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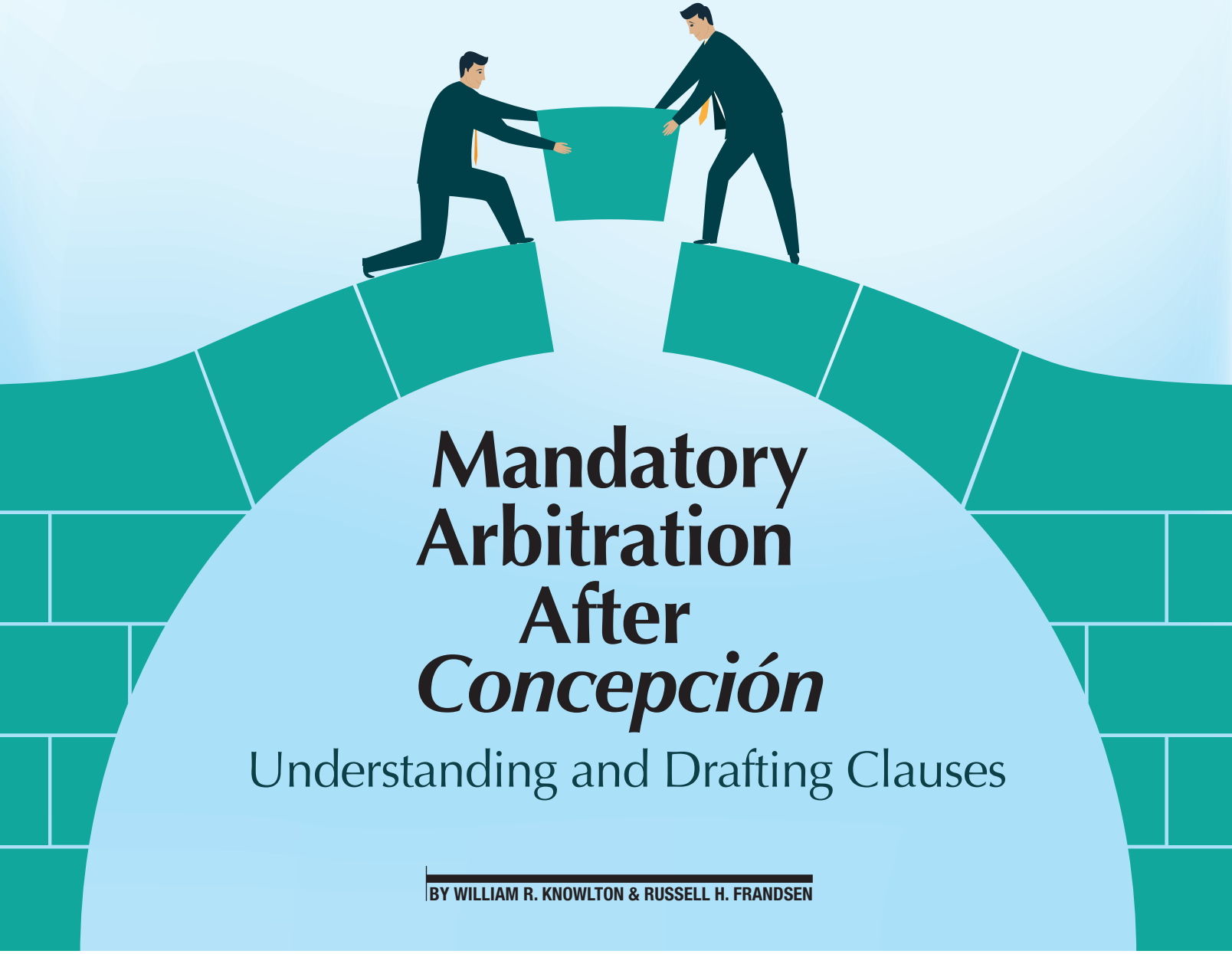

Mandatory Arbitration After *Concepción*

Understanding and Drafting Clauses

BY WILLIAM R. KNOWLTON & RUSSELL H. FRANDSEN

Speaking of his pre-political vocation as a small-town lawyer, Abraham Lincoln felt compelled to offer the following advice to aspiring attorneys:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has superior opportunity of being a good [person]. There will still be business enough.

According to published statistics by the U.S. Courts, there were 284,604 civil cases filed in federal District Courts in 2013.[1] This number represents a 25 percent increase from the same time period in 1990. Also, according to the Federal Mediation and Conciliation Services (the FMCS), a typical civil dispute takes approximately 18 to 36 months of litigation to work its way through the court system.

Mandatory Arbitration After *Concepción*

Arbitration can be an expeditious and relatively painless alternative for clients to resolve legal disputes. Because the rules of evidence and procedure are usually more relaxed in arbitration proceedings, the parties may be in a better position to represent themselves without having the expense of preparing and responding to discovery.

As a general rule, parties to a contract can agree at the time of entering the agreement to an alternative means of resolving disputes that may arise. The most common form of alternative dispute resolution provided in contracts is mandatory and binding arbitration. In such arrangements, a privately appointed arbitrator is empowered to resolve claims that arise between the parties, including both contractual disputes and disputes under state or federal law.

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The conscientious contract drafter of these binding mandatory arbitration provisions should be aware of the rapidly evolving case law and regulatory framework for this highly nuanced area of alternative dispute resolution.

Recent Developments

During its 2011 Term, the U.S. Supreme Court held that the Federal Arbitration Act (the FAA) makes agreements to arbitrate valid and enforceable—even if the agreement limits participation in class-wide proceedings.[2] The Court in *AT&T Mobility v. Concepción* further held that "when state law prohibits outright the arbitration of a particular type of claim, the FAA displaces the conflicting rule."[3] Then, in 2013, the U.S. Supreme Court further upheld the enforceability of class-action waivers in arbitration clauses.[4]

Also, in 2013, the Fifth Circuit Court of Appeals struck down a National Labor Relations Board (the NLRB) ruling that class-action waivers in arbitration clauses allegedly violated an employee's rights to engage in concerted activities for mutual aid and protection.[5]

Then, in an abundance of clarity to the NLRB, the Fifth Circuit recently reaffirmed that holding and admonished the NLRB:

> Though the [NLRB] might not need to acquiesce in our decision [in *D.R. Horton*], it is a bit bold for [the NLRB] to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an "illegal objective" in doing so. The [NLRB] might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.[6]

Likewise, on December 15, 2015, the United States Supreme Court issued a clarifying opinion to *Concepción* with its ruling on *DirectTV, Inc. v. Imburgia*.[7] Not surprisingly, this 6–3 decision reaffirmed the enforceability of mandatory binding arbitration and class waiver agreements—regardless of conflicting state laws (in this case, California). Nevertheless, it is worthwhile to note the dissenting Justices' opinions in *Imburgia*; to wit, consumers will be deprived of the appropriate avenues for economic redress and that this precedent will "insulate powerful economic interests from liability for violations of consumer protection laws."

Since the 2011 Court ruling in *Concepción*, and its subsequent progeny, 313 federal and state courts have favorably cited to the *Concepción* decision as binding precedent in mandatory arbitration disputes—including class-action waivers.

Not surprisingly, many businesses have rushed to revise their existing agreements—especially those facing consumers and employees—to include similar provisions as a way to insulate themselves from the uncertainty of courtroom litigation and class-action carnage. Some notable companies who have taken this step: Wells Fargo, Umpqua Bank, Valve, eBay, PayPal, Instagram, StubHub, and the ride-sharing phenom, Uber.[8] Indeed, a March 2015 report from the Consumer Financial Protection Bureau (the CFPB) estimates that tens of millions of consumers use products or services that are subject to pre-dispute arbitration clauses.[9]

One year after the Supreme Court's 2011 *Concepción* decision, senior consumer advocacy attorney Paul Bland lamented that "there is no case in the history of consumer law as harmful as *Concepción*."[10] Likewise, UNLV Law professor Jean R. Sternlight criticized that "it is highly ironic but no less distressing that a case with a name meaning 'conception' should come to signify death for the legal claims of many potential plaintiffs."[11]

However, despite this apparently overwhelming "pro-business" tact of the courts in recent years, business owners (and their attorneys) need to be cognizant of certain legal landmines that can erupt in binding mandatory arbitration clauses.

For example, in June 2015, the Northern District of California scrutinized the arbitration clause in Uber's independent contractor agreements for being procedurally and substantively unconscionable.[12] The court was particularly concerned with the unconscionability risks in Uber's contracts of adhesion—which most consumer and independent contractor agreements tend to be.[13]

Also, on January 5, 2016, FitBit Inc. (maker of the wearable fitness tracker) was sued in the U.S. District Court of Northern California in a class-action case, claim-

ing *inter alia* deceptive trade practices.[14] A key element of the plaintiffs' allegation is the mandatory binding arbitration and class waiver agreement users of the FitBit devices are required to enter prior to using the products. For obvious reasons, the class-action bar is pushing the boundaries of the *Concepción* decision to further develop the law in this regard.

Furthermore, in direct response to *Concepción*, the CFPB is considering a proposal for an outright ban on mandatory arbitration clauses and class-action waivers in consumer financial product agreements.[15] Also, practitioners should be aware that on May 26, 2016, the Seventh Circuit in Chicago struck down an arbitration clause that banned employees from joining together as a class and required workers to battle the employer one by one outside of court.[16] There, the appellate court held that an arbitration agreement precluding collective arbitration or collective action violates Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (the NLRA), and is unenforceable under the FAA. This decision put the Seventh Circuit decidedly at odds with the Fifth, Second, Eighth, Ninth and Eleventh Circuits on this matter—which we anticipate will be submitted for review by the U.S. Supreme Court.

Prudent Drafting Considerations

It would behoove all contract drafting attorneys to take the appropriate time to review and understand the tremendous resources made available by the American Arbitration Association (the AAA)—particularly as it relates to drafting dispute resolution clauses.[17] These guidelines are based on tried and tested language, much of which has stood up to court scrutiny.

The Arbitration Process Must Be Considered Fair.

Fairness in the actual arbitration process is a paramount consideration when creating a binding mandatory arbitration clause—particularly when the end contract is intended for use by employees or consumers.

In 1999, the Fourth Circuit Court of Appeals invalidated a mandatory arbitration clause in an employment agreement at Hooters of America because the arbitration process was tilted so far in favor of the employer.[18] There, the court found the following elements problematic: (1) the arbitrators could only be chosen from a list created by the employer; (2) the employee was required to file her claim with a list of all fact witnesses, specifying the facts known to each witness, but the employer was not required to do the same; (3) the employer was permitted to move for summary disposition, but the employee was not; (4) the employer could amend its position, but the employee could not; (5) the employer could record the hearing, but the employee could not; and (6) the employer could modify the arbitration rules at will, without notice to the employee.[19]

In 2000, the California Supreme Court defined standard principles to consider when the question of fairness (or conscionability) arises about the agreed upon arbitration process in employment agreements.[20] The court held that, at a minimum, the clause must provide for: (1) the selection of a neutral arbitrator; (2) provide for meaningful (even if limited) discovery; (3) recovery of all types of relief that would otherwise be available in court; and (4) require a written award to allow for adequate judicial review.

The Arbitration Clause Should Be Clear and Conspicuous.

Any agreement to waive or modify a party's legal rights is an important decision. Binding mandatory arbitration clauses—with class-action waivers—should not be buried in boilerplate, miscellaneous provisions of a contract. Typically, judges and regulators look favorably on arbitration clauses being conspicuously placed under separate headings, with bolded or capitalized font.

Also, the language of the arbitration provision should not be mired in legalese, nor should it require a law degree to understand. Plain English lawyering is strongly recommended when implementing these binding mandatory arbitration provisions.[21]

Commit the Parties to Arbitration and Define What is Arbitrable.

At times, drafting lawyers can be guilty of not being specific enough, which can lead to the unintentional equivocation of the true intent of the agreement between the parties. To that end, it is critical for the drafting attorney to understand that the main purpose of a mandatory arbitration clause is to avoid any detour to the courts to resolve a dispute between the parties.[22]

Also, the clause needs to clearly define what disputes are (and are not) to be resolved by arbitration. A possible remedy would be language similar to, "Any dispute arising out of or relating to this contract, or the breach thereof, must be resolved by binding mandatory arbitration, in accordance with the United States Arbitration Act."

Outline the Rules That Will Govern the Arbitration.

Most U.S. states have enacted statutes that directly apply to arbitration and alternative dispute resolution.[23] As you might antic-

ipate, some of these statutes conform to the FAA, while others do not. However, if the parties want to avoid any conflicts of law disputes, their arbitration clause need to define that the FAA rules and regulations will govern any dispute between the parties, which will preempt any inconsistent state law.[24]

Likewise, it is important to avoid any substantive law ambiguity or conflict in the body of the contract. This issue was recently raised in the *Uber* case, where the court criticized the inconsistent and conflicting severability, delegation, and governing venue and jurisdiction clauses.[25]

The Arbitration Clause Should Contain "Entry of Judgment" and Severability Language.

If the parties to the contract desire that the results of the arbitration be final, binding and enforceable, it is essential that the arbitration clause contain language that the judgment (or ruling) of the arbitrator can be entered in court. A common phrase that is used is, "Judgment upon the award rendered by the arbitrators can be entered in any court of competent jurisdiction."

Finally, as with any contract, it is important to include the appropriate severability language—particularly when the clause includes a class-action waiver. This way, in the event any element of the clause is found to be unlawful or unenforceable, that portion of the clause may be severed without rupturing the remaining intention of the parties regarding arbitration.

Fairness in the actual arbitration process is a paramount consideration when creating a binding mandatory arbitration clause.

Conclusion

As more businesses pivot their corporate contracts toward alternative dispute resolution and binding mandatory arbitration, the drafting attorney can add substantial value to their client by understanding the pressure points of these critical clauses. AZAT

endnotes

1. U.S. Courts, *Judicial Facts and Figures 2013*, Pub. Table No. 4.8, Sept. 30, 2013.
2. *AT&T Mobility v. Concepción*, 131 S. Ct. 1740 (2011).
3. *Id.* at 1742.
4. *Am. Ex. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013) ("No contrary congressional command requires us to reject the wavier of class arbitration here"). *See also* Alison Frankel, *How SCOTUS's Amex Ruling May Help Businesses Evade Class Actions*, Reuters, Aug. 22, 2013.
5. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357-360 (5th Cir. 2013) ("The use of class action procedures is not a substantive right … while a class action may lead to certain types of remedies or relief, a class action is not itself a remedy").
6. *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800 (5th Cir. 2015).
7. 577 U.S. __ (2015).
8. *See generally*, Peter B. Rutledge & Christopher R. Drahozal, *Sticky Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex," Vand. L. Rev. 67 (4): 955-1013, May 2014.
9. Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, Mar. 2015.
10. Karen Weise, *Consumer Protection Faces a 'Tsunami' in Court*, Bloomberg Bus., Apr. 27, 2012.
11. *See* Jean Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, Or. L. Rev. 90 (3): 703-727 (2012).
12. *Gillette v. Uber Techs., Inc.*, 2015 U.S. Dist. 3, 14-cv-05241-EMC (Dkt. 16) (N.D. Cal. June 9, 2015).
13. *Id.* at 24-26.
14. *McLellan et al. v. FitBit, Inc.*, 3:16-cv-00036-VC (Dkt. 1).
15. Consumer Financial Protection Bureau, *CFPB Considers Proposal to Ban Arbitration Clauses That Allow Companies to Avoid Accountability to Their Customers*, CFPB Newsroom, Oct. 7, 2015. *See also* Rob Berger, *The CFPB Declares War on Arbitration*, Forbes, Oct. 18, 2015.
16. *Lewis v. Epic Systems Corp.*, Case No. 15-2997.
17. American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide*, Oct. 1, 2013.
18. *Hooters of America, Inc. v. Philips,* 173 F.3d 933, 938-939 (4th Cir. 1999).
19. *Id. See also* David S. Baffa, John L. Collins, Gerald L. Maatman, Jr., *Guidance for Employers Considering Mandatory Arbitration Agreements with Class and Collective Action Waivers*, Emp. Rel. L. J. (Winter 2013).
20. *Armendariz v. Found. Health Psychcare Serv., Inc.*, 24 Cal. 4th 83 (2000). *See also* John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, Disp. Resol. J., Vol. 58, No.1 (2003).
21. See Richard C. Wydick, Plain English for Lawyers (5th ed., July 30, 2005).
22. *See, e.g., Uber Techs., Inc.*, 2015 U.S. Dist. 3, 14-cv-05241-EMC (Dkt. 16) (N.D. Cal. June 9, 2015) ("The first [and often final] step in determining validity and enforceability … is to decide whether the language of the clause, read in context with other relevant contract provisions, unambiguously calls for the arbitration of gateway issues such as arbitrability. This is because the default rule is that courts adjudicate arbitrability: 'Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.'")
23. For example in 2010, Arizona adopted the Revised Uniform Arbitration Act (the RUAA), which was codified in A.R.S. § 12-3001 *et seq.*
24. *See Concepción*, 131 S. Ct. at 1742.
25. *Uber Techs., Inc.*, 2015 U.S. Dist. 3, 14-cv-05241-EMC ("These two clauses in the 2013 Agreement are facially inconsistent with each other and thus, for this reason alone, the heightened 'clear and unmistakable' test is not met with respect to" the Uber contracts).