Arbitration In Civil Litigation; A Contractual Waiver of the Right to Trial by Jury?

By Richard M. Mitchell

In 1925, Congress codified the Federal Arbitration Act, laying the initial pavement in the road that has come to be known as alternative dispute resolution. States have, thereafter, enacted their own statutes, many more expansive than the federal law. Some state statutes also preclude arbitration of specific types of disputes. For example, 26 states currently have statutes that limit or restrict arbitration of insurance claims.

Arbitration can be an efficient mechanism to resolve disputes more quickly than protracted litigation. The time frame from start to finish is generally shorter with appellate rights primarily limited to arbitrator fraud or bias. A growing number of commercial and employment contracts contain these provisions. They are, however, subject to frequent challenges, sometimes by litigants who simply missed that language when they signed the contract. Claimants are sometimes surprised to find their claims dismissed when defendants raise the fact that the parties have agreed to binding arbitration, even if one party did not exactly know that. These attacks have been met with limited success, but there are clearly steps that can be taken to strengthen the viability of arbitration clauses from such assaults.

Challenges and how to survive them

Our office recently prevailed in the United States District Court for the Eastern District of Michigan on a heated challenge to an arbitration clause in an employment agreement. The plaintiff made several arguments, some of which have been raised by claimants in other actions, including consumers seeking to bring class action lawsuits.

The first was that the arbitration language did not represent a bargained for exchange. This is an argument that has been made, and often rejected, in seeking to hold arbitration clauses unenforceable. In *Tillman v Macy's*[1], Macy's instituted a mandatory arbitration process following its merger with May Department Stores.

The program required Macy's employees to complete a training video and explained that they could opt out of the program by completing a returned form to their employer. Plaintiff claimed she did not receive the opt-out form, but admitted she attended the video training. One of her primary arguments was that the arbitration requirement lacked consideration. The Court disagreed, holding that she accepted Macy's offer of continued employment subject to the arbitration agreement by working there without executing the opt-out form.

Other litigants have challenged arbitration clauses as ambiguous, particularly where it is buried in fine print beneath a myriad of other contractual language. For example, a federal Court rejected an arbitration clause[2] and allowed employees to pursue class action litigation for violations of the Fair Labor Standards Act. The Court noted that the arbitration language was buried in a 12-page application, and most of the applicants had obtained only a high school education. The remedy for this problem is to make the language conspicuous. Fine print should be rejected in favor of bold language making clear the parties' agreement.

This has sometimes been a problem with arbitration agreements contained in employee handbooks. A Missouri Court recently rejected such a clause.[3] The handbook contained an arbitration clause that stated it was a binding contract. That provision, however, was mired in a handbook that contained numerous other topics unrelated to conditions of employment. Moreover, the handbook itself noted that it was not a contract.

Utilizing the employee handbook acknowledgment is one potential solution to this problem. While an arbitration clause may be contained in the handbook itself, separate language in the acknowledgment highlighting the arbitration provision and stating that it is a contract can be used to defeat a challenge later.

Another problem is overreaching. A California Court recently struck down an arbitration provision in a shoe store sales associate's employment contract as unconscionable.[4] The contract contained a forum selection provision that required California employees to arbitrate in Indiana. It also contained an exemption for certain claims that were most likely to be asserted by the employer, as opposed to those brought by the employee. Another Court[5] struck an arbitration clause in a handbook that allowed the employer to unilaterally change the terms. The Court found such an agreement to be illusory.

Application of reasonable arbitration terms can be used to address these issues.

A clause is more likely to be upheld where all provisions are equally and clearly binding on both parties. It is noteworthy, though, that Courts have struck fee sharing provisions in employment contracts under certain circumstances where those clauses required employees to share equally in the costs of arbitration.

Another prominent argument is that an arbitration clause constitutes waiver of the 7th Amendment guarantee to a right of a jury trial. That argument has generally been rejected, even where there is no express acknowledgment of such waiver. The 6th Circuit has held that a party entering an arbitration agreement necessarily consents to the obvious consequence, surrender of the right to a jury trial.[6]

Conclusion

Arbitration clauses have become increasingly common, including in documents that have traditionally been called “contracts of adhesion.” While some claims are not subject to arbitration, particularly when preempted by a federal statute, Courts have grown to recognize these as contractually bargained for exchanges. Case law over the last decade has shown how these clauses might be subject to scrutiny. It also shows how careful drafting and attention to detail can help them survive.

[1]*Tillman v. Macy’s, Inc.*, 735 F.3d 453 (6th Cir. 2013)
[2]*Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005)
[3]*Johnson v. Vatteroott Educational Centers, Inc.*, 410 S.W.3d 735 (2013)
[4]*Capili v. Finish Line, Inc.*, _____ F.Supp.3d ____ (N.D. Cal. 4) (2015)
[5]*Carey v. 24 Hour Fitness USA, Inc.*, 669 F.3d 202 (5th Cir. 2012)
[6]*Cooper v. MRM Investment Co.*, 367 F.3d 493 (6th Cir. 2004)