Mandatory Arbitration in the United States and Europe

At first blush, the title of this article appears to be an oxymoron. It is hornbook law that all parties to a dispute must consent to waive their rights to a judicial determination and opt into a binding alternative dispute resolution ("ADR") mechanism such as arbitration.

The United States Supreme Court has repeatedly said that it will enforce arbitration agreements “according to their terms."[1] European law, because of the multiplicity of state actors, does not as easily lend itself to sweeping statements. However, commentators observing European arbitration law agree that “there is one requirement that is universal: only parties that have actually agreed to arbitrate their disputes can be compelled to arbitration proceedings."[2]

Despite paying homage to the role of consent in arbitration, United State courts over time have moved away from the traditional definition of waiver (intentional relinquishment of a known right) when the concept is applied to agreements for private resolution of otherwise justiciable disputes. The courts have redefined “consent" as any evidence of an assent to arbitration—irrespective of whether the pre-dispute arbitration provision was negotiated or even known, irrespective of whether the provision extends to the subject matter of the dispute, and even irrespective of whether the particular provision is prohibited by state law. The previously voluntary decision to trust one's fate to ADR has morphed into a compulsory obligation, so long as your counterparty inserted the magic word “arbitration" somewhere into the contract.

European countries have thus far resisted efforts to make arbitration compulsory. Most countries have adopted domestic rules to ensure that contracting parties are not forced into a proceeding that is beyond the scope of their pre-dispute arbitration agreement. Parties with little bargaining power, such as consumers, are generally exempt from arbitrating their disputes with businesses. No one knows whether these protections will endure. As more and more business transactions blur national lines, European countries will face increasing pressure to move in the American direction of de facto mandatory arbitration.

The United States

Ironically, the road to mandatory arbitration in the United States began with refusals to enforce pre-dispute arbitration agreements. Federal courts in the United States routinely struck down such agreements on the ground that they invaded the judiciary's constitutional prerogatives. Congress passed the Federal Arbitration Act,[3] to overcome this judicial hostility and thereby facilitate business transactions.

The national policy in favor of arbitrating business disputes was cemented by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). This treaty, which the United States spearheaded, has been adopted by 148 countries. The New York Convention obligates the signatories to enforce arbitration awards under most circumstances, although it does contain carve outs which permit nations to refuse enforcement based on non-arbitrability of the subject matter, or when enforcement would be contrary to the nation's public policy.
The United States’ long march to compulsory arbitration has several components, but one of the most notable has been an expansive view of the statutory claims that a party can remove from judicial resolution. Statutory claims held to be arbitrable include antitrust, securities, RICO and age discrimination, as well as consumer protection laws such as the Truth in Lending Act, Magnuson-Moss Warranty Act, and the Credit Repair Organizations Act (“CROA”). In fact, statutory causes of action are presumed arbitrable unless Congress evidences a contrary intent in the text, history, or purpose of the statute.[4]

The Supreme Court’s 2012 decision in CompuCredit Corp. v. Greenwood,[5] illustrates the high bar that Congress must clear in order to exempt a law from mandatory arbitration. The statute at issue, CROA, mandates notices advising consumers of their rights to sue, and further provides that CROA rights cannot be waived. The Supreme Court in CompuCredit nonetheless compelled arbitration, holding that Congress did not evidence an unmistakable intent to override the longstanding federal policy in favor of arbitration.[6] The Court unfavorably contrasted the anti-waiver language in CROA with three other statutes that clearly prohibit or restrict arbitration.[7]

Equally significant in the march to mandatory arbitration has been the judiciary’s expansive interpretation of the scope of particular arbitration provisions. Of particular note is the U.S. judicial refusal to apply the well-established maximum that ambiguous contractual provisions are construed against the drafter. This rule of construction should be particularly important when addressing arbitration provisions inserted into consumer documents. However, the courts consistently have held that the strong national policy in favor of arbitration trumps this principle of state contract law.[8] Many courts even have ruled that ambiguities about the scope of an arbitration agreement are dispositive in favor of ordering binding arbitration.[9]

These authorities were decided in the context of disputes between businesses. In the 1990s, however, some creative corporate counsel used the precedent strongly favoring arbitration to extend binding ADR to disputes between businesses and consumers. This extension served to block actions brought by consumers under the antitrust laws and various consumer protection statutes. Arbitration avoided trial by jury and—at least temporarily—class actions. The courts upheld these mandatory arbitration clauses even though they were simply inserted into the “take it or leave it” contracts (whether paper or electronic) that accompany the sale of consumer goods and services. Quite often, the consumer was unaware that she had waived her right to go to court.

A law of physics is that every action has an equal and opposite reaction. So too with law. United States arbitration administrators began seeing an ever increasing number of cases that originally were filed as class actions. Rather than telling these claimants that class relief was unavailable (and thus turning down the business), the two major arbitration administrators (AAA and JAMS) embraced the notion of class relief and developed procedures to handle class arbitrations. Like the courts, the AAA embraced a broad construction of arbitration agreements and adopted Supplementary Rules which specify that class arbitrations are within the scope of the parties’ arbitration agreement unless they are expressly excluded. The AAA also adopted the class certification requirements of Fed. R. Civ. P. 23(b)(3) and, in contravention of its normal confidentiality rules, required that class arbitrations be conducted in the open. The AAA reports that it has conducted over 300 class arbitrations.

At first, the courts allowed AAA and JAMS room to develop their class arbitration practices and procedures. In 2003, for example, the United States Supreme Court held in a plurality opinion that arbitrators (rather than the courts) should decide whether a particular arbitration agreement allows for class-wide arbitration.[10] However, the pendulum swung the other way in Stolt-Nielsen in 2010 when a differently constituted Supreme Court overturned a class arbitration award on the ground that the Respondent should not have been compelled to participate in a class proceeding.[11] In this decision, the Court ruled that the arbitrators exceeded their authority, i.e. acted in “manifest disregard of the law,” by employing the AAA’s presumption that class arbitration is within the scope of the parties’ agreement absent express language to the contrary.[12] The Court went on to opine, somewhat gratuitously, that class proceedings are inconsistent with arbitration’s historic advantages of efficiency and confidentiality.[13]
While it was a nice win for corporate America, the Supreme Court's 2010 *Stolt-Nielsen* decision was in many ways superfluous. Consumer businesses had already reacted to the advent of class arbitrations by amending their “take it or leave it” contracts to prohibit that mechanism. Some states, most notably California, refused to enforce these exclusions. However, in 2011, in *AT&T Mobility, LLC v. Concepcion*, the Supreme Court once again expressed its skepticism about class arbitrations and reversed a California Supreme Court decision that refused to enforce a class arbitration waiver. The Supreme Court ruled that the Federal Arbitration Act preempts virtually all state efforts to restrict the nature and scope of arbitration. The Supreme Court reiterated its *Concepcion* ruling in December 2015 when it once again reversed on preemption grounds a California Supreme Court decision that refused to enforce a class arbitration waiver.

At this juncture, United States law on participation in arbitration is settled. A party will be ordered to arbitration if there is any rational basis for a court to do so. Relief from mandatory arbitration, if any, will have to come from outside the judiciary. In October 2015, the Consumer Financial Protection Bureau announced that it is considering rules that would ban consumer financial companies from using ‘free pass’ arbitration clauses to block consumers from suing in groups to obtain relief. Relief might also come from the proposed *Restoring Statutory Rights Act*, which was introduced in February 2016 by Senators Patrick Leahy and Al Franken. If enacted, the legislation would, in the view of a Consumer Reports article, “prevent companies from imposing forced arbitration in cases covered by consumer protection laws, as well as in employment discrimination and other civil rights matters.”

**Europe**

National rather than EU law governs the formal prerequisites necessary for a valid domestic arbitration. These include the form of the arbitration clause, arbitrability of the dispute, and standards of review. While each country's law is a little different, certain broad themes emerge from the various national approaches.

As a general matter, European judicial authorities have been more willing than United States courts to subject arbitration awards/orders to significant review, particularly when the award implicates individual rights. In 2012, for example, the Swiss Federal Tribunal set aside a Court of Arbitration for Sport award as violative of public policy. The arbitrators had ordered a soccer player to pay a 11.85 million Euro award within 90 days or be banned from playing. The Swiss court found that the award violated the player’s right to economic freedom protected by Article 27(2) of the Swiss Federal Constitution.

When it comes to defining what is arbitrable, the European statutory schemes are more intrusive than their United States counterpart. This is particularly true with respect to consumer claims. European Union Council Directive 93/13 on Unfair Terms in Consumer Contracts creates a rebuttable presumption that pre-dispute arbitration clauses in consumer contracts are invalid. The reason is the unequal bargaining power between the contracting parties in consumer contracts. Compliance with the Directive is considered jurisdictional, so the consumer can challenge an allegedly unfair arbitration provision at any time, even in a subsequent annulment action. Indeed, arbitrators and reviewing courts in Europe have an independent duty to address the possible unfairness of arbitration provisions when the parties have unequal bargaining power or unequal resources.

Some EU member states go even further than the Directive in protecting consumers. In the UK, arbitration clauses are presumed unfair if the amount at issue is less than £ 5000. France prohibits consumer arbitrations all together in purely domestic disputes. In Sweden, arbitration clauses are prohibited generally in contracts concerning the sale of goods or services for private use. Germany won't enforce a consumer arbitration clause unless it is in a separate, signed document or part of a fully notarized contract.

It should be noted that the arbitration protections afforded parties in Europe are principally a domestic phenomenon. Perhaps as a result of the New York Convention, international arbitrations receive deference more akin to United States procedure. The differences between domestic and international arbitrations are usually articulated in court decisions, but France and Switzerland have even gone so far as to enact separate statutory schemes to govern each kind of proceeding. The statutes contain some rather substantial differences. For example, as noted above, business/consumer arbitrations in France are not allowed domestically. However, they have been permitted in the international context.
Conclusion

Will the current differences between United States and Europe's arbitration regimes remain? The trend line is not encouraging. Most European countries already permit the arbitration of statutory torts, such as antitrust claims,[29] and European national courts already defer to arbitration in the international context. The next step is not a long one.

Ironically, efforts to make the courts more accessible to smaller claimants may provide the spark that extends mandatory arbitration to purely domestic claims. Because European businesses have not, thus far, had to deal with meaningful mass tort litigation, they have not had to focus on using arbitration provisions as a defensive measure. Collective redress statutes such as the UK's Consumer Rights Act of 2015 could change that. The Consumer Rights Act, when combined with the EU Damages Directive of 2014, may someday elevate mass purchaser antitrust litigation to a level that cartel participants can no longer ignore.[30] Only time will tell whether European arbitration remains a consensual form of ADR or becomes a new arrow in the cartelist quiver.

Footnotes

[6] Id. at 670-71.
[7] Id. at 672-73 (citing 7 U.S.C § 26(n)92), 15 U.S.C § 1226(a)(2) and 12 U.S.C § 5518(b)).
[12] Id. at 681-86.
[13] Id. at 686-87.
[16] Id. at 343-52.
[17] Id. at 346-52.


[24] *Id.* at 95-96.


