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Think you'll be arbitrating employment and consumer claims in California?

Not without careful planning

Here's the scenario: Your company has done everything it can to avoid facing a jury in the United States. It has incorporated arbitration clauses into its contracts. The clauses incorporate the rules of a neutral arbitration forum for resolving any disputes, such as the American Arbitration Association. You think you are covered for any dispute arising out of that contract. But are you? It may boil down to whether your company is employing individuals or selling to consumers located in the world's fifth largest economy — California. In both of those contexts, as set forth below, the court will enforce the agreement only if it meets certain criteria not required in other contexts.

Generally, the laws of the United States, as well as of the individual states, favor enforcement of arbitration agreements. Written arbitration agreements in interstate and foreign commercial transactions, except employment agreements, are enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq. The FAA, when applicable, also preempts state laws that conflict with it, including state laws that purport to limit arbitration. In fact, one of the main purposes of the FAA was to curtail a state's ability to enact state laws that undercut the enforceability of agreements to arbitrate. As a result, the policy favoring enforcement of arbitration agreements has become entrenched in both federal and state laws over time.

Holly Whatley

So what happened? A tension developed between enforcing arbitration agreements and protecting individuals from what some courts view as oppressive and non-negotiable agreements to arbitrate. The tension has arisen as a result of efforts by companies to enforce pre-dispute arbitration agreements against employees and consumers, two groups of individuals that California courts have deemed deserve additional safeguards in arbitration agreements.

Arbitration clauses in employment contracts

In the employment context, the California Supreme Court in *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83 (2000), ruled that an arbitration agreement entered into by an employee, as a non-negotiable condition of employment, is only enforceable to

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resolve statutory discrimination claims if it provides for each of the following: 1) a neutral arbitrator; 2) more than minimal discovery; 3) the same relief otherwise available in court; 4) a written decision by the arbitrator; and 5) a limit on costs of the arbitration to the employee. Any imposition of costs on an employee that are greater than he or she would pay for asserting a claim in court is prohibited.

The arbitration agreement at issue in Armendariz did not meet these requirements because it attempted to limit the employee's remedies for wrongful termination claims, which would include any statutory discrimination claims, only to lost wages. The court found that such a limitation was contrary to public policy, unconscionable and unenforceable. Importantly, the court found that this unconscionable provision could not be severed from the remainder of the arbitration agreement and declared the entire arbitration agreement unenforceable.

The court also found that the agreement was unenforceable because arbitration was imposed by the employer, the stronger party, on the employee, the weaker party, and: 1) required arbitration of claims by the employee, but permitted the employer to choose which forum it could use to pursue claims against the employee; and, 2) purported to limit the employee's recovery of damages, but placed no such restriction on the employer. The employer provided no business justification for such a one-sided agreement, and the court found it unconscionable and unenforceable.

The lesson here is that an employer cannot use its superior bargaining power to extract concessions from employees that are contrary to public policy. Agreements to arbitrate in the employment context, at least in California, must include additional specific terms that are not required in other arbitration agreements to guard against employer abuses. And unless the limitations imposed in the arbitration agreement also apply to the employer as well, courts are unlikely to enforce the clauses against the employees.

Arbitration in consumer contracts

Courts have similarly limited the enforceability of arbitration agreements in consumer contracts. The recent decision in *Gutierrez v. AutoWest, Inc.*, 114 Cal. App. 4th 77 (2004), briefed and argued by LAWorld member Christa & Jackson, is illustrative. The trial court in Gutierrez held that an arbitration agreement preprinted on the reverse side of consumer's automobile lease was unconscionable because it provided no mechanism for the plaintiff to seek a waiver of the required arbitration fee. Because the plaintiff asserted a class claim, he estimated that under the applicable rules his arbitration fees would exceed $10,000, an amount he claimed he could not afford. Based on that cost estimate, the appellate court found the arbitration agreement substantively unconscionable noting, "[w]hile arbitration may be within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the arbitration process is not." Crucially, however, the Court of Appeal did not declare the entire agreement unenforceable as the court in Armendariz had done. Rather, it left open for the trial court to decide on remand whether the provision requiring the payment of such high fees should be severed and the rest of the arbitration agreement enforced.

On a separate ground, the court ruled that in cases asserting a consumer's unwaivable statutory rights, the law implies in every arbitration agreement that unaffordable fees will not be allocated to the consumer at any point in the arbitration process. Id. at 271–72. But, in a win for those seeking to enforce arbitration agreements, the court declined to follow the arbitration rule applicable in employment cases that any fees above those a claimant would pay in court are unreasonable. Instead, determination of what would be affordable for any particular plaintiff would be decided on a case-by-case basis.

Because many consumer actions are based on nonwaivable statutory rights, in cases subject to arbitration, a company should evaluate whether the arbitration clause itself, or the applicable arbitration rules designated, provide a mechanism for the consumer to seek relief from any arbitration fees he or she claims are prohibitive. As long as the rules have such a mechanism, then the arbitration agreement will be enforceable. If not, then the fee provision will probably have to be severed from the rest of the agreement.

Another significant issue that, as yet, is undecided in California, is whether class action waivers in arbitration agreements are valid. In *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, the Fourth District Court of Appeal struck down a provision in an otherwise valid arbitration agreement, in which both parties waived the right to pursue a claim in a representative or class action capacity. In that case, Discover Bank had amended its cardmember agreement by inserting an amendment inside a regular monthly billing statement. That amendment included a waiver of both the bank's and customer's right to bring a representative or class action claim. The court nevertheless found the waiver unconscionable under California law because it contradicted the state legislature's stated policy of creating a mechanism for a representative to seek relief on behalf of the general public.

However, in a case decided less than one year later, and now on appeal to the California Supreme Court, the Second Appellate District declined to follow Szetela. (*Discover Bank v. Superior Court* (2003) 105 Cal. App. 4th 326, review granted, depublished by *Discover Bank v. Superior Court*, 2003 Daily Journal DAR 3936.) Interpreting the identical cardholder agreement and class action waiver, the court in *Discover Bank* applied Delaware law to find the arbitration agreement was valid. The court found that the FAA preempted any state judicial policy precluding class-wide arbitration waivers.

It is expected that the decision by the California Supreme Court will reconcile the conflict between these two cases. But as of yet, the conflict remains. What is certain, however, is that when a form arbitration agreement affects either employees or consumers, courts are more likely to find ways to avoid enforcement of the arbitration agreement, unless those agreements also ensure that the statutory rights of such individuals are not curtailed by pursuing a claim in arbitration. Further, in the employment context, the costs of arbitration to the employee cannot exceed those that the employee would incur in court. In the consumer context, there must be a mechanism for the consumer to seek relief from arbitration fees that she contends she cannot afford. Addressing each of those issues fully, and up front in the arbitration agreement, greatly increases the chances that a court will enforce the agreement, and your company will not find itself facing a sometimes unpredictable jury.

Holly Whatley is an associate with Christa & Jackson, the LAWorld member firm in Los Angeles.

Luxembourg as a financial centre

Luxembourg is a major financial centre — it has 170 banks, with 665 billion euros on deposit. Banks and professionals from the financial sector are subject to secrecy laws which guarantee the anonymity of banking operations, subject to certain exceptions such as money laundering and all other criminal activity.

There is some flexibility in the application of the headquarters principle; the headquarters must be located in Luxembourg for the company to come under Luxembourg law.

Luxembourg law, which governs company law and the aligned tax law, enables certain company arrangements to be completed which encourage fiscal optimisation in financial and commercial operations.

Luxembourg "holdings" are the instruments most frequently used to meet the objectives of these arrangements. There are two types of holding arrangements: Luxembourg Investment Companies (SOPARFI) and Holdings 29. The latter cannot engage in any commercial activity.

These two types of holding companies are capital companies which hold shares in other companies. Their make-up, except in the event of merging with an English company, is based on a capital duty of 1%. Where tax is concerned, the Holdings 29 type are subject only to charges of 0.2% of the total value of their assets.

The Holdings 29 type do not benefit from international tax treaties against double taxation but can sell shares, exempt from increases in transfer value, subject to retaining 10% of the capital of the company whose shares are being sold.

Furthermore, following a law passed in December 2001, Holdings 29 companies can collect royalties from activity involving the use of a subsidiary company (the Holding may hold 20% of the subsidiary company's capital). The sole tax on such royalties, based on the use of either intellectual or industrial property, is a levy at source of 10% of the total of the royalties.

The dividend allocated by a Holdings 29 to its shareholders is not subject to any tax deduction at source.

SOPARFI type holdings, which may engage in commercial activity, are entitled to collect dividends and to sell off interests without disclosure both in relation to the revenue collected and the increase in transfer value caused by taxation.

There is no tax incurred when the company distributing the dividends or selling the shares holds at least 10% of the investment company for at least 12 months.

These company transactions are facilitated by the existence of two legal mechanisms: transferable shares and trust companies.

Transferable shares representing the company's capital are issued at the request of shareholders when the company's capital is entirely given up by these shareholders. A simple transfer of securities is all that is required for a change of shareholders and the transfer of shares to take place.

Trust companies are a valuable tool in completing these operations, in particular the financial operations. Trust companies enable the settler to remain anonymous; the settler transfers either the funds required for the company settlement or a company's securities.

This type of trust company, commonly known as a management trust, may also be used for holding shares, notably where one of the shareholders cannot or does not wish to create a majority holding where the shares of a company are concerned.

Luxembourg recognises (since its ratification of the Hague Convention on 1 July 1985) the consequences of a trust set up under the control of foreign legislation.

It is now accepted that the trustee is likened to an owner and can thus be granted all the rights and obligations of an owner with the exception of those rights and obligations imposed by the Trust Law or by the Trust Law Constitutional Act.

On a financial level, Luxembourg has, for several years, had various means and mechanisms at its disposal for encouraging investment and the growth of capital under highly beneficial tax conditions. Techniques for securing financial claims are also in existence, enabling companies to meet debts by transforming them into securities. These representative securities are vehicles for investment in which the degree of risk involved depends on the management regulations of the bodies offering the products.

The net assets of Luxembourg collective billion euros. Aware of the fact that the European economy will henceforth be influenced by the scale of investment in projects, whether these are industrial or non-industrial projects, Luxembourg has introduced a new investment tool in a recent bill which has very interesting tax benefits; the project has been named SICAR.

The aim of these companies will be to invest in the private equity and venture capital sectors; this field will, however, require greater development when the definitive terms of the legislative project are made known.

Article prepared by Joë Lemmer, of Etude de Maître Joë Lemmer, LAWorld member firm in Luxembourg.

LAWorld's 2004 conference — Madrid

In May, senior representatives of 20 LAWorld member firms met in Madrid for the organisation's annual conference. The attendees and partners, from fifteen different countries, were hosted by José Suárez, of Suárez de la Dehesa, the LAWorld member firm in Madrid. The conference chairman was Bill d'Apice, of Makinson & d'Apice, Sydney, Australia.

During three days of meetings and social activities, participants discussed a variety of issues, including emerging markets in China, India and elsewhere, business development and marketing for legal firms, legal trends in different regions around the world, internet law, intellectual property, antidumping in China, and knowledge management.

During the conference participants dined at some of Madrid's excellent restaurants, sampling Andalusian, Basque and Galician cooking. The conference concluded with a visit to historic Toledo.

The conference provided participants with opportunities to network and share experiences in an informal atmosphere. There is significant business carried on amongst member firms, much of which is based on relationships formed during LAWorld gatherings and other professional meetings.

Mark Sadler (Romford, Essex), Yiota Kythreotou (Nicosia), Ken & Kirsten Fisher (New York)

José Suárez (Madrid), Deb d'Apice (Sydney), Caroline & Joe Murphy (Limerick), Laura Christa (Los Angeles) and Jan van der Steenhoven (Amsterdam)

The next annual conference will take place in Amsterdam, from 18–20 May 2005.

Office bearers for the coming year were elected at the conference. They are as follows:

Chairman:	**Jan van der Steenhoven, Amsterdam**
Past Chairman:	**Bill d'Apice, Sydney**
Treasurer:	**Giorgio Corno, Milan**
Regional Chairpersons:	
Americas:	**Val Stieglitz, Columbia, SC**
Middle East:	**Yoav Salomon, Haifa**
Asia-Pacific:	**Bill d'Apice, Sydney**
Europe:	**Claus Lenz, Cologne**

Website update ...

LAWorld's website, www.laworld.com, has been revamped. Have a look at the site from time to time to check out the articles on it. For Francophiles, there is an article on the proposed European Constitution:

REFLEXION SUR LA NOUVELLE CONSTITUTION EUROPEENNE (Reflections on the new European Constitution) by Jean-Pierre Spitzer, of SCP Champetier de Ribes — Spitzer, LAWorld member firm in Paris, France.

There is also an article on the service sector in China :

CEPA — FURTHER LIBERALISATION OF CHINA'S SERVICE SECTORS
by Kenneth Lo of Ng & Shum, LAWorld member firm in Hong Kong.

Corporate governance

New Brazilian Civil Code

On 11 January 2003 Law n° 10.406 became effective, revoking the previous Brazilian Civil Code of 1916, and the general part of the Commercial Code. This New Brazilian Civil Code ("NBCC") established new provisions in all civil areas, and also established rules related to different types of Brazilian Companies, some of which were previously foreseen by the Commercial Code.

The NBCC has also converted into law some decisions already granted by the highest Courts. The most important of them, related to Brazilian companies, is the disregard of legal entity (personal responsibility of shareholders), which was possible, before NBCC was enacted, by a Court decision, even though there was no law pertaining to this.

This principle permits a judge, under certain conditions, to hold the shareholders of a company responsible and personally liable for the company's debts.

Also, the NBCC changed the rules of limited liability companies, which were previously regulated by Decree 3708/19. Under the NBCC, the most important difference refers to the necessary ownership requirement for amendments to the articles of association of a limited liability company.

Under the old rules, shareholders owning a majority (51%) of the listed capital could amend the articles of association without the approval of the minority shareholders. However, the NBCC has raised this figure and now the Articles of Association may only be amended by shareholders holding at least 75% of the listed capital. As a result, some limited liability companies are being converted into corporations.

Another change is that an Audit Committee may be installed if requested by those owning 75% of the shares, and minority shareholders may elect one member of this Audit Committee.

In short, the purpose of the NBCC is to give minority shareholders more rights and powers.

Other issues regulated by the NBCC, for which a vote of more than 51% of the shareholdings is required, include: Appointment of an administrator when he / she is not a shareholder if the listed capital of the company is not paid up (unanimous decision); company's conversion into a corporation (unanimous decision); approvals related to merger, acquisition, spin-off, winding up and end of liquidation (75%); administrator's appointment when he / she is not a shareholder if the listed capital is paid up (2/3 of the listed capital), and administrator's dismissal when he / she is appointed in the articles of association (2/3 of the listed capital).

The NBCC established a one-year period for limited liability companies to have their Articles of Association changed to the new rules. The deadline for implementation was 9 January 2004, subsequently extended by a year to 9 January 2005.

Marco Antonio d'Utra Vaz

Marco Antonio d'Utra Vaz is senior partner of Vaz Advogados Associados S/C, the LAWorld member firm in São Paulo, Brazil

ADR and Turkish Textile Companies

Gökhan Muhtaranlar

Gökhan Muhtaranlar, from Muhtaranlar & Associates, the LAWorld member firm in Istanbul, Turkey, recently delivered a seminar on Alternative Dispute Resolution (ADR) to the Istanbul Textile Exporters Association (ITKIP). The seminar concentrated on international commercial arbitration and key issues in preparing international sales contracts. Attendees at the seminar were from prestigious Turkish textile companies.

ADR is a process whereby legal conflicts and disputes are resolved privately, rather than through public courts. Usually either mediation or arbitration is used. Typically the process is much less formal than would be the case in court proceedings, and includes the appointment of a third party to preside over a hearing between the parties. Advantages are usually speed, lower cost and privacy; the major disadvantage is that compromise may be required.

Gökhan Muhtaranlar has represented Turkish clients before international arbitration institutions such as the International Chamber of Commerce (ICC) and the Chamber of Commerce and Industry of Geneva and in ad hoc arbitration. He is a specialist in the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG — Vienna Treaty).

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