

PUBLICATION

Is Your ADR Clause Enforceable?

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A number of recent court decisions have addressed the enforceability of contract clauses that call for alternative dispute resolution procedures instead of traditional courtroom litigation.

While not in the franchise context, the U.S. Supreme Court's recent decision in *American Express v. Italian Colors Restaurant* guides drafters of arbitration clauses. The court attempted to clarify concerns and confusion that had arisen in response to its earlier decision in *AT&T Mobility, LLC v. Concepcion*. After that decision was handed down, a number of lower courts had interpreted the case to mean that if a plaintiff could show that it would not be economically feasible to pursue certain statutory rights, especially consumer protection rights and Title VII and other federally protected employment rights, then the arbitration clause would be deemed to be "unconscionable" and unenforceable.

However, in the *American Express* decision the Supreme Court noted that courts should not infer that class actions are the only available or effective remedy. Not all laws "guarantee an affordable procedural path to vindication of every claim." In short, federal rights can be arbitrated so long as the arbitration agreement allows the plaintiff to pursue his or her underlying rights.

The holding in *American Express* is broadly worded and not limited to the specific antitrust issues involved in that case. As such, it will likely affect other subject areas, particularly in the labor and employment context where class and collective actions are commonplace. The decision also supports the deference given to arbitration agreements and the insistence that courts rigorously enforce their terms.

Several recent local cases have addressed these concerns in a franchise or related context.

For instance, in *Shoney's North America, LLC v. Vidrine*, the U.S. District Court in Nashville forced Shoney's to follow the ADR provisions in its franchise agreements, which require direct negotiations and mediation before a suit can be filed. Shoney's sued to enforce the liquidated damages provisions in several terminated franchise agreements, but the court stayed the cases until Shoney's could specifically demonstrate compliance with its own contracted dispute resolution process.

Similarly, in *Launch Fitness, LLC v. GoPerformance Franchising*, 2103 WL 1288253, the U.S. District Court in New Jersey applying Tennessee law dismissed the case filed by a franchisee and instructed the parties to pursue their claims under the arbitration provisions in the franchise agreement. In this case, the franchisee had actually been instrumental in inserting the ADR provision as a negotiated change to the franchise agreement, and consequently, could not persuade the court that the arbitration provision was unconscionable. The ADR provision enforced by the court stated that "all controversies, disputes or claims between us and you arising from this Franchise Agreement or the franchise relationship set for in this Agreement will be submitted to binding arbitration conducted in Nashville, TN Metropolitan Area."

However, in *Brown v. Consolidated Restaurant Operations, Inc.*, the U.S. District Court in Nashville refused to enforce an arbitration provision that was built into the employer's employee handbook. Consolidated Restaurant Operations, which has 115 restaurants under eight different brand names, had inserted an arbitration provision in its handbook and confirmed each employee's commitment to such procedures through

a signed acknowledgement. The plaintiff, Kathy Brown, a non-exempt hourly employee at an El Chico restaurant in Nashville, claimed that she was required to purchase and launder her work uniform at her own expense without reimbursement, thus lowering her hourly wage below permissible levels under the Fair Labor Standards Act. Ms. Brown also sued on behalf of herself and other similarly affected employees for the last three years.

Because Consolidated could not produce a copy of the acknowledgment signed by Ms. Brown, the case was permitted to proceed on a class action basis. Consolidated has been ordered to provide plaintiff's counsel with the names, last known addresses and telephone numbers of its current and former employees (at any of its restaurants) for three years prior to the filing of Ms. Brown's action and also to provide notice with non-exempt employees' paychecks and post a notice about the class action in employee break rooms.

An arbitration clause was also invalidated in a recent decision from the U.S. Sixth Circuit Court of Appeals because the court found that the parties' agreement, as a whole, was illusory and part of an illegal pyramid scheme. In *Day v. Fortune Hi-Tech Marketing*, the "marketing" agreement contained an arbitration clause that included a provision that stated that the agreement could be modified at any time within the sole discretion of the defendant. Because the defendant retained the ability to modify any term of the contract, at any time, its promises were deemed illusory. As a result, the court found the contract lacked consideration, and therefore, the entire agreement, including the arbitration clause, were void and unenforceable. The plaintiff's complaint, which included allegations of violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), consumer protection laws and common law fraud, was permitted to proceed to trial.

All of these recent decisions underscore the need for companies and their counsel to re-evaluate their ADR provisions with some frequency and develop a comprehensive strategy for enforcing their dispute resolution procedures.