

Drafting Fair, Efficient and Enforceable Arbitration Agreements

situation

Arbitration provisions in standard consumer and employment contracts provide a simple and informal way to resolve relatively small disputes.

Consumers and employees benefit from a quick, inexpensive and convenient resolution. The business achieves greater certainty and lower legal costs by reducing the risks from litigation and, in particular, lawyer-driven class action lawsuits that do little to benefit the putative clients.

in-house counsel challenge

Guided by the strong pro-arbitration policy of the Federal Arbitration Act, most courts enforce arbitration agreements containing class waivers.

Some courts, however, have declined to enforce agreements to arbitrate on an individual basis. To maximize the odds of a class waiver being upheld, inside counsel must craft an arbitration agreement that courts will deem fair to consumers and employees.

approach adopted

Establish a simple pre-arbitration process to resolve most claims amicably. One approach is to create a Web site that provides consumers or

employees with instructions on how to file a claim. A pre-arbitration notice procedure will increase the chances of resolving the dispute quickly and preserving the consumer or employee relationship.

Make arbitration affordable for customers/employees. If feasible, offer to pay the full costs of arbitration. Where claims are small, also consider incentive payments that increase potential recoveries for consumers and their attorneys.

Don't limit legal remedies. Courts deemed early arbitration agreements unfair because they limited the company's punitive or consequential damages, precluded recovery of attorneys' fees or had an unusually short statute of limitations.

Early arbitration clauses also required the claim to be brought in the company's home territory. For a small claim, that's impractical. Ensure that the location is convenient to the plaintiff.

Protect your company with a non-severability provision. If the court won't uphold individual arbitration, the provision will prevent the court from forcing you into high-risk class arbitration.

Finally, because state laws vary, establish a team of lawyers familiar with the laws to defend your arbitration clause regardless of where the dispute occurs.

measuring success

An arbitration provision is worth adopting to reduce dispute resolution costs. A successful arbitration provision is fair to all parties; is more

implementation steps

- Develop a pre-arbitration process to resolve claims amicably.
- Offer to pay costs of arbitration and financial incentives to ensure that the arbitration process is affordable.
- Make sure that the arbitration location is convenient to the plaintiff.
- Do not limit remedies available in arbitration such as punitive or consequential damages.
- Include a non-severability clause, which voids the entire arbitration agreement if a class arbitration prohibition is struck down.
- Rely on a team of lawyers capable of defending your arbitration agreement in any jurisdiction.

likely to be enforced; enhances customer/employee relationships; and gradually lowers a company's litigation costs, particularly in the context of consumer and employment claims.

future issues to consider

The law governing the enforceability of arbitration agreements continues to evolve. While much of the action is taking place in the lower state and federal courts, the U.S. Supreme Court has taken an interest in the Federal Arbitration Act and whether it pre-empts state law rules that would deny enforcement of arbitration agreements. Businesses should keep an eye on future arbitration law developments.



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