolution, covering mandatory-arbitration provisions, class waivers, choice of law, choice of venue, exculpatory and liquidated-damages clauses, fee and cost allocations, and more.

He writes that some defendant-friendly U.S. Supreme Court decisions, critical coverage in the popular press, and efforts by federal agencies to stymie the private sector's increasingly widespread use of contractual dispute-resolution provisions have made the topic particularly timely.

"In light of the growing importance of dispute-resolution provisions, this guide seeks to concisely identify and explore, from a transactional perspective, the relevant questions, considerations, and law relating to these powerful tools," Newman writes. "It also provides illustrative examples of well-drafted provisions, often drawn from real-world legal instruments. The target audience includes practitioners, scholars, businesspersons, and other analysts seeking to learn and apply best practices when planning and drafting for dispute resolution."

Read the article.

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Trump Lawyer: No Settlement in Lawsuit Against Celeb Chef

The Hill **is reporting** that President-elect Donald Trump will not settle a lawsuit against celebrity chef Geoffrey Zakarian, a lawyer for the Trump Organization told a judge Tuesday.

Trump's breach of contract alleges the celebrity chef backed out of plans to open a new restaurant in Trump International Hotel in Washington, D.C.

Zakarian's withdrawal from the deal followed Trump's claims that Mexican immigrants included criminals and rapists, reports Max Greenwood

Lawyers for the Trump Organization and for Zakarian's company told the judge that the two parties had reached an impasse.

Read *The Hill* article.

Navigating Construction Disputes, From Mediation to Litigation

All parties involved with a construction contract need to explore which dispute resolution option is right for them and the project, and also ensure their contract terms are as clear as possible to avoid potential problems down the road, writes **Kim Slowey** in *Construction Dive*.

In her article, Slowey covers mediation, arbitration vs. litigation, and the importance of planning.

She quotes Margaret Greene, partner and leader of the construction planning practice group at Honigman Miller Schwartz and Cohn in Detroit, who counsels that perhaps the most important aspect of dispute resolution is to minimize the chance of conflict before disagreements rise to the level of "disputes" or "claims."

Read the article.

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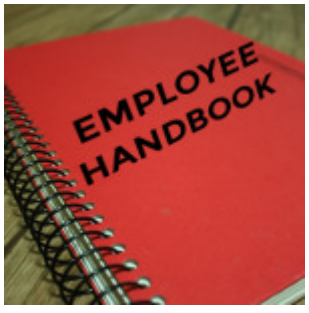
Don't Bury Arbitration in Your Employee Handbook



Employers who don't want employees to arbitrate employment-related claims shouldn't bury the agreement in an employee handbook that includes a disclaimer stating that the handbook is not a contract, ***advises Business Management Daily***.

That's because a court could conclude that the conflicting language means the arbitration agreement isn't binding.

The article describes a recent case in which an employer asked the court to send the case to arbitration, arguing that the employee knew about the arbitration requirement that was included in a handbook.

"The court didn't see it that way. It reasoned that to be binding, the arbitration clause had to demonstrate clear mutual assent," according to the article.

Read the article.

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It Can Be Challenging to Enforce an Arbitration Provision in an Expired Contract

A unanimous panel of the Sixth Circuit recently rejected a manufacturer's attempt to compel arbitration under an expired contract in *Linglong Americas, Inc. v. Horizon Tire, Inc.*, **reports Butler Snow LLP**.

Erin Palmer Polly explains that the manufacturer and its distributor entered into a collaboration agreement that contained an arbitration clause.

"The agreement expired and was not renewed, but the manufacturer and its distributor continued to work together and continued to make various representations of continued involvement," she writes. "Approximately three years after the agreement expired, the parties' relationship deteriorated and resulted in a federal court lawsuit. The manufacturer attempted to compel arbitration and pointed to the arbitration provision in the collaboration agreement."

She points to two important lessons to be learned from the case.

Read the article.

Fuzzy Math? 6 Differing Arbitration Agreements = 0 Arbitration Agreement

The **Arbitration Nation** blog provides a good example of how drafting arbitration agreements can go wrong, pointing to the Tenth Circuit's ruling in *Ragab v. Howard*, in which a majority of the panel concluded that because the parties had six differing arbitration agreements, they had never reached a meeting of the minds on arbitration and their dispute would stay in court.

"The parties had six agreements that governed their business relationship. Each agreement had an arbitration agreement," writes **Liz Kramer** in the Stinson Leonard Street blog. "But,

those arbitration agreements did not provide for the same set of rules to govern the arbitration, or the same method of choosing an arbitrator, or the same notice period before arbitration, or the same opportunity to recover attorneys' fees. Even so, when Mr. Ragab sued the defendants for misrepresentation and statutory violations, the defendants moved to compel arbitration."

Read the article.

Smart Contracts Pose Enforceability Issues

Business Insider summarizes the major findings of a new white paper by blockchain consortium R3 and global law firm Norton Rose Fulbright on smart contracts.

The white paper explores whether blockchain-based "smart contracts" are legally binding under current legislation in different countries.

The *Business Insider* **article** discusses the variety of possible smart contract models, the effect jurisdiction has on whether smart contracts are legally binding, the enforceability issues resulting from smart contracts' underlying technology, and the importance of embedding dispute resolution mechanisms to reduce friction.

Read the *Business Insider* article.

China Contracts: Dispute Resolution Clauses

In his China Law Blog, **Dan Harris** writes that the dispute resolution provision in China contract may be the most important provision in the contract.

"If you put in a dispute resolution provision that makes sense, your Chinese company counter-party with whom you are contracting will be afraid to breach the contract. Conversely, if you put into the contract a dispute resolution provision that will not work, you are signaling to your Chinese company counter-party that it can breach its contract with you with impunity. Yes, it really is that important," Harris writes in the **blog post**.

He explains why a provision calling for resolution in U.S. courts can sometimes be a hindrance, compared to a clause requiring dispute resolution to take place in Chinese courts.

Read the article.