Bloomberg Law®

Aug. 13, 2024, 4:30 AM EDT

Arbitration Agreement Tweaks Can Have Outsize Enforcement Impact

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- *Hollingsworth attorneys share agreement drafting tips*
- *Including key terms can avoid costly litigation*

Businesses often get dragged into litigation despite having arbitration clauses. One reason is that many arbitration agreements are poorly written with outdated boilerplate language that spills a lot of ink but loses sight of core goals.

Those core goals always should be to outline the scope of an agreement clearly and limit any potential court battles over its enforcement. As the US Supreme Court stated in May in *Coinbase, Inc. v. Suski*, "the first question in any arbitration dispute must be: What have these parties agreed to?"

While arbitration agreements should be tailored to the individual circumstances and jurisdictions, any agreement should include certain key provisions.

First, they should explicitly state that the Federal Arbitration Act governs their interpretation and enforcement. This law doesn't apply de facto, so to get its benefits (and there are many), you must include this statement.

The primary benefit is the robust case law enforcing arbitration agreements under the FAA, including recent Supreme Court decisions reversing lower courts that refused to compel arbitration. Many attorneys fail to include this provision, leading to unnecessary and often costly court fights over whether the FAA or a state arbitration statute applies.

Avoid state arbitration laws at all costs; they may not come with the same protections as the FAA (even when they claim to be modeled after the FAA), and state analogs won't have the same robust case law favorable to arbitration.

Second, the scope of an arbitration agreement should be as broad as possible, such as covering "all claims arising from or relating to the contract and/or the relationship between the parties." In this example, the addition of only one word—"relationship"—could make all the difference in whether a court finds that a legal claim belongs in arbitration.

In the US Court of Appeals for the Fourth Circuit, if an arbitration agreement only covers claims arising from or relating to the contract, the court must apply a "significant relationship" test to determine whether the legal claims are sufficiently related to the contract before the court can order arbitration.

But if the arbitration agreement also covered the "relationship between the parties," then the "significant relationship" test wouldn't apply—removing an additional hurdle for the party seeking to compel arbitration. Language matters, so avoid unnecessary fights by making the scope of disputes subject to arbitration as broad as possible.

Third, consider including a delegation clause so that if a party refuses to arbitrate, the arbitrator and not the court decides any questions of arbitrability and validity or enforceability. With this provision, the only question a court should properly consider when deciding whether to compel claims to arbitration is if an arbitration agreement exists—a question of contract formation under state law principles that can never be delegated to an arbitrator.

You may be familiar with clauses that delegate questions of arbitrability—that is, who is bound by an arbitration clause and whether a dispute falls within its scope. But many attorneys overlook that you can also delegate questions of contract validity or enforceability, which routinely involve complex, fact-intensive disputes over whether an agreement is unconscionable under state law.

You want to avoid these disputes because the case law on unconscionability (and other similar defenses to contract enforceability under state law) is often messy, inconsistent, and can be used by a court to refuse to compel arbitration due to supposed uncertainty. Worse, courts often incorrectly conflate contract formation with contract enforceability, so delegating the question of contract enforceability to an arbitrator can help reduce potential confusion by a court when ruling on a motion to compel arbitration.

There are many more provisions we recommend including in arbitration agreements as best practices, but these three steps can help reduce potential battlefields in court if another party refuses to arbitrate.

Having a well-written and up-to-date mandatory arbitration clause is critical to protecting your company; otherwise, you may be trapped in unnecessarily complex and protracted litigation. The goal, as always, is to make the court's job as straightforward and narrow as possible to streamline your ability to get claims into arbitration.

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