DREHER TOMKIES LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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AMERICAN ARBITRATION ASSOCIATION LAUNCHES CONSUMER ARBITRATION CLAUSE REGISTRY

Effective September 1, 2014, the American Arbitration Association ("AAA") will require businesses to register consumer arbitration clauses on the AAA Consumer Clause Registry in order to use AAA arbitration services. The new AAA Consumer Arbitration Rules ("Rules") state that all businesses that provide for or intend to provide for these Rules or another set of AAA rules in a consumer contract should (i) notify AAA of the existence of such a consumer contract at least 30 days before the planned effective date of the contract and (ii) provide AAA a copy of the arbitration agreement. The Rules apply to arbitration clauses in "consumer agreements," which means an agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features or choices. The product or service must be for personal or household use. "Consumer agreement" includes credit cards agreements, finance agreements (*i.e.*, car loans, mortgages and bank accounts), telecommunication agreements, travel services agreements and health club membership agreements.

A business must register and AAA must approve a business's arbitration clause prior to filing a consumer case with AAA. An expedited review process (for an additional fee) will be available for businesses that do not register their arbitration clauses in advance. To register, a business must submit its arbitration agreement and pay a nonrefundable review fee ($650 for 2014) and an annual fee ($500 for 2014). These fees are assessed per clause reviewed or maintained on the registry.

AAA will approve an arbitration clause if the clause substantially and materially complies with the due process standards of the Consumer Due Process Protocol. The Consumer Due Process Protocol is a set of broad principles that establishes minimum fairness standards for mediation and arbitration programs involving consumers. Once approved, AAA will add a business to the publicly-accessible Consumer Clause Registry. The Registry displays the name of the business, the business's address, the consumer arbitration clause and any related documents deemed necessary by AAA. AAA may decline to administer a case if a business fails to comply with the registration requirement or AAA does not approve a business's arbitration clause.

Businesses must resubmit arbitration clauses and pay the registration fee if any changes are made to a registered arbitration clause. Moreover, businesses must submit all of the arbitration clauses it uses or that a subsidiary uses for review and approval. Businesses can currently register on AAA's website, but the Consumer Clause Registry will not be available until September 1, 2014. The launch of AAA's Registry comes at a time when the Consumer Financial Protection Bureau is studying predispute arbitration clauses in financial consumer contracts. *See* our Alert of January 22, 2014.

If you have not reviewed your clause(s) lately, you may wish to update and standardize them in light of recent developments. We can review your arbitration clauses for compliance with the Consumer Due Process Protocol and other guidance.

✧ *Mike Tomkies and Susan M. Manship*

STATE SUPREME COURTS REVERSE DECISIONS TO INVALIDATE ARBITRATION AGREEMENTS

Two recently published state supreme court decisions address the enforceability of arbitration agreements based on whether an invalid provision constitutes a material term of the arbitration agreement. In *Dean v. Heritage Healthcare of Ridgeway, LLC*, the Supreme Court of South Carolina ruled that a named arbitral forum is not a material term of the arbitration agreement. No. 27401, 2014 WL 2765644 (S.C. June 18. 2014). In *Venture Cotton Co-op v. Freeman*, the Supreme Court of Texas held that an invalid limitation on statutory rights is not an essential term of an arbitration agreement and a one-sided attorneys' fees provision is not per se unconscionable. 57 Tex. Sup. Ct. J. 730 (June 13, 2014). Both courts upheld the arbitration agreement.

In *Dean*, the Supreme Court of South Carolina held that the named arbitral forum is not a material term to arbitration agreements in which the parties agree to arbitrate "in accordance with" the named forum's rule. In response to defendants' motion to compel

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arbitration, the plaintiff argued that the arbitration agreement is unenforceable because of the unavailability of named arbitral forum. The plaintiff proffered that the parties had agreed to an arbitration proceeding exclusively administered by American Arbitration Association ("AAA") and AAA has a *policy* against hearing personal injury disputes with a pre-injury arbitration agreement. The circuit court agreed with the plaintiff, concluding that the arbitral forum selection is a material part of the arbitration agreement and cannot be remedied.

On appeal, the supreme court addressed whether the named forum (*i.e.*, AAA) is a material term of the arbitration agreement or an ancillary consideration. The supreme court noted the substantial split of authority on the issue. The supreme court adopted the majority rule which distinguishes agreements requiring a proceeding to be "administered by" the named (*i.e.*, a material term) forum from those requiring a proceeding conducted "in accordance with" the named forum's rules (*i.e.*, an ancillary consideration). The supreme court offered the following justifications for its adoption of the majority rule: (i) a different arbitral forum can follow AAA rules, (ii) AAA rules do not prohibit the plaintiff's claim and (iii) the agreement contains a severance clause, which shows the parties intent to make the named arbitral forum a non-material term. Because the arbitration agreement stated that proceedings are to be "in accordance" with the AAA rules, the supreme court held that the arbitral forum is not a material term and the unavailability of AAA does not render the agreement unenforceable.

In *Venture Cotton Co-op*, the Supreme Court of Texas held that an arbitration agreement is not unconscionable because (i) the impermissible limitation on statutory remedies is a non-essential term, which can be severed, and (ii) arbitration agreements with one-sided attorneys' fees are not unconscionable per se. The supreme court analyzed an arbitration agreement that adopts the arbitration rules of the American Cotton Shippers Association (ACSA) and provides that in the event the plaintiffs breach the agreement, the plaintiffs will pay all of defendant's attorneys' fees. Under the ACSA rules, arbitral awards exclude attorneys' fees unless provided for in the contract.

The supreme court agreed with the court of appeals' finding that an implied waiver under the the ACSA rules (of plaintiffs' statutory right to attorneys' fees and other remedies under the Texas Consumer Protection-Deceptive Trade Practices Act) is contrary to public policy and invalid. However, the supreme court concluded that the objectionable limitation on the plaintiffs' rights could be severed from the arbitration agreement because the limitation on statutory rights and remedies was not the essential purpose of the arbitration agreement. The essential purpose of the arbitration agreement is to provide a speedy and efficient resolution of disputes to ensure timely performance under the contract.

The supreme court also disagreed with the court of appeals' opinion that the one-sided attorneys' fee provision constitutes an independent reason to hold the arbitration agreement unconscionable. The supreme court provided the following justification for finding that one-sided attorneys' fees are not per se unconscionable: (i) parties are generally free to contract for attorneys' fees, (ii) there is a liberal federal policy favoring arbitration agreements and (iii) the U.S. Supreme Court has indicated that arbitration agreements should not be held unconscionable based on speculation regarding the potential effects of a remedies limitation. The Texas supreme court warned that "courts should use care not to intrude upon arbitral jurisdiction under the guise of an unconscionability defense."

Dean and *Venture Cotton Co-op* provide important drafting tips. Parties should carefully review arbitral rules and policies prior to appointing a particular administrator or adopting a particular set of rules.

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