PUSH AND PULL

RECENT APPELLATE RULINGS ABOUT ARBITRATION

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Arbitration continues to enjoy the fervent approbation of a majority of the U.S. Supreme Court. In recent years, the Court has strictly defined the word "arbitration" to mean "arbitration on an individual basis," thus negating the concept of class arbitration (and thus negating the possibility of any recovery for many small-dollar wrongs). The Court has also strictly enforced its rule that arbitration clauses enjoy "most favored" status when it comes to statutes and common law rules governing the interpretation and enforcement of contracts.

Meanwhile, recent Oregon decisions have steadily narrowed the procedural and substantive grounds on which parties can challenge arbitration clauses as unconscionable. On the flip side, the courts have narrowed the category of parties who are bound by arbitration agreements they did not sign.

These are only some examples of the recent trends.

Class arbitration is an oxymoron

In the last decade, the Court has (re) defined the term "arbitration" in the Federal Arbitration Act (FAA) to mean arbitration of individual claims only, holding there is no such thing as class-action arbitration. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 US 662 (2010), the Court held that, where an arbitration clause is silent on whether it permits class arbitration, class arbitration is not permitted. In *Lamps Plus, Inc. v. Varela*, 139 S Ct 1407 (2019), the Court extended *Stolt-Nielsen's* holding to arbitration clauses that are ambiguous about class arbitration. The clause in *Lamps Plus* had been drafted by the defendant, and the lower court had therefore resolved the ambiguity against the drafter and permitted class arbitration. But the high court reversed, explaining that, because class arbitration is not really arbitration, you cannot apply the *contra proferentem* maxim to make it so. The Court did leave open the possibility that parties could explicitly (or perhaps implicitly) specify they want to have the oxymoron of class arbitration. But good luck finding that provision in your next arbitration clause.

Resistance is futile

Some have resisted the Court's push against class arbitration. But the Court has not tolerated those efforts. A recent string of cases considered the validity of arbitration clauses that explicitly waived class arbitration — an increasingly common practice that was more important before *Lamps Plus* (re)defined arbitration to not include class arbitration in the first place. For example, California had a common law rule saying class arbitration waivers are unconscionable. The Court struck the rule down as preempted by the FAA in *AT&T Mobility LLC v. Concepcion*, 563 US 333 (2011). *See also DIRECTV, Inc. v. Imburgia*, 577 US 47 (2015) (further applying *Concepcion*).

See Push and Pull p 34

Continued from p 31

Likewise, in *Epic Sys. Corp. v. Lewis*, 138 S Ct 1612 (2018), the Court rejected an effort by the National Labor Relations Board to invalidate class arbitration waivers in the context of labor-relations claims. And in *Am. Exp. Co. v. Italian Colors Rest.*, 570 US 228 (2013), the Court explicitly held a class arbitration waiver must be enforced even where the plaintiff's cost of individually arbitrating the claim exceeds any potential recovery, such that the waiver causes the plaintiff not to pursue the claim at all.

Class actions are not the only areas where the Court has shut down efforts to avoid its view of the FAA. In *Concepcion*, the Court made clear challenges to arbitration cannot be based on theories that take a dim view of arbitration, apply only to arbitration, derive their meaning from the fact that arbitration is at issue or disproportionately impact arbitration clauses. In short, arbitration clauses get preferential treatment compared to all other contract clauses. That is why California's common law rule saying that class arbitration waivers are unconscionable was struck down. Similarly, in *Marmet Health Care Ctr., Inc. v. Brown*, 565 US 530 (2012), the Court struck down a West Virginia common law rule that barred as against public policy a predispute arbitration clause that applied to personal-injury and wrongful-death claims against nursing homes. *See also Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S Ct 1421 (2017) (Kentucky's clear-statement rule, requiring an explicit statement in a power of attorney that the attorney-in-fact has authority to waive the principal's state constitutional rights to access the courts and to a jury trial, disfavors arbitration agreements and, therefore, is preempted by the FAA); *CompuCredit Corp. v. Greenwood*, 565 US 95 (2012) (unless a federal statute explicitly requires a given claim to be tried in court, such claims are arbitrable under the FAA). Cf. *New Prime Inc. v. Oliveira*, 139 S Ct 532 (2019) (enforcing narrow exemption in FAA requiring claims of certain transportation workers to be tried in court).

Oregon has fallen in line with this paradigm. *See Livingston v. Metro. Pediatrics, LLC*, 234 Or App 137 (2010) (under Oregon Uniform Arbitration Act, claims subject to arbitration can include statutory claims and intentional torts); *Lumm v. CC Servs., Inc.*, 290 Or App 39 (2018) (FAA preempts ORS 36.620(5), which bars arbitration clauses in employment contracts unless certain requirements are met).

It's unconscionable

The Court's cases have left room for one category of challenges to arbitration clauses: challenges based on generally applicable rules of state law that are totally neutral as to arbitration. The most common type of challenge is unconscionability. But unconscionability can be difficult to prove, and, while substantive unconscionability alone can defeat an arbitration clause, Oregon has not decided if procedural unconscionability alone can do the same. *Hatkoff v. Portland Adventist Med. Ctr.*, 252 Or App 210 (2012).

The best case for Oregon plaintiffs is *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553 (2007), where the court held an arbitration clause was procedurally unconscionable because it was adhesive and obtained through oppression and surprise, and substantively unconscionable because it contained a waiver of class arbitration and required the plaintiff to pay unaffordable arbitration costs.

Subsequent decisions have limited *Vasquez-Lopez* to its facts, however. The court's reliance on the class arbitration waiver, for example, was rendered invalid by the U.S. Supreme Court in *Conception*. Moreover, the Oregon Court of Appeals later held the fact that an arbitration clause is adhesive does not alone render it unenforceable. *Sprague v. Quality Restaurants Nw., Inc.*, 213 Or App 521 (2007); *Gist v. ZoAn Mgmt., Inc.*, 305 Or App 708 (2020), rev allowed, 367 Or 257 (2020). *See also Livingston* (plaintiff needs to prove more than unequal bargaining power). So the vitality of *Vasquez-Lopez* now rests on just the procedural factors of oppression and surprise, and the substantive factor of unaffordable arbitration costs.

But even the costs issue is difficult. You cannot rest on generalized fairness arguments or assumed notions of financial impact; you need detailed evidence to win. The need for evidence is illustrated by *Gist*, where the plaintiff argued that an arbitration clause was unconscionable because it forced the plaintiff to pay arbitration costs. Unlike in *Vasquez-Lopez*, the clause in *Gist* permitted the arbitrator to require the losing party to pay costs, and there was no evidence as to what the costs would be or whether they would be too onerous for the plaintiff to pay. The Oregon Court of Appeals held when an arbitration costs provision is not facially onerous and when the plaintiff's factual information is incomplete, the court will not rely on speculation to declare the provision unconscionable.

The court in *Gist* also rejected the plaintiff's argument the arbitration clause was unconscionable because it required each side to pay its own attorney fees. The court noted this provision was facially even-handed, not one-sided, and there was no evidence indicating the clause would deter or unreasonably burden the plaintiff's ability to pursue their claims. This conclusion was similar to the one the Court of Appeals reached in *Livingston*, where again, the plaintiff proffered no evidence, but relied merely on the terms of the arbitration clause and naked policy arguments. There, the court approved a clause that contained a fee-shifting provision requiring the loser to pay the attorney fees of the prevailing party, despite the theoretical risk that, if the plaintiff did not prevail, they would

have to pay the defendant's attorney fees.

Livingston illustrates another principle of recent arbitration decisions. The substantive unconscionability analysis is case-by-case and focuses on the one-sided *effect* of an arbitration clause, rather than on its one-sided *applicability*. Thus, in *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610 (2007), the court approved of an arbitration clause that required arbitration of the employee's claims but not the employer's claims, because the plaintiff was still entitled to all of the same remedies — and most of the same procedural protections — as the defendant. She simply had to bring her claims in a different forum.

Other substantive challenges have likewise failed in the Oregon Court of Appeals. The court has approved of confidentiality provisions that apply only to the amount of the award (*Vasquez-Lopez*) and that otherwise are even-handed and equally benefit and burden both parties (*Livingston*). Likewise, the court in *Sprague* and *Hatkoff* approved shortened contractual periods for bringing claims because they did not effectively deprive the plaintiffs of a reasonable opportunity to vindicate their rights.

For its part, the Ninth Circuit has approved continued judicial review of arbitration clauses for unconscionability under terms that are neutral as to arbitration. *Compare Chavarria v. Ralphs Grocery Co.*, 733 F3d 916 (9th Cir 2013) (clause was unconscionable), *with Poublon v. C.H. Robinson Co.*, 846 F3d 1251 (9th Cir 2017) (clause was not unconscionable), *and Tompkins v. 23andMe, Inc.*, 840 F3d 1016 (9th Cir 2016) (same)."

Consent is paramount

One area where plaintiffs have successfully challenged arbitration clauses in recent years is when they did not agree to arbitration with the defendant. *See Revitch v. DIRECTV, LLC*, 977 F3d 713 (9th Cir 2020) (arbitration clause applicable to defendant's "affiliates" applied only to affiliates existing at time of contract formation); *DeLashmutt v. Parker Grp. Investments, LLC*, 276 Or App 42 (2016) (where contract requires arbitration for certain named parties, other parties cannot force plaintiff to arbitrate claims against them); *Eugene Water & Elec. Bd. v. MWH Americas, Inc.*, 293 Or App 41 (2018) (same; developer's agreement to arbitrate with general contractor did not apply to subcontractors); *Bates v. Andaluz Waterbirth Ctr.*, 298 Or App 733 (2019), rev den, 366 Or 292 (2020) (same; mother-to-be's agreement to arbitrate her claims against midwife did not apply to claims of newborn baby).

In *Livingston*, the Oregon Court of Appeals explained, where an arbitration clause is broad enough, a nonsignatory defendant can enforce the clause against a signatory plaintiff. But it is more difficult for a defendant (signatory or nonsignatory) to enforce an arbitration clause against a nonsignatory plaintiff. In *Drury v. Assisted Living Concepts, Inc.*, 245 Or App 217 (2011), the court explained a plaintiff who is a third-party beneficiary of a contract with an arbitration clause can be bound by the clause only if they manifest assent to be bound by the contract — for example, by ratifying it or asserting a claim for relief under it. Thus, where the resident of an assisted living facility did not sign an arbitration agreement (her son did), and her claims against the facility sounded in tort instead of contract, her claims were not subject to arbitration.

Who decides arbitrability?

Recent decisions have also clarified who decides whether a claim goes to arbitration. In *Rent-A-Ctr., W., Inc. v. Jackson*, 561 US 63 (2010), the Court reiterated the rule from prior cases that challenges to the enforceability of a contract that contains an arbitration clause are for the arbitrator to decide, while challenges to the enforceability of just

See Push and Pull p 36

Continued from p 35

the arbitration clause are for the court to decide, unless the parties expressly agree to arbitrate the latter kind of challenges. In *Renta-A-Ctr.*, the contract at issue was an arbitration agreement that contained a clause delegating arbitrability questions to the arbitrator.

The Court applied its prior cases to hold that challenges to the arbitration agreement as a whole were for the arbitrator to decide, while challenges to only the delegation clause were for the court. *See also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S Ct 524 (2019) (when the parties' contract delegates the arbitrability question to an arbitrator, a court may not decide that question even if the court thinks the defendant's argument in favor of arbitration is wholly groundless).

In *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 US 287 (2010), the Court held the same rubric described in *Rent-A-Center* applies not only to disputes over the scope and validity of an arbitration clause, but also to disputes over its formation, such as whether (and when) the parties agreed to that clause. *See also Gist* (describing issues decided by court v. arbitrator under FAA); *Citigroup Smith Barney v. Henderson*, 241 Or App 65 (2011) (same).

Note that, unlike the FAA, under the Oregon Uniform Arbitration Act ("OAA"), which applies to strictly local (not-interstate) contracts, the court decides not only challenges to the arbitration clause itself, but also challenges to the entire contract that contains the arbitration clause. *Hinman v. Silver Star Grp., LLC*, 280 Or App 34 (2016). That is, unless the parties expressly agree to arbitrate challenges to the entire contract. *Couch Investments, LLC v. Peverieri*, 359 Or 125 (2016).

The arbitrability questions mentioned above are what the Court has deemed substantive issues of arbitrability. There are also procedural issues, such as waiver and delay, which the Court has held are for the arbitrator to decide. *Henderson*; *Industra/Matrix Joint Venture v. Pope & Talbot, Inc.*, 341 Or 321 (2006) (applying FAA). The OAA has a similar test, under which waiver and estoppel are for the arbitrator to decide, because they are conditions precedent to arbitration. *Livingston*.

Under both the FAA and the OAA, there is a presumption in favor of arbitration. However, the Court in *Granite Rock* explained the presumption applies only to the scope of an arbitration clause, not its formation or validity. Even then, the Court held, the presumption applies only where it has not been rebutted by evidence that the parties did not intend to arbitrate the dispute at issue. The rule under the OAA is the same. *EWEB*; *Adair Homes, Inc. v. Dunn Carney Allen Higgins & Tongue, LLP*, 262 Or App 273 (2014).

Similarly, if the facts bearing on a challenge to arbitration, such as unconscionability or intent, are disputed, the court must allow the parties to present evidence on those facts and must decide the factual questions presented to it, *Hinman; Couch Investments*, and the appellate courts must defer to those findings, *Harnisch v. Coll. of Legal Arts, Inc.*, 243 Or App 16 (2011). Of course, if the facts permit only one reasonable conclusion — that the parties did not agree to arbitrate the dispute — then the presumption in favor of arbitration does not apply either. *Warren v. Smart Choice Payments, Inc.*, 306 Or App 634 (2020) (later contract superseded one that had arbitration clause). Only if the evidence is in equipoise does the trial court resort to the maxim in favor of arbitration. *Adair*.

Appeals from arbitrability rulings

Under the FAA, when a court denies a motion to compel arbitration, the defendant can immediately appeal that order. Likewise, when the court grants a motion to compel and dismisses the lawsuit in deference to the arbitration, as the defendant wanted, but the court interpreted the arbitration clause differently than what the defendant wanted (such as by permitting class arbitration), the defendant can immediately appeal. *Lamps Plus*.

Under the OAA, an order denying a motion to compel arbitration must be appealed immediately; the defendant cannot wait and later appeal from a general judgment following trial. *Snider v. Prod. Chem. Mfg., Inc.*, 348 Or 257 (2010). However, if the defendant misses the deadline for appealing the order denying arbitration, it can simply file a second motion to compel arbitration and appeal the denial of that order. *Gozzi v. W. Culinary Inst., Ltd.*, 276 Or App 1 (2016), on recons, 277 Or App 384 (2016).

What if the plaintiff wants to appeal an order granting a motion to compel arbitration? Under the FAA, the plaintiff must either obtain permission for an interlocutory appeal or wait until after the arbitration concludes and the award is confirmed. The Ninth Circuit has held as much even when the plaintiff dismisses all claims with prejudice as a result of the order compelling arbitration. *Langere v. Verizon Wireless Servs., LLC*, 983 F3d 1115 (9th Cir 2020). By contrast, under the OAA, the plaintiff can appeal the judgment in that circumstance, as the Oregon Court of Appeals held in *Gist*.

Appeals from arbitration awards

The Court has kept challenges to arbitration awards to narrow limits. The FAA defines the types of challenges a party may bring against an arbitration award, including when an arbitrator exceeds their powers. An arbitrator does so, for example, if the arbitrator strays from interpretation and application of the parties' agreement and instead dispenses the arbitrator's own brand of justice as a form of public policy, which is what the Court held occurred in *Stolt-Nielsen*.

But the FAA does not permit parties to challenge an arbitration award on the ground that the arbitrator committed a legal or factual error, even a serious error, so long as the arbitrator arguably applied the law to the evidence. *Oxford Health Plans LLC v. Sutter*, 569 US 564 (2013) (the sole question on review is whether the arbitrator interpreted the parties' contract, not whether the arbitrator did so correctly); *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F3d 1262 (9th Cir 2013) (Ninth Circuit permits challenges to arbitration awards exhibiting "manifest disregard for law," but Supreme Court has expressed doubt if that judicial gloss on the FAA is valid); *Nieto v. City of Talent*, 295 Or App 625 (2019) (OAA does not permit challenge to award predicated on an error of law. Rather, the error must relate to the arbitrator's authority to decide the dispute).

The Court has also held the FAA prohibits parties from modifying the grounds for judicial review specified in the FAA. Thus, parties may not agree to "legal error" review of arbitration awards. *Hall St. Associates, LLC v. Mattel, Inc.*, 552 US 576 (2008). *See also Wal-Mart* (FAA bars parties from eliminating all judicial review of arbitration awards). Freedom of contract has some limits, it turns out.

Conclusion

In sum, recent federal and state appellate cases have made it very tough for plaintiffs seeking to challenge arbitration clauses. There are avenues to pursue, however, especially if you make the effort to create a detailed evidentiary record that supports your challenge.

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