

High Court On How To Write Arbitration Agreements

Law360, New York (July 07, 2010) -- The U.S. Supreme Court recently provided important guidance on drafting arbitration clauses. The court held in *Rent-A-Center West Inc. v. Jackson* that arbitrators, not courts, will decide whether an arbitration agreement is void as unconscionable if the arbitration agreement is worded properly.

Briefly stated, the dispute in *Rent-A-Center* was whether Antonio Jackson, a former employee of Rent-A-Center, was required to arbitrate his race discrimination claims.

Jackson had signed a “Mutual Agreement to Arbitrate Claims” as a condition of his employment. The agreement provided that the parties would arbitrate all disputes arising out of Jackson’s employment, including all discrimination claims.

Critically, the agreement also provided that the “arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this agreement including, but not limited to any claim that all or any part of this agreement is void or voidable.”

Jackson brought his race discrimination claims in federal district court; Rent-A-Center moved to dismiss and compel arbitration. Jackson resisted arguing that the arbitration agreement is unconscionable and thus unenforceable under state law.

The Supreme Court held that the issue of unconscionability is for the arbitrators, not the court because the arbitration agreement specifically committed such questions to the arbitrators, and Jackson was challenging the unconscionability of the entire arbitration agreement, not just the part of the arbitration agreement that committed questions of the agreement’s enforceability to the arbitrators.

The case built on and brought together two important lines of Supreme Court arbitration precedent. The first is the principle articulated in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), where the court held that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.”

In *Rent-A-Center*, the court said that the “clear and unmistakable” requirement related to the parties’ intent to arbitrate the arbitrability issue, not to whether the underlying agreement was valid. (Slip op. at 5 n.1.)

The second line of cases hold that if the party resisting arbitration challenges the “contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid,” then arbitrators decide whether to uphold the challenge.

Conversely, courts will resolve disputes over the validity of the arbitration agreement where the challenge is targeted at the arbitration agreement alone, separate from the rest of the agreement. [Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440, 444 (2006).]

In Rent-A-Center, the court used these two principles to parse the arbitration agreement at issue, and held that there were really two arbitration agreements, not one — the agreement to arbitrate underlying employment disputes, such as Jackson’s race discrimination claims, and the agreement to arbitrate questions of enforceability, including claims that the agreement was unconscionable.

Jackson’s unconscionability arguments were directed at the arbitration agreement as a whole, rather than the second agreement to arbitrate questions of enforceability. Therefore, when coupled with the parties’ clear expressions of intent to arbitrate enforceability issues, the district court should have declined to decide Jackson’s unconscionability claims and referred them to the arbitrators instead.

The court also found that Jackson’s particular unconscionability arguments were directed at the arbitration of his underlying race discrimination claims rather than at the arbitration of the issue of whether the arbitration agreement itself was void.

Specifically, Jackson argued that the arbitration agreement was unconscionable because (1) it required him to arbitrate claims that he is likely to have, such as contract, discrimination and other statutory claims, but not the type of claims that Rent-A-Center is likely to have, such as intellectual property and unfair competition; (2) it unfairly limited discovery; and (3) it required fee splitting.

The court found that none of these had much if any force when the question is whether the agreement to arbitrate employment claims is unconscionable.

The lessons to employers and others is clear. The agreement to arbitrate should contain two separate clauses, which should be made clearly independent.

The first clause should contain the agreement to arbitrate the underlying disputes, such as all claims arising out of or related to the employment, including but not limited to claims arising in tort or contract, claims for discrimination under federal, state or local law, claims for defamation, claims for or related to wages, including claims for unpaid wages, overtime and unlawful deductions from wages. (We leave to one side for now the issue of class action waivers or class arbitrations more generally.)

The second clause should contain the agreement to arbitrate all disputes relating to the interpretation, applicability, enforceability or formation of the agreement generally or the agreement to arbitrate, including, but not limited to any claim that all or part of the agreement generally or the agreement to arbitrate is void or voidable for any reason, including but limited to that it is a contract of adhesion, fails for lack of consideration, is procedurally or substantively unconscionable or is void as against public policy.

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