POLSINELLI

in the news

Commercial Litigation

October 2013

Enforcing Your Arbitration Agreement: Why, How, and Whether

by: Jasmine J. Abou-Kassem

In this Issue:

Business contracts frequently include agreements to arbitrate rather than litigate any dispute. Often this is done based on the belief that arbitration is a less costly, more efficient method of resolving a dispute. However, there are times when one party thinks he or she will gain a strategic advantage by filing the case in court, hoping to avoid arbitration. Whether your company will be successful in requiring arbitration, or should seek to avoid it, depends on a number of factors.

What Law Applies?

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 1, *et al.* (the "FAA") governs arbitration agreements in transactions "affecting commerce." Courts have held that a diverse variety of contracts "affect commerce," including employment contracts, service contracts, credit card agreements, and sales contracts. Section 2 of the FAA provides that arbitration agreements involving commerce are enforceable, unless general contract defenses can be applied to invalidate the agreement.

As a matter of federal law, courts may not invalidate an arbitration agreement based on a state law that singles out arbitration clauses. For example, the United States Supreme Court held that the FAA preempted a Montana law which dictated that arbitration clauses are unenforceable

unless they are typed in underlined, capital letters on the first page of the contract. (In the event of a wholly state law issue, contact counsel to determine the enforceability of your arbitration agreement.)

What Do You Have to Prove?

The party seeking to compel arbitration has the burden of showing the arbitration agreement is valid. The opposing party has to defeat the agreement. Some common arguments used to defeat the agreement include:

- Claiming the person who entered into the contract was a minor or was mentally deficient at the time of signing, or otherwise lacked legal capacity to enter into the contract;
- The agreement is unconscionable;
- The agreement resulted from fraud or duress; or
- The claim involves a tort claim, such as personal injury, rather than contract issues.

Unconscionability appears to be the most litigated defense in cases involving consumer-related contracts.

How Have Courts Treated Motions to Compel Arbitration?

The answer to this question depends to some degree on whether you are in state or federal court. State courts seem more willing to strike arbitration agreements, or limit their enforcement. State courts are also more likely to give public policy stronger consideration based on a desire to protect the interests of the state's citizens.

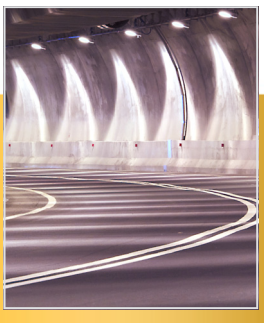
However, some litigants have attempted to invalidate certain kinds of provisions in arbitration agreements, like class arbitration waivers, on the grounds that the cost of individually arbitrating a claim exceeds the potential recovery. The United States Supreme Court recently rejected this argument. In response, the majority of courts have enforced class arbitration waivers in consumer contracts.

Do You Want to Enforce Your Arbitration Agreement?

Some traditional benefits of arbitration include:

- It is faster than litigation and less costly;
- The award is final and binding;
- There is a very limited basis for appeal, privacy of the proceedings and flexibility to adapt to the needs of the parties;
- Autonomy by the parties to choose a neutral arbitrator that is an expert in a specific legal industry;
- Elimination of local favoritism or a "run-away" jury; and
- Restricted or less regulated discovery.

There are times, however, when these benefits do not play out as anticipated in application. When the matter is a complex, commercial dispute, you may find the lack of compelled discovery, with no right to take depositions, to be a significant impediment to pursuing a claim. There are also few safeguards against your



opponent hiding or withholding evidence. On the other hand, if depositions and full discovery are involved, the expense of arbitration can mirror that of court litigation.

Additionally, under private arbitration agreements, parties can find themselves having to pay three arbiters for their full time service at their hourly rates for attendance at hearings, and for their time spent researching and writing their decision. This added expense can, in many instances, result in a very expensive endeavor.

Arbitration can also lose its confidentiality if one party seeks judicial enforcement of an arbitration agreement or award. Without a clause in your arbitration requiring confidentiality, or an order to the same effect by the arbitrator, the winner of the arbitration is free to publicize the arbitration or details of the proceedings. If you are a public company, you may be subject to government rules requiring disclosure of information regarding the arbitration.

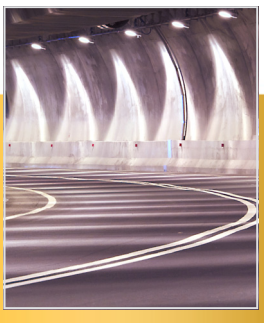
Finally, arbitration tends to be a poor forum for cases that can be decided solely on the application of a legal principle where the important facts are not in dispute. Frequently motions on issues of law are not allowed, and if they are allowed, they are rarely granted. Where the case is subject to arbitration, you must assume that it will proceed to a full evidentiary hearing, regardless of any legal defenses you may have.

What Should You do?

Try to avoid any surprises and be prepared. If an arbitrable dispute arises under your contract:

- Obtain counsel that specializes in commercial litigation with specific experience litigating arbitration agreements;
- Work closely with your counsel to understand how courts in the jurisdiction your arbitration agreement is subject to have treated motions to compel similar agreements and why; and
- Closely evaluate the facts of your case to best develop your litigation strategy.

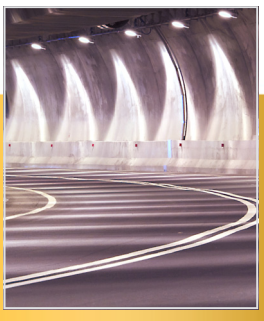
Arbitration in practice is not as simple or streamlined as many people think. You will want to carefully weigh all of the factors, including those listed above, with your counsel to choose the right path. You may not want to arbitrate if some of these factors prejudice your case. Small, discrete matters, or matters requiring a specialized knowledge by the arbiters, may be well suited for arbitration. But, if it this is not the case, litigation may be the better route.

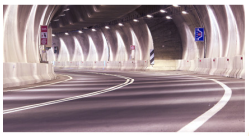


For More Information

If you have specific questions related to this Alert, please contact:

- Russell S. Jones Jr. | 816.374.0532 | rjones@polsinelli.com (Kansas City)
- S. Jay Dobbs | 314.552.6847 | jdobbs@polsinelli.com (St. Louis)
- Stacy A. Carpenter | 303.583.8237 | scarpenter@polsinelli.com (Denver)
- Leon B. Silver | 602.650.2066 | lsilver@polsinelli.com (Phoenix)
- Mark A.. Brand | 312.873.3668 | mbrand@polsinelli.com (Chicago)
- Leane C. Medford | 214.661.5537 | lmedford@polsinelli.com (Dallas)
- William D. Blakely | 202.626.8310 | wblakely@polsinelli.com (Washington, D.C.)
- Wesley D. Hurst | 310.203.5337 | whurst@polsinelli.com (Los Angeles)
- Jasmine J. Abou-Kassem | Author | 816.218.1265 | jabou-kassem@polsinelli.com (Kansas City)





Russell S. Jones Jr.
Chair
Kansas City
816.374.0532
rjones@polsinelli.com

Stacy A. Carpenter
Vice Chair
Denver
303.583.8237
scarpenter@polsinelli.com

S. Jay Dobbs
Vice Chair
St. Louis
303.583.8237
scarpenter@polsinelli.com

A complete list of Commercial Litigation attorneys is available here.

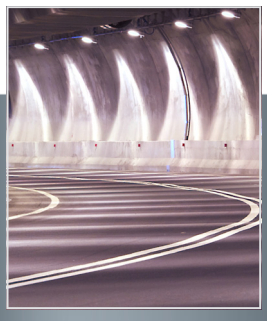
Polsinelli's Commercial Litigation practice provides practical, industry-specific litigation strategies that are informed by substantive legal and procedural knowledge, real courtroom experience and a deep understanding of how legal outcomes can impact businesses' bottom lines. Our comprehensive approach integrates a deep understanding of evolving industry and legal trends, varied litigation specialties, skilled practitioners and in-house litigation support capabilities including courtroom technology and electronic discovery management and storage capabilities.

Collectively, our teams offer significant experience in litigation involving:

- Aviation and transportation
- Business torts
- Class and mass actions, including consumer class actions
- Contract and UCC disputes
- Dealer/franchise/distribution litigation
- Government investigations and regulatory proceedings
- Insurance matters
- Professional liability
- Statutory claims, including the Civil Rights Act, Computer Fraud and Abuse Act, Telephone Consumers Protection Act, Foreign Corrupt Practices Act and state consumer protection statutes
- Environmental and Energy matters
- Real Estate issues
- Trials, arbitrations, mediations and appeals in all commercial and business fields.

Our experience allows for a proactive approach that is focused on relieving our clients and their businesses from the burden of litigation as quickly, efficiently and effectively as possible. Early in each case, we partner with clients to craft strategies that will help predict litigation costs and determine the best course of action. When a matter reaches the courtroom, our trial-savvy teams are prepared to implement aggressive and comprehensive strategies designed to achieve the best possible outcome for clients. Our success has earned the firm and our litigators acclaim in a range of industry directories and publications, but the most significant validation of our practice comes from clients who retain our litigators time and time again, trusting that Polsinelli will deliver real answers to real challenges.

To learn more about our services, visit us online at www.polsinelli.com.



About Polsinelli

Real Challenges. Real Answers.[SM] Serving corporations, institutions, entrepreneurs, and individuals, our attorneys build enduring relationships by providing legal counsel informed by business insight to help clients achieve their objectives. This commitment to understanding our clients' businesses has helped us become the fastest growing law firm in the U.S. for the past five years, according to the leading legal business and law firm publication, The American Lawyer. Our more than 680 attorneys in 17 cities work with clients nationally to address the challenges of their roles in health care, financial services, real estate, life sciences and technology, energy and business litigation.

The firm can be found online at www.polsinelli.com. Polsinelli PC. In California, Polsinelli LLP.

About this Publication

If you know of anyone who you believe would like to receive our e-mail updates, or if you would like to be removed from our e-distribution list, please contact Kim Auther via e-mail at KAuther@polsinelli.com.

Polsinelli provides this material for informational purposes only. The material provided herein is general and is not intended to be legal advice. Nothing herein should be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

Polsinelli is very proud of the results we obtain for our clients, but you should know that past results do not guarantee future results; that every case is different and must be judged on its own merits; and that the choice of a lawyer is an important decision and should not be based solely upon advertisements.

Polsinelli PC. In California, Polsinelli LLP.