PLAIN LANGUAGE

Is your arbitration clause clear enough?

BY MARK COONEY

The author is perhaps too modest to say so, but this article is adapted from part of his new book (with Diana Simon): The Case for Effective Legal Writing *(Carolina Academic Press, 2024). — JK*

Might plain language and a reader-centered design enhance your arbitration clause's chances of being enforced? Cases from across the country suggest that the answer is yes. When enforcing arbitration clauses, courts routinely point out the absence of fine print or "confusing legalese."[1] On the other hand, courts have rejected arbitration clauses that:

- were "a paragon of prolixity," with sentences that were "filled with statutory references and legal jargon," such that "[a] layperson trying to navigate th[e] block text, printed in tiny font, would not have an easy journey";[2]
- "consist[ed] of two pages of dense legalese — a lot for unsophisticated consumers to digest, particularly on their own";[3]
- were "legalistic" and found in a contract "so complex and full of legalese" that "large portions" of the contract would need to be rewritten "for it to be even remotely comprehensible to a layperson";[4]
- were "buried on page 10" of "twelve pages of legalese," such that the clause's validity was "a disputed matter" warranting discovery.[5]

If some courts seem impatient with arbitration clauses mired in jargon and poor typography, that may owe, in part, to arbitration's mixed reputation. Critics complain that stronger parties use arbitration to discourage or disadvantage weaker parties.[6] Critics also bemoan the fiction of consent by unwitting laypersons,[7] citing their "lack of understanding" or awareness.[8] We've all heard tales of patients signing on the dotted line moments before entering the surgical suite.[9] And employers' take-it-or-leave-it arbitration agreements are, in critics' eyes, instruments of "forced arbitration."[10]

Drafters should be mindful of these criticisms. Yes, the Federal Arbitration Act[11] reflects a national policy favoring arbitration.[12] But because the Act also reflects the "fundamental principle that arbitration is a matter of contract," state-law contract principles, including common-law defenses, still apply.[13] Indeed, arbitration agreements "may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'"[14]

This is conceivable even in an arbitration-friendly[15] state like Michigan. Our Supreme Court recently reminded us that Michigan's general pro-arbitration stance "does not go so far as to override foundational principles of contractual interpretation."[16] And Michigan's common-law contract principles include defenses such as unconscionability.[17]

UNCONSCIONABILITY FROM UNREADABILITY?

Michigan's unconscionability standard sets a high bar for litigants challenging an arbitration agreement's validity.[18] As in most jurisdictions,[19] the challenger must prove both procedural and substantive unconscionability.[20] Procedural unconscionability means that "the weaker party had no realistic alternative to acceptance of the term."[21] Substantive unconscionability means that the challenged term is so unreasonable that its inequity shocks the conscience.[22]

Unlike the out-of-state cases quoted at this column's start, Michigan's caselaw is quiet on the potential role of legalese and poor design in

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an unconscionability analysis. In a dissenting opinion, then–Michigan Court of Appeals Judge Janet Neff quoted a passage from *Williston on Contracts* acknowledging that "overwhelming bargaining strength or use of fine print or incomprehensible legalese may reflect procedural unfairness in that it takes advantage of or surprises the victim of the clause."[23] But Michigan's cases are mostly silent on this point, and evidence of legalese-based unconscionability challenges is sparse.[24]

The Michigan Supreme Court's recent leave grant in *Rayford v Am House Roseville I, LLC*[25] sought briefing on whether the defendant employer's contractually shortened limitations period "is an unconscionable contract of adhesion."[26] So it's not far-fetched to wonder whether the Court's eventual opinion might revisit Michigan's unconscionability rules and articulate a standard that tracks the national approach, which typically factors in a contract's clarity.

In fact, there are states in which legalese and poor design, by themselves, can doom an otherwise fair arbitration clause:

> If the arbitration clause is written in "legalese" and disguised in the "fine print," the provision may be unenforceable even though not substantively unconscionable.[27]

In jurisdictions that require both procedural and substantive unconscionability, a typical procedural-unconscionability analysis focuses on oppression from lack of choice and surprise from a provision's being "hidden within a prolix printed form."[28] As one court observed, "[o]ppressive terms ancillary to the main bargain can be concealed in fine print and couched in vague or obscure contractual language."[29]

Whatever unconscionability model prevails, lawyers who recycle dense, legalese-heavy forms may expose clients to unwelcome challenges — especially if the form is scrutinized outside Michigan.

WHAT TO DO?

Because courts are less likely to invalidate clear, accessible arbitration clauses,[30] lawyers serve clients well by using plain-language drafting techniques. Those techniques include:

- using informative, conspicuous headings;
- avoiding long blocks of dense text;
- avoiding arbitration clauses buried deep within lengthy documents;
- discarding legalese and inflated diction;
- avoiding long, complex sentences; and
- using confident, direct language.

Online research reveals arbitration clauses of every size, shape, and style. I found one that was 800-plus words of ALL-CAPS TEXT. A refreshing contrast was this example from the London Court of International Arbitration:[31]

> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.
>
> The number of arbitrators shall be [____].
>
> The seat, or legal place, of arbitration shall be [the State of ________, United States of America, in the City of _________, ________ County].
>
> The language to be used in the arbitral proceedings shall be [___________].
>
> The governing law of the contract shall be the substantive law of [______________].

I see edits, but it's far clearer and more accessible than most.

I found the text for the next example, which you can see on the following page, in an employment contract. I've edited the provision and added organizational features common to consumer drafting.

An employee claiming to be blindsided by this arbitration clause would face a daunting challenge.

CONCLUSION

There's good cause to remain diligent when drafting arbitration language. Even in the most arbitration-friendly states, unconscionability remains a potential challenge. Knowing this should motivate drafters to prefer plain language. And besides, it's the right thing to do. Readers should have a fighting chance at understanding any important document that they sign.

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Arbitrating Disputes

If I have a dispute with the Company, how will it be resolved?

By signing this Contract, you and the Company agree to arbitrate any dispute concerning your employment. This includes a dispute about this Contract's meaning or about the Company's decision to discipline or discharge you.

What is the nature of the arbitration?

The arbitration will be a private, confidential proceeding that does not take place in a court or involve a judge or jury. It will result in a final decision. That decision will be binding, meaning that you and the Company must abide by it.

Who will conduct the arbitration?

A certified arbitrator selected by [________] will conduct the arbitration. That arbitrator will be neutral (meaning will not favor either side) and will have experience relevant to the dispute.

What authority will the arbitrator have?

The arbitrator will follow [_________]'s rules, which you can find at [__________.com].

The arbitrator may:

- award any relief that you or the Company could seek in a court;
- require you and the Company to provide "discovery" — meaning sharing information, including documents, that could reasonably be expected to help resolve the dispute;
- issue a written opinion stating the decision; the reasons for the decision; and what relief, if any, is awarded; and
- take other actions allowed in [________]'s rules.

Where will the arbitration take place?

The arbitration will take place at [________]'s offices at _____________, in ___________, _________.

Why will my dispute be arbitrated instead of resolved in court?

Arbitration will ensure that the dispute is resolved quickly, privately, and economically.

Does this mean that I'm giving up a legal right?

Yes. By agreeing to arbitrate, you and the Company both give up the right to resolve a dispute in a court or an administrative agency.

May I still have an attorney?

Yes. You have the right to an attorney throughout the arbitration process.

Who will pay for the arbitration?

The Company will pay for the arbitration, including the arbitrator's fees and expenses.

ENDNOTES

1. See, e.g., *Cox v Station Casinos, LLC*, opinion of the United States District Court for the District of Nevada, issued June 25, 2014 (Case No. 2:14-CV-638-JCM-VCF), report and recommendation adopted July 21, 2014 (Case No. 2:14-CV-638 JCM VCF), at *1 ("The arbitration clause does not contain any fine print [or] confusing legalese, and appears to have been printed in twelve or thirteen point font.").
2. *OTO, LLC v Kho*, 8 Cal 5th 111, 128; 447 P3d 680 (2019).
3. *Dunn v Glob Tr Mgt, LLC*, 506 F Supp 3d 1214, 1235 (MD Fla 2020), rev'd on other grounds Case No. 21-10120 (2024) ("We do not address whether the arbitration agreements are enforceable . . . . Instead, in this decision, we hold only that the parties have agreed to delegate questions pertaining to the enforceability of their arbitration agreements to an arbitrator . . . .").
4. *Ronderos v USF Reddaway, Inc*, opinion of the United States District Court for the Central District of California, issued June 2, 2021 (Case No. EDCV21639MWFKKX).
5. *Horton v FedChoice Fed Credit Union*, opinion of the United States District Court for the Eastern District of Pennsylvania, issued October 13, 2016 (Case No. CV 16-0318).
6. See, e.g., Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 Va J Soc Policy & L 195, 200 (2017).
7. *Id.*
8. *Id.* at 210.
9. See, e.g., *Sosa v Paulos*, 924 P2d 357, 362 (Utah 1996) (plaintiff argued that arbitration agreement was procedurally unconscionable because hospital staff presented it for signing less than an hour before her surgery, when "she was already in her surgical clothing").
10. Bland et al., *From the Frontlines of the Modern Movement to End Forced Arbitration and Restore Jury Rights: An Essay in Three Parts*, 95 Chi–Kent L Rev 585 (2020).
11. 9 USCA § 1 *et seq.*
12. *Mastrobuono v Shearson Lehman Hutton, Inc*, 514 US 52, 56–57; 115 S Ct 1212; 131 L Ed 2d 76 (1995).
13. *Rent-A-Ctr, W, Inc v Jackson*, 561 US 63, 67–68; 130 S Ct 2772; 177 L Ed 2d 403 (2010).

14. *Id.* at 68 (quoting *Doctor's Assoc, Inc v Casarotto*, 517 US 681, 687; 116 S Ct 1652; 134 L Ed 2d 902 (1996)).
15. *Altobelli v Hartmann*, 499 Mich 284, 295; 884 NW2d 537 (2016).
16. *Lichon v Morse*, 507 Mich 424, 437; 968 NW2d 461 (2021).
17. *Titan Ins Co v Hyten*, 491 Mich 547, 554–55; 817 NW2d 562 (2012).
18. See *Lebenbom v UBS Fin Servs, Inc*, 326 Mich App 200, 217; 926 NW2d 865 (2018).
19. *Strand v US Bank Nat Ass'n ND*, 693 NW2d 918, 922 (ND 2005).
20. *Lebenbom*, 326 Mich App at 217.
21. *Id.*
22. *Id.*
23. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 148; 706 NW2d 471 (2005) (Neff, J., dissenting); *see also McGuire v CoolBrands Smoothies Franchise, LLC*, unpublished opinion of the California Court of Appeals, issued August 22, 2007 (Case No. H030202).
24. But see *Barth v First Consumer Credit, Inc*, unpublished opinion of the Court of Appeals, issued November 25, 2008 (Docket No. 278517), at *2 (describing a party's attempt to avoid an arbitration clause because, among other things, it was "buried in fine print on the back of the contract and did not provide clear notice" — yet remanding the case because the trial court hadn't considered that argument).
25. *Rayford v Am House Roseville I, LLC*, 513 Mich 1096; 6 NW3d 63 (2024).
26. *Id.*
27. *Schnuerle v Insight Communications Co, LP*, 376 SW3d 561, 576 n 12 (Ky 2012).
28. *OTO, LLC*, 8 Cal 5th at 126 (cleaned up).
29. *Schnuerle*, 376 SW3d at 576–77.
30. See, e.g., *Cox*, n 1 above.
31. *Recommended Clauses*, London Court of Int'l Arbitration <https://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx> (accessed February 11, 2025).

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