

# Contents

About the Companion Website, Other Search Options . . . . .	ix
---	----

## Chapter 1

### Preliminary Issues

1.1 Scope of This Treatise . . . . .	1
1.2 Predispute Binding Arbitration Agreement Defined . . . . .	3
1.3 Why Many Consumers Try to Avoid Predispute Binding Arbitration . . . . .	4
1.3.1 Introduction . . . . .	4
1.3.2 Limitations on Class Actions . . . . .	5
1.3.3 Concerns About Arbitrators' Impartiality . . . . .	5
1.3.4 Secrecy in Arbitration . . . . .	7
1.3.5 Limitations on Discovery . . . . .	9
1.3.6 Arbitration Fees . . . . .	9
1.3.7 Other Concerns . . . . .	11
1.4 Serious Flaws with Studies Allegedly Showing Benefits of Consumer Arbitration . . . . .	12
1.5 Consumer Arbitration and the National Arbitration Forum . . . . .	13
1.6 Corporations Avoid Binding Arbitration When It Applies to Them . . . . .	14
1.7 Upcoming Developments in Consumer Arbitration Law . . . . .	14

## Chapter 2

### Threshold Issues for Challenges to Arbitration Clauses

2.1 Introduction . . . . .	17
2.2 Who Decides Challenges to an Arbitration Clause—Courts or Arbitrators? . . . . .	17
2.3 Jurisdictional Issues . . . . .	19
2.3.1 When Federal Jurisdiction Exists over Actions to Compel Arbitration Under the FAA . . . . .	19
2.3.1.1 Overview . . . . .	19
2.3.1.2 Diversity Jurisdiction over Claims Subject to Arbitration . . . . .	20
2.3.1.3 Federal Question Jurisdiction over Claims Subject to Arbitration . . . . .	21
2.3.2 Parallel Proceedings in State and Federal Courts . . . . .	22
2.3.3 Venue . . . . .	23
2.4 Right to Discovery Relating to Enforceability of Arbitration Clause . . . . .	24
2.4.1 Introduction . . . . .	24
2.4.2 Precedent Upholding Right to Discovery . . . . .	24
2.4.3 Discovery Serves Public Policy Goals . . . . .	27
2.5 Right for a Jury to Decide If Arbitration Agreement Is Enforceable . . . . .	27
2.6 Appeal from Judicial Orders Relating to Arbitration . . . . .	29
2.6.1 FAA Section 16 . . . . .	29
2.6.2 Orders Compelling Arbitration Are Appealable When the District Court Issues an Order Dismissing All Claims . . . . .	31
2.6.3 Pendent Jurisdiction . . . . .	33
2.6.4 Broader Appealability of State Court Arbitration Orders . . . . .	34

Chapter 3

The Federal Arbitration Act, State Laws, and Preemption

3.1 Introduction to the Federal Arbitration Act and Its Policy Favoring Arbitration Agreements . . . . . 37

3.1.1 General . . . . . 37

3.1.2 External Limitations on the FAA’s Policy Favoring Enforcement of Arbitration Clauses . . . . . 38

3.1.3 Clarification of the FAA’s Policy Favoring the Enforceability of Arbitration Clauses . . . . . 39

3.2 FAA Preemption of State Law . . . . . 40

3.2.1 FAA Preemption of State Laws That Limit the Enforceability of Arbitration Clauses . . . . . 40

3.2.1.1 Introduction . . . . . 40

3.2.1.2 When State Law Singles Out Arbitration Clauses for Less Favored Treatment . . . . . 40

3.2.1.3 When State Law Effectively Prohibits Arbitration Without Explicitly Mentioning It . . . . . 42

3.2.1.4 No FAA Preemption When Arbitration Inconsistent with Effective Vindication of State Law Rights . . . . . 43

3.2.1.4.1 Claims for “public” injunctive or expedited administrative relief . . . . . 43

3.2.1.4.2 Effective vindication of *any* statutory claim . . . . . 44

3.2.2 Limited FAA Preemption of State Procedural Law . . . . . 45

3.2.2.1 Introduction . . . . . 45

3.2.2.2 The FAA Generally Does Not Preempt State Procedural Rules Addressing Enforcement of Arbitration Agreements . . . . . 45

3.2.2.3 FAA Procedural Provisions, by Their Own Language, Apply Only to Federal Court Actions . . . . . 46

3.2.3 FAA Preemption and Substantive State Laws Not Aimed at Restricting Arbitration . . . . . 47

3.2.3.1 General . . . . . 47

3.2.3.2 Whether Federal or State Law Applies to Questions of Contract Formation, Validity, and Enforceability . . . . . 48

3.2.3.3 Whether the FAA Preempts State Consumer Protection Laws That Do Not Target Arbitration Clauses . . . . . 49

3.2.3.3.1 Overview . . . . . 49

3.2.3.3.2 Cases rejecting preemption argument . . . . . 50

3.2.3.3.3 Cases finding preemption . . . . . 50

3.2.4 FAA Preemption and State Laws Regulating the Conduct of Private Arbitrators and Arbitration Services . . . . . 52

3.2.5 FAA Preemption and State Laws Prohibiting the Enforcement of Class Action Ban Provisions . . . . . 52

3.3 Statutory and Contractual Limits to the FAA’s Application and Preemptive Effect . . . . . 54

3.3.1 Introduction . . . . . 54

3.3.2 The FAA Only Applies to Transactions Involving Interstate Commerce . . . 54

3.3.2.1 The FAA Virtually Always Applies . . . . . 54

3.3.2.2 Even If the FAA Does Not Apply, Most States Enforce Arbitration Agreements on Similar Terms . . . . . 56

3.3.3 Parties May Contract to Have State Law Displace the FAA with Respect to the Arbitrability of Disputes . . . . . 57

3.3.4 Exception for State Regulation of the Business of Insurance . . . . . 58

3.3.4.1 General . . . . . 58

3.3.4.2 Is a State Law One Enacted for the Purpose of Regulating Insurance? . . . . . 59

Contents

3.3.4.3 Does State Insurance Law Restrict the Enforceability of Arbitration Agreements? . . . . . 60

3.4 Courts, Not Arbitrators, Determine an Arbitration Clause’s Enforceability Under State Contract Law Principles Subject to Limited Exceptions. . . . . 62

3.4.1 Introduction. . . . . 62

3.4.2 State Contract Law Governs the Question of Whether an Agreement to Arbitrate Was Formed. . . . . 62

3.4.3 State Law Determines Whether a Contract Defense Applicable to an Arbitration Clause Bars the Clause’s Enforceability . . . . . 63

3.4.4 Agreement to Arbitrate “Arbitrability Disputes” Does Not Displace Right to Judicial Determination As to Existence and Enforceability of Arbitration Clause Unless Agreement is Clear, Unmistakable, and Enforceable . . . . . 65

3.4.5 FAA Determines Severability, Requires *Arbitrator* to Resolve Challenge to Validity of General Contract Provisions That Is Not Aimed Specifically at Arbitration Clause. . . . . 66

Chapter 4

When Other Federal Statutes Expressly or Impliedly Supersede the FAA’s Enforcement of Arbitration Clauses

4.1 Introduction . . . . . 69

4.2 Federal Statutes That Expressly Prohibit or Restrict Arbitration of Claims . . . . . 70

4.2.1 Overview . . . . . 70

4.2.2 Arbitration Restrictions in the Dodd-Frank Act . . . . . 70

4.2.3 Certain Consumer Credit Contracts with Active Duty Military Personnel or Their Dependents . . . . . 71

4.3 FAA’s Per Se Inconsistency with Specified Federal Statutes. . . . . 71

4.3.1 Standard for Determining Whether a Federal Statute Prohibits or Restricts Use of Arbitration . . . . . 71

4.3.1.1 General . . . . . 71

4.3.1.2 Does Arbitration Allow Vindication of Statute’s Purpose? . . . . . 72

4.3.1.3 Specific Examples . . . . . 72

4.3.2 The Magnuson-Moss Warranty Act . . . . . 75

4.3.2.1 Introduction . . . . . 75

4.3.2.2 The Text and Structure of the Act . . . . . 76

4.3.2.3 The Act’s Legislative History . . . . . 76

4.3.2.4 The Act’s Implementing Regulations . . . . . 77

4.3.2.5 Debunking Argument That Magnuson-Moss Claims Are Subject to “Formal” Arbitration As Distinct from “Informal” Procedures Under the Act. . . . . 78

4.3.2.5.1 Introduction . . . . . 78

4.3.2.5.2 Supreme Court views arbitration as informal . . . . . 78

4.3.2.5.3 Other courts find arbitration to be informal . . . . . 79

4.3.2.6 The Act Prevents Use of Arbitration Agreements in Only Certain Consumer Transactions. . . . . 80

4.3.2.7 Binding Arbitration Clauses, When Permitted, Must Still Comply with the Act’s Provisions Concerning Disclosures and Tie-Ins . . . . . 81

4.3.2.7.1 Introduction . . . . . 81

4.3.2.7.2 Arbitration requirement must be disclosed in written warranties. . . . . 81

4.3.2.7.3 Significance of disclosure requirement. . . . . 82

4.3.2.7.4 Does disclosure requirement extend to service contracts and extended warranties? . . . . . 83

4.3.2.7.5 Does Magnuson-Moss Act prohibit merchant’s designation of arbitration service provider? . . . . . 83

*Consumer Arbitration Agreements*

- 4.3.3 Claims Asserted in Bankruptcy . . . . . 84
  - 4.3.3.1 Introduction . . . . . 84
  - 4.3.3.2 Conflict Between Bankruptcy Code and FAA . . . . . 84
  - 4.3.3.3 *Zimmerman*, the 1984 Amendments, and Subsequent Case Law . . . . . 85
  - 4.3.3.4 Court Need Not Require Arbitration of Core Matters . . . . . 85
  - 4.3.3.5 Claims Asserted on Behalf of Bankruptcy Estate . . . . . 88
  - 4.3.3.6 Application to Consumer Cases . . . . . 88
  - 4.3.3.7 Non-Core Matters Subject to Arbitration . . . . . 91
  - 4.3.3.8 Confirmed Plan Can Bar Enforcement of Arbitration Clause . . . . . 91
- 4.4 Arbitration Clauses That *Explicitly* Limit Consumers' Statutory Rights . . . . . 92
  - 4.4.1 General Principles . . . . . 92
    - 4.4.1.1 Arbitration Clause Cannot Limit Federal Statutory Right . . . . . 92
    - 4.4.1.2 Statutory Remedies Serve Three Functions . . . . . 93
  - 4.4.2 Limitations on Specific Statutory Rights . . . . . 94
    - 4.4.2.1 Introduction . . . . . 94
    - 4.4.2.2 Arbitration Clauses That Limit Statutory Right to Attorney Fees and Costs . . . . . 94
    - 4.4.2.3 When Arbitration, But Not Statute, Applies Loser Pays Rule . . . . . 95
    - 4.4.2.4 Limits on Statutory Right to Punitive Damages . . . . . 96
    - 4.4.2.5 Limits on Statutory Right to Proceed As a Class . . . . . 97
    - 4.4.2.6 Limits on Statutory Right to Injunctive Relief . . . . . 99
    - 4.4.2.7 Shortening of a Statute of Limitation . . . . . 100
- 4.5 High Arbitration Fees *Effectively* Prevent Vindication of Statutory Rights . . . . . 100
  - 4.5.1 Introduction . . . . . 100
  - 4.5.2 The Supreme Court's Decision in *Randolph* . . . . . 101
  - 4.5.3 When Are Arbitration Charges Inconsistent with Federal Statute? . . . . . 101
    - 4.5.3.1 When Charges Exceed Those for a Court Action . . . . . 101
    - 4.5.3.2 When Charges Deter Pursuit of Statutory Claims . . . . . 102
  - 4.5.4 Does Reimbursement of Fees to a Prevailing Consumer Cure the Problem? . . . . . 104
- 4.6 When a Party's One-Sided Control Over the Arbitration Process Prevents Effective Vindication of Statutory Rights . . . . . 105

Chapter 5

Formation of Agreement to Arbitrate

- 5.1 No Presumption That Arbitration Agreement Is Formed . . . . . 107
- 5.2 Assent to Arbitration Agreement Is Required. . . . . 109
  - 5.2.1 General . . . . . 109
  - 5.2.2 Express Assent . . . . . 109
    - 5.2.2.1 Assent by Signature . . . . . 109
    - 5.2.2.2 Must the Arbitration Clause Be Initialed? . . . . . 110
    - 5.2.2.3 Consumer Attempts to Modify a Signed Agreement to Exclude Arbitration Requirement . . . . . 111
    - 5.2.2.4 Must Both Parties Sign the Agreement? . . . . . 111
    - 5.2.2.5 Incorporation of Arbitration Agreement by Reference into Signed Contract . . . . . 112
    - 5.2.2.6 Electronic Assent . . . . . 112
    - 5.2.2.7 Forged Signatures and Fraud in the Factum . . . . . 113
    - 5.2.2.8 Other Situations in Which a Signature Is Not Enough . . . . . 114
    - 5.2.2.9 Can a Third Party's Signature Bind the Consumer? . . . . . 115
  - 5.2.3 Implied Assent Based on Conduct or Reliance . . . . . 116
    - 5.2.3.1 Overview . . . . . 116
    - 5.2.3.2 Notice Requirement . . . . . 116
      - 5.2.3.2.1 General . . . . . 116

Contents

5.2.3.2.2	Availability of notice insufficient; notice must be delivered . . . . .	116
5.2.3.2.3	Proof of delivery . . . . .	117
5.2.3.2.4	The mailbox rule: notices sent by mail . . . . .	117
5.2.3.2.5	Notice must be conspicuous so that consumer aware of its contents . . . . .	119
5.2.3.3	Action Sufficient to Signify Acceptance Is Required . . . . .	120
5.2.3.3.1	General. . . . .	120
5.2.3.3.2	Continued employment or use of a credit card as acceptance. . . . .	120
5.2.3.3.3	When consumer does <i>not</i> continue using the card . . . . .	121
5.2.3.3.4	Performance under a contract as acceptance . . . . .	122
5.2.3.3.5	Reliance on accompanying contract terms as acceptance. . . . .	122
5.2.4	Lack of Capacity to Assent . . . . .	123
5.3	Illusory Agreements and the Requirement of Consideration . . . . .	123
5.3.1	Must the Arbitration Requirement Be Mutual? . . . . .	123
5.3.2	Failure of Other Consideration for Consumer’s Arbitration Agreement . . . . .	125
5.3.3	Is the Arbitration Agreement an Illusory Contract? . . . . .	125
5.3.4	No Consideration When Arbitration Agreement Is Made with Arbitration Service Provider. . . . .	126
5.4	Language of Arbitration Clause Must Be Clear and Unambiguous . . . . .	127
5.4.1	General. . . . .	127
5.4.2	When Contract Merely Refers to an Arbitration Requirement . . . . .	129
5.4.3	When Multiple Arbitration Agreements Conflict . . . . .	129
5.5	Waiver of Right to Jury Trial Must Be Knowing and Voluntary . . . . .	129
5.5.1	Introduction to the Doctrine . . . . .	129
5.5.2	The Doctrine and FAA Preemption . . . . .	130
5.5.3	Examples of Application of the Doctrine . . . . .	131
5.5.4	Application of the Doctrine to Waiver of Statutory Rights. . . . .	133
5.5.5	Cases Rejecting the Doctrine . . . . .	133
5.6	Arbitration Clauses Sent Unilaterally After Agreement Reached . . . . .	134
5.6.1	Introduction. . . . .	134
5.6.2	Arbitration Clause Unilaterally Added After Agreement Is Consummated . . . . .	134
5.6.3	Final Agreement Not Reached Until After Purchase Is Delivered. . . . .	136
5.6.4	Arbitration Agreement Added or Amended As a Change in Terms. . . . .	137
5.6.4.1	Introduction . . . . .	137
5.6.4.2	Cases Holding That “Change-in-Terms” Provisions Do Not Allow the Addition of an Arbitration Clause . . . . .	137
5.6.4.3	Contracts Permitting Issuers to Add New Terms. . . . .	138
5.6.4.4	The Delaware Legislation . . . . .	139
5.7	“Yo-Yo” Sales and Other Condition Precedent Contracts . . . . .	140
5.8	When NAF or Other Designated Arbitration Forum Is Unavailable. . . . .	140
5.8.1	Designated Forum Unavailable with Surprising Frequency . . . . .	140
5.8.2	When Arbitration Agreement Lists Alternative Forums. . . . .	141
5.8.3	When Forum’s Unavailability Makes Arbitration Requirement Unenforceable . . . . .	141
5.8.3.1	General . . . . .	141
5.8.3.2	Determining the Parties’ Intent in Designating the Forum . . . . .	142

Chapter 6

Unconscionability and Other Contract Law Defenses to Arbitration Clauses

6.1	Introduction . . . . .	145
6.2	Who Decides Unconscionability Challenge: Court or Arbitrator? . . . . .	146
6.3	General Unconscionability Standards . . . . .	147

*Consumer Arbitration Agreements*

6.4 Relationship Between Procedural and Substantive Unconscionability . . . . .	148
6.5 Procedural Unconscionability . . . . .	152
6.5.1 Contracts of Adhesion—Enough in Some States, Merely a Factor in Others . . . . .	152
6.5.2 Surprise As a Factor in Procedural Unconscionability . . . . .	156
6.5.3 Meaningful Choice As a Factor . . . . .	162
6.6 Substantively Unconscionable Arbitration Provisions . . . . .	164
6.6.1 Introduction . . . . .	164
6.6.2 Excessive Fees and Costs . . . . .	165
6.6.2.1 Demonstrating That the Arbitration Fees Will, in Fact, Be Excessive . . . . .	165
6.6.2.2 AAA Fees for Consumer Cases . . . . .	168
6.6.2.3 Varying Approaches As to Who Pays the Fees . . . . .	170
6.6.2.4 Precedent Regarding Unconscionable Arbitration Fees . . . . .	171
6.6.3 One-Way or Non-Mutual Arbitration Clauses Are Often Unconscionable . .	173
6.6.3.1 Introduction . . . . .	173
6.6.3.2 Non-Mutuality Rendering Clause Unconscionable Distinguished from Non-Mutuality Creating Lack of Consideration for Agreement . . . . .	173
6.6.3.3 Cases Finding Non-Mutuality to Be Unconscionable . . . . .	174
6.6.3.4 Cases Not Finding Non-Mutuality to Be Unconscionable . . . . .	176
6.6.3.5 Non-Mutual Clauses That Appear to Be Mutual . . . . .	177
6.6.3.6 Non-Mutual Appeal Rights Rendering Clause Unconscionable . . .	178
6.6.4 Clauses That Strip Statutory Remedies . . . . .	179
6.6.4.1 Limitation on Damages . . . . .	179
6.6.4.2 Limitation on Attorney Fees . . . . .	181
6.6.4.3 Limitation on Injunctive and Equitable Relief . . . . .	182
6.6.4.4 Shortened Statute of Limitations . . . . .	182
6.6.4.5 High Arbitration Fees Accentuate Problem of Remedy Stripping Provisions . . . . .	184
6.6.5 Class Action Bans Embedded in Arbitration Clauses . . . . .	184
6.6.5.1 Class Action Bans Before <i>Concepcion</i> . . . . .	184
6.6.5.2 The <i>Concepcion</i> Decision . . . . .	186
6.6.5.3 Challenging Class Action Bans After <i>Concepcion</i> . . . . .	186
6.6.5.3.1 Overview . . . . .	186
6.6.5.3.2 <i>Concepcion</i> does not disturb Supreme Court’s repeated holding that parties must be able to effectively vindicate their rights in arbitration . . . . .	187
6.6.5.3.3 <i>Concepcion</i> does not require enforcement of a class action ban that would conflict with federal law . . . . .	189
6.6.5.3.4 <i>Concepcion</i> may not apply in state courts . . . . .	190
6.6.5.3.5 Miscellaneous rules concerning arbitration which survive <i>Concepcion</i> . . . . .	190
6.6.6 Inconvenient Venue for Arbitration . . . . .	192
6.6.7 Bias of Arbitrator or Arbitration Mechanism . . . . .	194
6.6.7.1 General . . . . .	194
6.6.7.2 Defenses to Bias Allegations . . . . .	197
6.6.8 Secrecy Provisions . . . . .	198
6.6.8.1 Introduction . . . . .	198
6.6.8.2 Cases Finding Mandatory Confidentiality to Be Unconscionable . .	198
6.6.8.3 Cases Finding Mandatory Confidentiality Not to Be Unconscionable . . . . .	200
6.6.9 Loser Pays Rules . . . . .	201
6.6.10 Excessive Limitations on Discovery . . . . .	202
6.7 Remedies When Part, or Parts, of an Arbitration Clause Are Unconscionable . .	203

*Contents*

6.7.1 Introduction . . . . . 203  
6.7.2 Party That Drafted Unconscionable Clause Should Not Receive Court’s Assistance . . . . . 203  
6.7.3 Interdependent Aspects of Arbitration Clause Should Not Be Severed. . . . . 207  
6.8 Miscellaneous Contract Defenses Other Than Unconscionability. . . . . 208  
6.8.1 Fraud in the Inducement Related to the Arbitration Clause Itself . . . . . 208  
6.8.2 Impossibility, Infancy, Undue Influence, Breach of Covenant of Good Faith, and Other Common Law Contract Defenses. . . . . 209  
6.8.3 State Statutes That Regulate Contract Terms . . . . . 210  
6.8.4 Was the Arbitration Agreement Rescinded or Superseded? . . . . . 211  
6.8.4.1 TIL Rescission and Other Three-Day Rights to Cancel . . . . . 211  
6.8.4.2 Document Containing Arbitration Clause Is Superseded by Later Document or Does Not Survive Termination of the Contract . . . . . 212

Chapter 7

Arbitration Clause’s Applicability to Particular Claims or Parties

7.1 Introduction . . . . . 215  
7.2 General Standards of Interpretation . . . . . 215  
7.3 Whether Particular Claims Fall Within an Arbitration Clause. . . . . 218  
7.3.1 General. . . . . 218  
7.3.2 Application to Issues of Arbitrability . . . . . 222  
7.3.3 Application to Tort and Statutory Claims . . . . . 224  
7.3.4 Arbitration Clause Does Not Apply to Consumer’s Self-Help Remedies . . . . . 232  
7.3.5 The Temporal Scope of an Arbitration Provision . . . . . 232  
7.3.6 Whether an Arbitration Clause in One Contract Applies to Claims Arising from an Earlier or Later Contract Between the Same Parties . . . . . 236  
7.3.7 When Some Claims Are Within the Arbitration Clause’s Scope and Some Are Not . . . . . 239  
7.4 Application of Arbitration Agreement to Non-Signatories: General Principles. . . . . 241  
7.4.1 Overview . . . . . 241  
7.4.2 Equitable Estoppel . . . . . 244  
7.4.2.1 Overview . . . . . 244  
7.4.2.2 Equitable Estoppel When a Non-Signatory Seeks to Enforce the Arbitration Agreement . . . . . 245  
7.4.2.3 Equitable Estoppel When a Signatory Seeks to Enforce the Arbitration Agreement Against a Non-Signatory . . . . . 250  
7.4.3 Third-Party Beneficiaries . . . . . 252  
7.4.4 Agency . . . . . 255  
7.5 Application of Arbitration Agreement to Non-Signatories: Specific Situations. . . . . 259  
7.5.1 Assignees and Successors in Interest . . . . . 259  
7.5.2 Insurers, Manufacturers, Service Contractors, Attorneys, and Owners . . . . . 259  
7.5.3 Debt Buyers and Debt Collectors . . . . . 260  
7.5.3.1 Debt Buyer or Collector Must Produce the Arbitration Agreement. . . . . 260  
7.5.3.2 Debt Buyer’s Right to Enforce Creditor’s Arbitration Agreement. . . . . 261  
7.5.4 Claims on Behalf of Nursing Home Residents. . . . . 262  
7.5.5 Wrongful Death Claims . . . . . 266  
7.5.6 Guarantors and Sureties . . . . . 267  
7.5.7 When Some Parties Are Subject to the Arbitration Clause and Some Are Not . . . . . 268  
7.5.8 Application of Arbitration Agreement to Enforcement Agencies and Contempt Proceedings. . . . . 269  
7.5.9 Can Affinity Group’s Agreement Bind Its Members? . . . . . 270

Chapter 8

Waiver of the Right to Compel Arbitration

8.1 Introduction . . . . . 271

8.2 Preliminary Issues . . . . . 272

    8.2.1 Does the Court or Arbitrator Decide Whether There Is a Waiver? . . . . . 272

    8.2.2 Does State or Federal Law Apply? . . . . . 274

8.3 Actions That Do or Do Not Constitute Waiver of the Right to Compel Arbitration . . . . . 275

    8.3.1 Introduction . . . . . 275

    8.3.2 Non-Judicial or Pre-Litigation Conduct . . . . . 277

    8.3.3 Lawsuit-Related Conduct . . . . . 277

        8.3.3.1 Overview . . . . . 277

        8.3.3.2 Filing Pleadings . . . . . 277

        8.3.3.3 Motions and Asking the Court to Address the Merits . . . . . 279

        8.3.3.4 Conducting Discovery . . . . . 281

        8.3.3.5 Delay . . . . . 282

        8.3.3.6 Miscellaneous Actions That Do or Do Not Constitute Waiver . . . . . 285

    8.3.4 Policy Rationales for Waiver Through Litigation Conduct . . . . . 287

8.4 Revival of the Right to Compel Arbitration After Waiver . . . . . 288

    8.4.1 No Waiver Because Motion to Compel Arbitration Would Have Been Futile Prior to Change in the Law . . . . . 288

    8.4.2 Revival When Amended Complaint Changes Scope or Theory of the Case . . . . . 289

8.5 Breach of Arbitration Clause’s Provisions As Waiver . . . . . 290

    8.5.1 In General . . . . . 290

    8.5.2 Breach of an Arbitration Clause’s Covenant of Good Faith . . . . . 291

    8.5.3 Breach of an Arbitration Clause’s Provisions for Payment of Forum Costs . . . . . 291

8.6 Prejudice As a Requirement or Factor to Establish Waiver. . . . . 292

    8.6.1 Cases Are Divided on Whether Prejudice Is Required . . . . . 292

    8.6.2 Demonstrating Prejudice . . . . . 294

8.7 Defenses to Waiver Based Upon Contract Terms or Arbitral Rules . . . . . 295

Chapter 9

Arbitration of Claims on a Classwide Basis

9.1 Introduction . . . . . 297

9.2 Does Arbitration Agreement Allow Classwide Relief? . . . . . 297

    9.2.1 The Parties’ Intent As Determined by the Arbitrator . . . . . 297

    9.2.2 Factors Indicating That a Silent Clause Authorizes Class Arbitration . . . . . 298

    9.2.3 When Arbitration Agreement Appears to Prohibit Class Arbitration . . . . . 299

    9.2.4 Court Review of Award Authorizing Class Arbitration . . . . . 300

        9.2.4.1 Limits to Court Review of the Award’s Merits . . . . . 300

        9.2.4.2 Parties Generally Cannot Contract for Expanded Judicial Review Under the FAA . . . . . 300

        9.2.4.3 Will a Court Allow Interlocutory Review?. . . . . 300

        9.2.4.4 Other Procedural Limits to Court Review . . . . . 301

9.3 Procedures for Arbitration of Class Claims . . . . . 301

    9.3.1 Importance of the Arbitration Forum . . . . . 301

    9.3.2 AAA Classwide Arbitration Rules . . . . . 302

    9.3.3 JAMS Classwide Arbitration Rules . . . . . 302

    9.3.4 When an Arbitration Agreement Specifies NAF Rules . . . . . 303

9.4 Limited Judicial Review of Arbitrator’s Certification Award. . . . . 303

9.5 Confirmation of a Class Arbitration Award . . . . . 304

Judicial Review and Effect of the Arbitration Award

10.1 Overview . . . . .	305
10.2 Procedure to Confirm, Vacate, or Modify an Award . . . . .	306
10.2.1 The Proper Court . . . . .	306
10.2.2 Does State or Federal Law Apply? . . . . .	307
10.2.3 Strict Timing Requirements . . . . .	309
10.2.3.1 Short Period to Vacate or Modify an Award . . . . .	309
10.2.3.2 Longer Period to Confirm an Award . . . . .	310
10.2.3.3 Barriers to Vacating an Award at the Confirmation Hearing . . . . .	311
10.2.4 Arbitration Agreement Must Be Produced at the Confirmation Hearing . . . . .	312
10.2.5 Can the Parties, by Contract, Alter the Nature of Judicial Review? . . . . .	312
10.2.5.1 Contract Cannot Limit Court’s Power to Vacate or Modify an Award . . . . .	312
10.2.5.2 Arbitration Agreements That Increase the Scope of Judicial Review . . . . .	313
10.2.6 Appeals of Trial Court Review of Arbitration Award . . . . .	313
10.3 Grounds to Modify or Correct an Award . . . . .	314
10.4 Grounds to Vacate Explicitly Set Out by Statute . . . . .	314
10.4.1 General . . . . .	314
10.4.2 When Arbitrators Exceed Their Powers or There is No Arbitration Agreement . . . . .	315
10.4.3 Arbitrator’s Evident Partiality or Corruption . . . . .	317
10.4.3.1 General . . . . .	317
10.4.3.2 California Statutes Requiring Disclosures by Arbitrators . . . . .	319
10.4.3.3 <i>Ex Parte</i> Communications . . . . .	319
10.4.3.4 Equal Protection in Selection of Arbitrator . . . . .	319
10.4.4 Arbitrator’s Refusal to Postpone the Hearing or to Hear Evidence or Other Misbehavior . . . . .	320
10.4.5 Award Procured by Corruption, Fraud, or Undue Means . . . . .	320
10.5 Vacating an Award Based on Its Merits . . . . .	321
10.5.1 Are There Independent Grounds to Vacate on the Merits? . . . . .	321
10.5.2 The Manifest Disregard of the Law Standard . . . . .	322
10.5.2.1 General . . . . .	322
10.5.2.2 Manifest Disregard After <i>Hall Street Associates</i> . . . . .	323
10.5.2.3 When Arbitrator Does Not Explain the Decision . . . . .	324
10.5.2.4 A Different Standard for Statutory Claims? . . . . .	324
10.5.3 Must Courts Ensure Arbitration Decision Is Consistent with Public Policy? . . . . .	325
10.5.4 Arbitrary and Capricious Awards . . . . .	326
10.5.5 Can the Court Re-Examine Evidence? . . . . .	326
10.5.6 Review of Award Affecting Individual Not Party to Arbitration Agreement . . . . .	327
10.6 Arbitral Immunity . . . . .	327
10.7 Protecting the Arbitrator’s Punitive Damages Award . . . . .	328
10.7.1 Introduction . . . . .	328
10.7.2 Is a Challenge to a Punitive Damages Award Timely and Brought in the Correct Court? . . . . .	329
10.7.3 Does the Award Exceed the Arbitrator’s Powers? . . . . .	329
10.7.3.1 Introduction . . . . .	329
10.7.3.2 Does the Arbitration Agreement Limit the Arbitrator’s Authority to Award Punitive Damages? . . . . .	329
10.7.3.3 Do the Rules of the Arbitration Service Provider Limit the Arbitrator’s Authority to Award Punitive Damages? . . . . .	329

*Consumer Arbitration Agreements*

10.7.3.4 Does State Law Limit the Arbitrator’s Authority to Award Punitive Damages? . . . . . 330

10.7.3.4.1 Few state laws limit punitive damages in arbitration . . 330

10.7.3.4.2 FAA preempts state law limitations on punitive damages . . . . . 330

10.7.3.4.3 Do general state law limits on punitive damages apply in arbitration? . . . . . 331

10.7.4 Has the Arbitrator Disregarded the Law or Facts? . . . . . 331

10.7.5 Does a Punitive Damages Award Violate Public Policy? . . . . . 332

10.7.6 Due Process Challenges to Punitive Damages Awards. . . . . 332

10.8 Arbitration and Issue or Claim Preclusion . . . . . 332

10.8.1 Introduction . . . . . 332

10.8.2 Arbitration’s Preclusive Effect on Subsequent Court Proceeding . . . . . 332

10.8.3 Preclusive Effect of Arbitration or Court Ruling on Subsequent Arbitration . . . . . 333

Chapter 11

Creditor’s Use of Arbitration to Collect Consumer Debts

11.1 About This Chapter . . . . . 335

11.2 How Collection Using Arbitration Works . . . . . 336

11.3 Options After Receiving a Notice of Arbitration. . . . . 337

11.3.1 Doing Nothing . . . . . 337

11.3.2 Seeking a Stay of Arbitration . . . . . 337

11.3.3 Participating in the Arbitration Proceeding . . . . . 338

11.3.3.1 Implications of Consumer’s Participation on Later Court Proceedings . . . . . 338

11.3.3.2 Participation May Result in Increased Consumer Liability . . . . . 338

11.3.3.3 How to Participate in the Arbitration. . . . . 339

11.4 *Vacatur* of an Arbitration Award . . . . . 339

11.4.1 Introduction . . . . . 339

11.4.2 Timeliness . . . . . 339

11.4.3 Applicable Law, Jurisdiction, and Venue. . . . . 340

11.4.4 Grounds for Vacating an Award in a Debt Collection Case . . . . . 340

11.4.4.1 No Enforceable Arbitration Agreement . . . . . 340

11.4.4.2 Lack of Notice of the Arbitration Proceeding . . . . . 342

11.4.4.3 Lack of a Required In-Person Hearing . . . . . 343

11.4.4.4 Failure to Follow the Arbitration Agreement or Arbitration Forum Rules . . . . . 343

11.4.4.5 Arbitrator Improperly Selected . . . . . 343

11.4.4.6 Inconvenient Venue . . . . . 344

11.4.4.7 Arbitration Award Is Contrary to the Law or Facts . . . . . 344

11.4.4.8 Arbitrator Bias. . . . . 344

11.4.4.9 Corruption, Fraud, or Undue Means . . . . . 345

11.5 Opposing Confirmation of the Award . . . . . 345

11.5.1 The Confirmation Process. . . . . 345

11.5.2 Time Period to Vacate Does Not Start Running When Notice of Award Is Defective or Is Not Sent. . . . . 346

11.5.3 No Deadline to Challenge the Arbitration Agreement’s Existence or Enforceability. . . . . 347

11.5.4 Creditor’s Failure to Produce Arbitration Agreement and Any Applicable Assignment . . . . . 349

11.5.5 Corruption, Fraud, or Undue Means Unknown to the Consumer. . . . . 350

11.5.6 Consumer’s Failure to Participate May Prevent Confirmation . . . . . 350

11.5.7 Defects in the Confirmation Proceeding . . . . . 351

11.5.7.1 Creditor’s Petition to Confirm Is Untimely . . . . . 351

*Contents*

11.5.7.2 Petition to Confirm Filed in the Wrong Court . . . . . 351  
11.5.7.3 Party Seeking to Confirm Award Entered on Behalf of a  
Different Party . . . . . 352  
11.5.7.4 Seeking an Amount in Excess of the Award . . . . . 352  
11.5.7.5 Other Defects in the Confirmation Proceeding . . . . . 352  
11.5.8 Preclusive Effect of Dismissal of Prior Confirmation Action . . . . . 353  
11.6 Setting Aside a Confirmed Arbitration Award . . . . . 353  
11.6.1 General . . . . . 353  
11.6.2 Facts About NAF May Be Sufficient to Set Aside a Confirmed Award . . 353  
11.6.3 Using Facts About NAF . . . . . 354

Appendix A

Federal Statutes

A.1 The Federal Arbitration Act, 9 U.S.C. §§ 1–16 . . . . . 357  
A.2 Other Federal Statutes . . . . . 360  
A.2.1 Limits on Arbitration Involving Military Personnel . . . . . 360  
A.2.2 Limits on Arbitration Involving Car Dealers and Their Franchisors . . . . 361  
A.2.3 Limits on Arbitration Involving Livestock and Poultry Farmers . . . . . 361  
A.2.4 Prohibition of Arbitrations Involving Residential Mortgage Loans . . . . . 362  
A.2.5 Consumer Financial Protection Bureau and Securities and Exchange  
Commission Authority to Restrict Arbitration . . . . . 362  
A.2.6 Limits on Arbitration Involving Whistleblowers . . . . . 363

Appendix B

Arbitration Service Provider Rules

B.1 The American Arbitration Association . . . . . 365  
B.1.1 Commercial Arbitration Rules and Mediation Procedures (Including  
Procedures for Large, Complex Commercial Disputes) . . . . . 365  
B.1.2 Supplementary Procedures for Consumer-Related Disputes . . . . . 377  
B.1.3 Class Arbitrations . . . . . 380  
B.1.3.1 Policy on Class Arbitrations . . . . . 380  
B.1.3.2 Supplementary Rules for Class Arbitrations . . . . . 380  
B.1.4 Consumer Debt Collection Arbitrations . . . . . 383  
B.1.5 Consumer Due Process Protocol . . . . . 383  
B.1.6 Disclosures for California Consumer Cases . . . . . 400  
B.1.6.1 Consumer-Related Disputes Filing Form—California . . . . . 400  
B.1.6.2 Ethics Standards for Neutral Arbitrators in Contractual  
Arbitration in California . . . . . 401  
B.1.6.3 Business Advisory of Consumer Case Disclosures . . . . . 402  
B.1.6.4 Consumer Statistics . . . . . 403  
B.1.6.5 Affidavit for Waiver of Fees—California . . . . . 404  
B.1.6.6 Demand for Arbitration—California Employment-Related  
Disputes . . . . . 405  
B.2 The National Arbitration Forum . . . . . 407  
B.3 JAMS . . . . . 425  
B.3.1 Streamlined Arbitration Rules and Procedures . . . . . 425  
B.3.2 Comprehensive Arbitration Rules and Procedures . . . . . 432  
B.3.3 Class Action Procedures . . . . . 441  
B.3.4 Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses . . . . . 442  
B.3.4.1 Minimum Standards of Procedural Fairness . . . . . 442  
B.3.4.2 Disclosures for California and Washington, D.C. Consumer  
Arbitrations . . . . . 442

Appendix C

Sample Discovery

C.1 Interrogatories and Document Requests Directed to Credit Card Issuer . . . . . 443

C.2 Discovery Directed to Credit Card Issuers . . . . . 444

    C.2.1 Interrogatories . . . . . 444

    C.2.2 Document Requests . . . . . 445

    C.2.3 Additional Document Requests and Interrogatories . . . . . 447

    C.2.4 Notice of Deposition . . . . . 449

    C.2.5 Subpoena for Document Production to National Arbitration Forum . . . . . 451

    C.2.6 Second Subpoena for Document Production to National Arbitration  
        Forum . . . . . 453

C.3 Discovery Directed to Auto Financer . . . . . 457

    C.3.1 Interrogatories . . . . . 457

    C.3.2 Document Requests . . . . . 459

    C.3.3 Request for Admissions . . . . . 461

C.4 Interrogatories Directed to Car Dealer . . . . . 461

C.5 Discovery Directed to Payday Loan Company . . . . . 463

C.6 Discovery Directed to Payday Lender . . . . . 464

    C.6.1 First Set of Interrogatories and Document Requests . . . . . 464

    C.6.2 Second Set of Interrogatories and Document Requests . . . . . 467

C.7 Document Request Directed to Auto Title Pawn Company . . . . . 470

Appendix D

Findings of Fact and Stipulations Regarding NAF Ownership

D.1 NAF Stipulation to Facts Regarding Its Ownership . . . . . 473

D.2 Court’s Findings of Fact Regarding NAF Ownership . . . . . 476

Appendix E

Finding Pleadings and Primary Sources on the Companion Website

E.1 Introduction . . . . . 479

E.2 Pleadings and Primary Sources Found on the Companion Website . . . . . 479

E.3 How to Access the Website . . . . . 480

E.4 Locating Documents on the Website . . . . . 481

E.5 How to Use the Documents, Find Microsoft Word Versions, and Locate  
    Additional Features . . . . . 483

E.6 Electronic Searches of This and Other NCLC Titles’ Chapters . . . . . 483

E.7 Finding Additional Pleadings . . . . . 483

Index . . . . . 485

Quick Reference to Consumer Credit and Sales Legal Practice Series . . . 501