

2018 IFA

LEGAL SYMPOSIUM

• May 6-8 | Washington, DC

A Litigator's Perspective on Arbitration

A Practical Session

We are using Poll Everywhere during the presentation:

The poll is active . . . respond at:

Pollev.com/melissadurso895 or

Text MELISSADURSO895 to 37607

Overview



- Key Trends in Arbitration
- Maximizing Your Right to Arbitration
- Eliminating Risks and Narrowing Others

Key Trends in Arbitration

What Are Franchisors Doing?

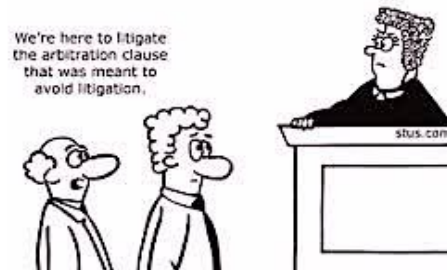
- Over 750,000 franchisors in the US
- Studies in 2002 show that about half of franchise agreements contained arbitration clauses
- Of the 300 largest franchisors today, 60 % have arbitration clauses
- 40% drop in federal cases over the past five years
- 782 AAA cases filed in 2017 – 24% ↑ over 2016



Key Trends in Arbitration: What is your preferred method of dispute resolution?

My organization or company has crafted and currently utilizes an arbitration provision in all contracts.

We prefer litigation.

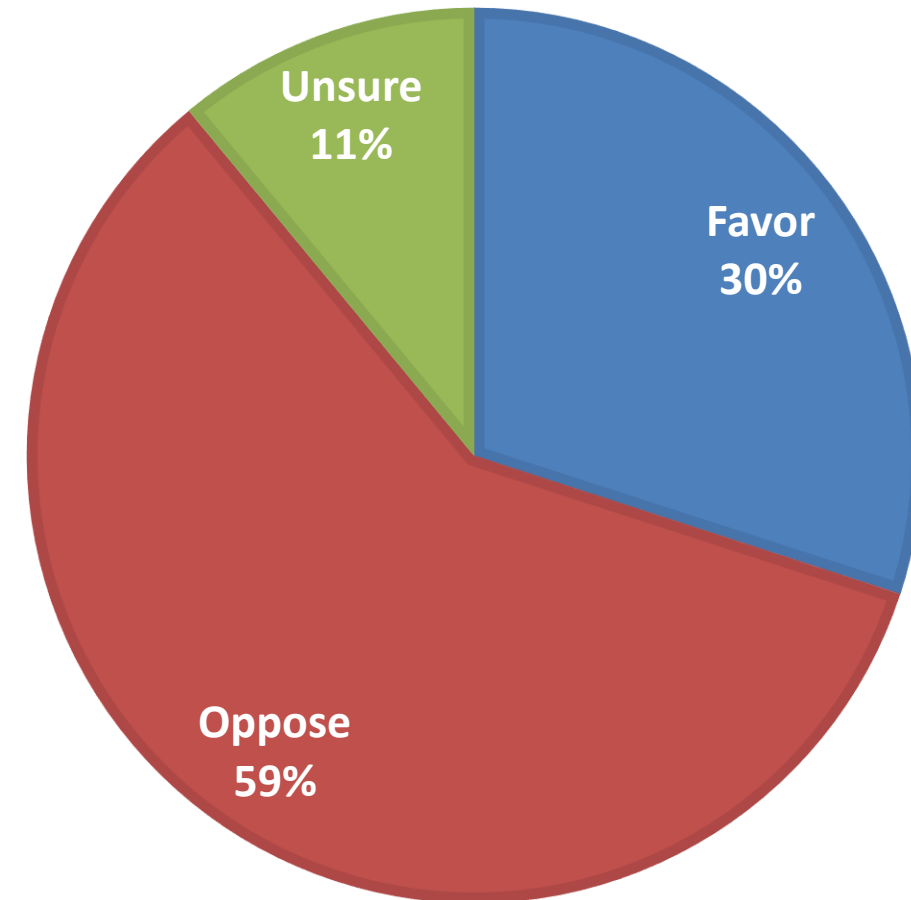
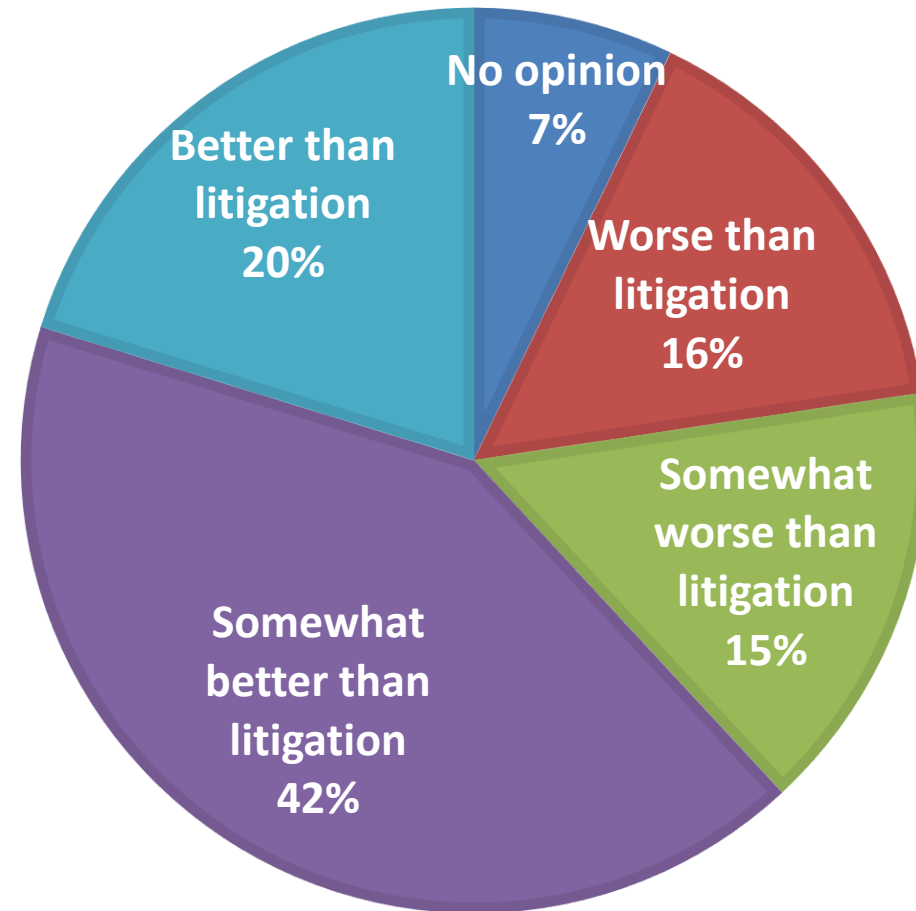


Key Trends in Arbitration

Attitudes Towards Arbitration Versus Litigation?

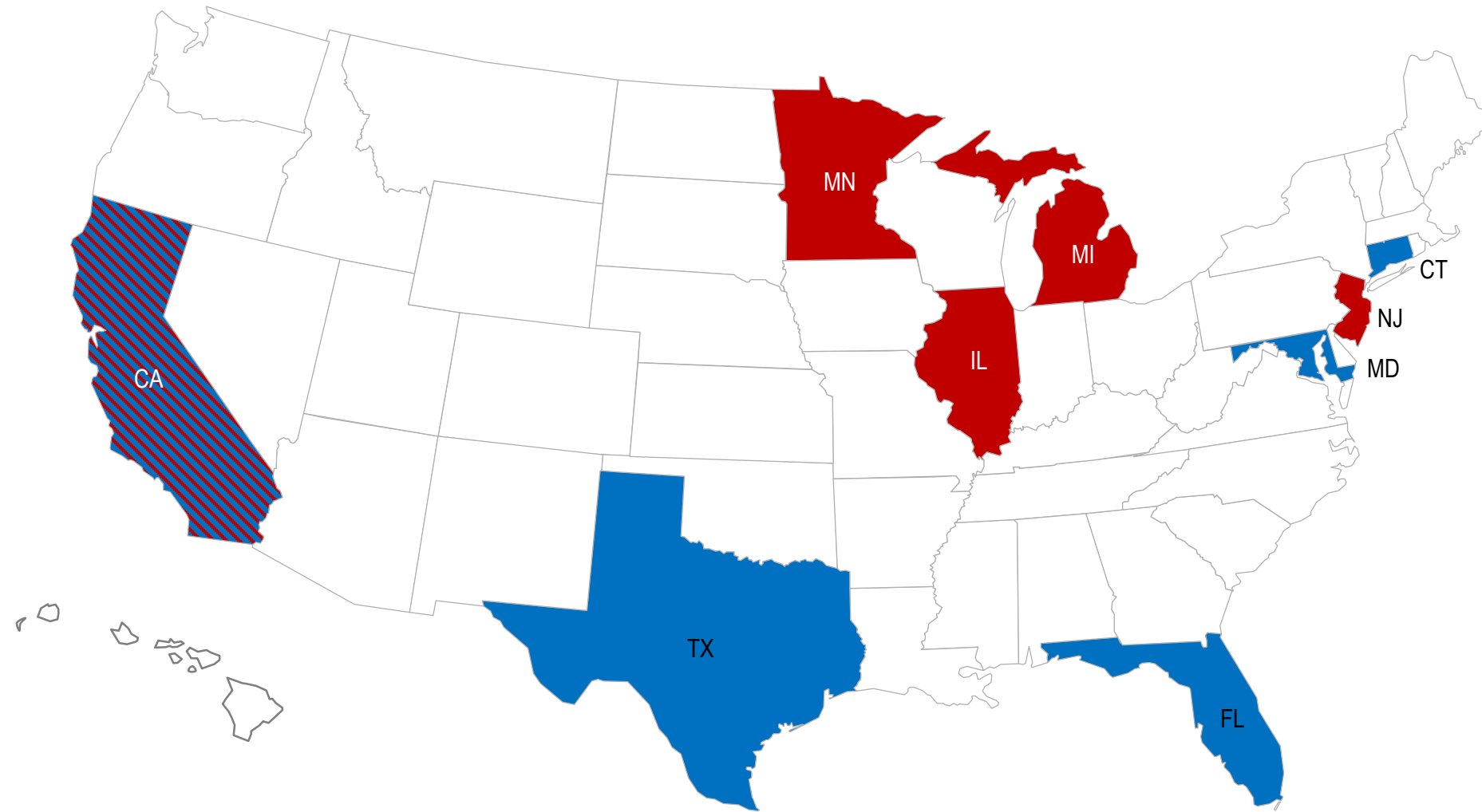
Businesses: 62% Prefer Arbitration

Consumers: 59% Oppose Arbitration



Key Trends in Arbitration

Top Five States: AAA Filings Versus Court Filings (2017)



■ AAA Filings
■ Federal Court Filings

Federal Judicial Center, IDB Civil Cases (2018); AAA (2018).

Key Trends in Arbitration

Does Speed Matter? – Additional Time to go to Trial Versus Award

State	2011	2012	2013	2014	2015
California	14.6	13.8	12.3	16.3	14.9
Florida	6.9	7.4	9.3	6.4	6.3
Georgia	16.7	15.5	12.9	18.1	13.4
Illinois	12.6	17.4	14.5	20.4	18.6
New Jersey	25.0	22.2	24.9	23.2	25.5
New York	19.8	22.6	29.4	21.8	18.4
Pennsylvania	17.2	15.4	9.8	16.6	12.9
Texas	10.8	7.6	8.8	11.9	9.9

It will take, on average, around 15 months longer in court

Key Trends in Arbitration

Does Speed Matter? – Impact on Costs



U.S. District Court v. Arbitration
(Delay to Trial)

Economic Impact	Delay in U.S. (Billions)
Direct Loss	\$10.9
Indirect Loss	\$8.0
Induced Loss	\$9.4
Total Loss	\$28.3

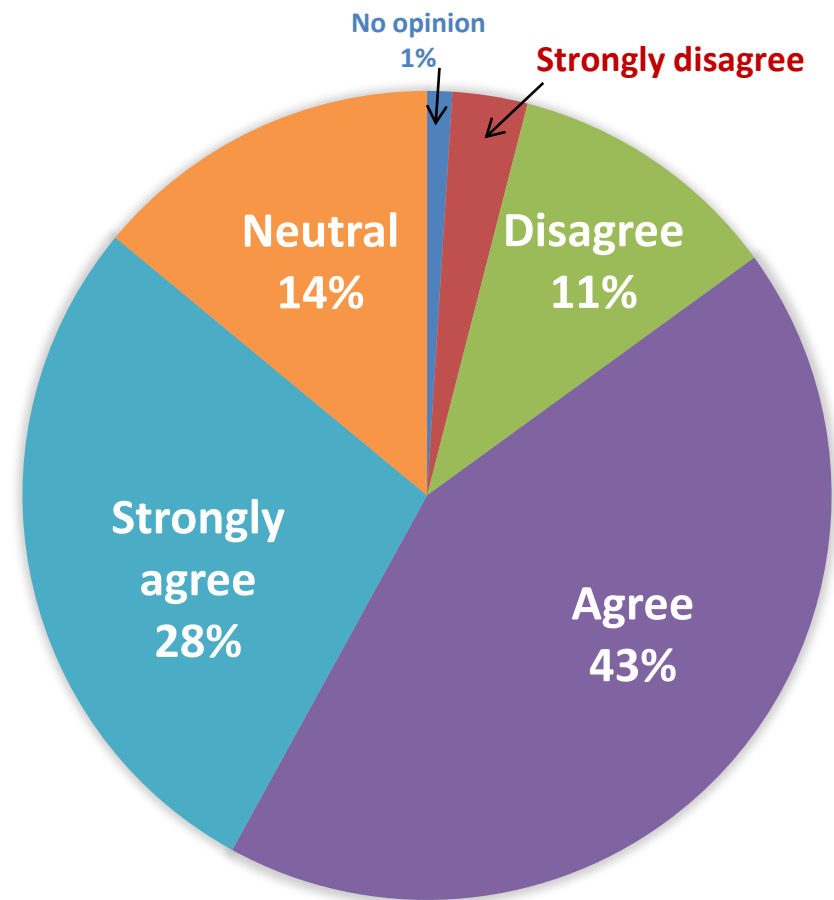
U.S. Appellate Court v. Arbitration
(Delay through Appeal)

Economic Impact	Delay in U.S. (Billions)
Direct Loss	\$20.0
Indirect Loss	\$14.6
Induced Loss	\$17.2
Total Loss	\$51.9

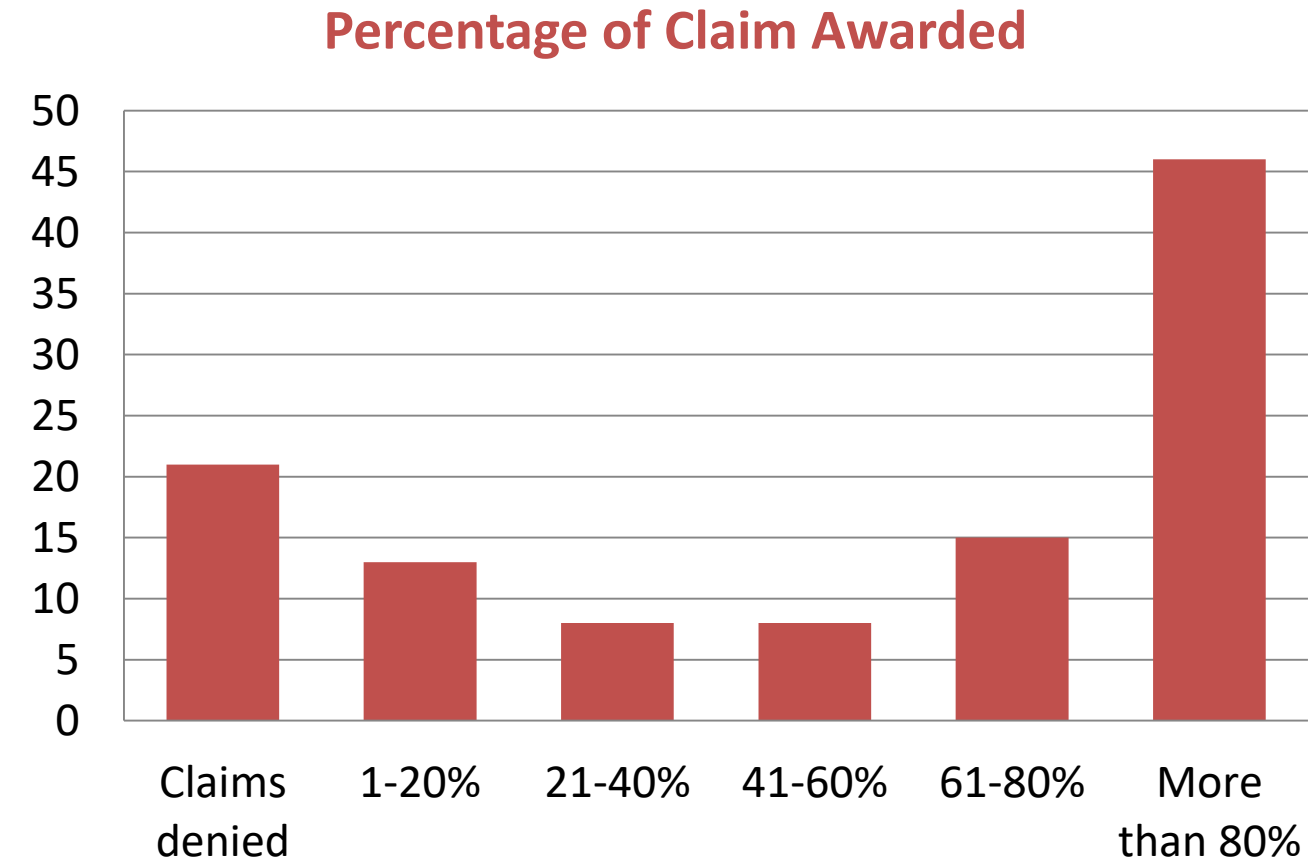
Key Trends in Arbitration

Perception Versus Reality: Arbitrators Are Not “Splitting the Baby”

Do Arbitrators Tend to “Split the Baby”



Not Based on Review of AAA Awards



Maximizing Your Right to Arbitration



Do the Administrators Differ?

Some differences between AAA, JAMS and CPR

	AAA	JAMS	CPR
Admin/Filing Fees	Yes – based on claim amount	Yes – based on arbitrator’s est. hours	Yes – based on claim amount
Arbitrator Rosters	Approx. 3,600; non-public list	Approx. 300; non-public list	Approx. 600; list available to CPR members
Qualifications of Arbitrators	Most diverse; easy to find arbitrator with necessary qualifications; can include non-lawyer industry experts	Most exclusive; many former federal and state judge; sometimes difficult to find appropriate arbitrator	Between AAA and JAMS
Default Award	No – arbitrator discretion	No – arbitrator discretion	Yes
Dispositive Motions	No – arbitrator discretion	Yes	No – arbitrator discretion
Expedited Procedures	Yes – no explicit limitations on discovery	Yes – limited discovery and no dispositive motions	Yes – only document discovery

Selecting Your Neutral



- Consider agency options or none
- Build in desired expertise
- Must the neutral come from a locale





Any controversy or claim arising out of or relating to this Franchise Agreement or the parties' business relationship shall be settled by arbitration pursuant to the Federal Arbitration Act and administered by the American Arbitration Association under its Commercial Arbitration Rules then in effect at that time. The hearing shall take place before a single arbitrator with more than twenty years of experience as a lawyer, who is a former state court or federal judge, and who has a demonstrated expertise in franchise law.

Controlling Venue/Jurisdiction



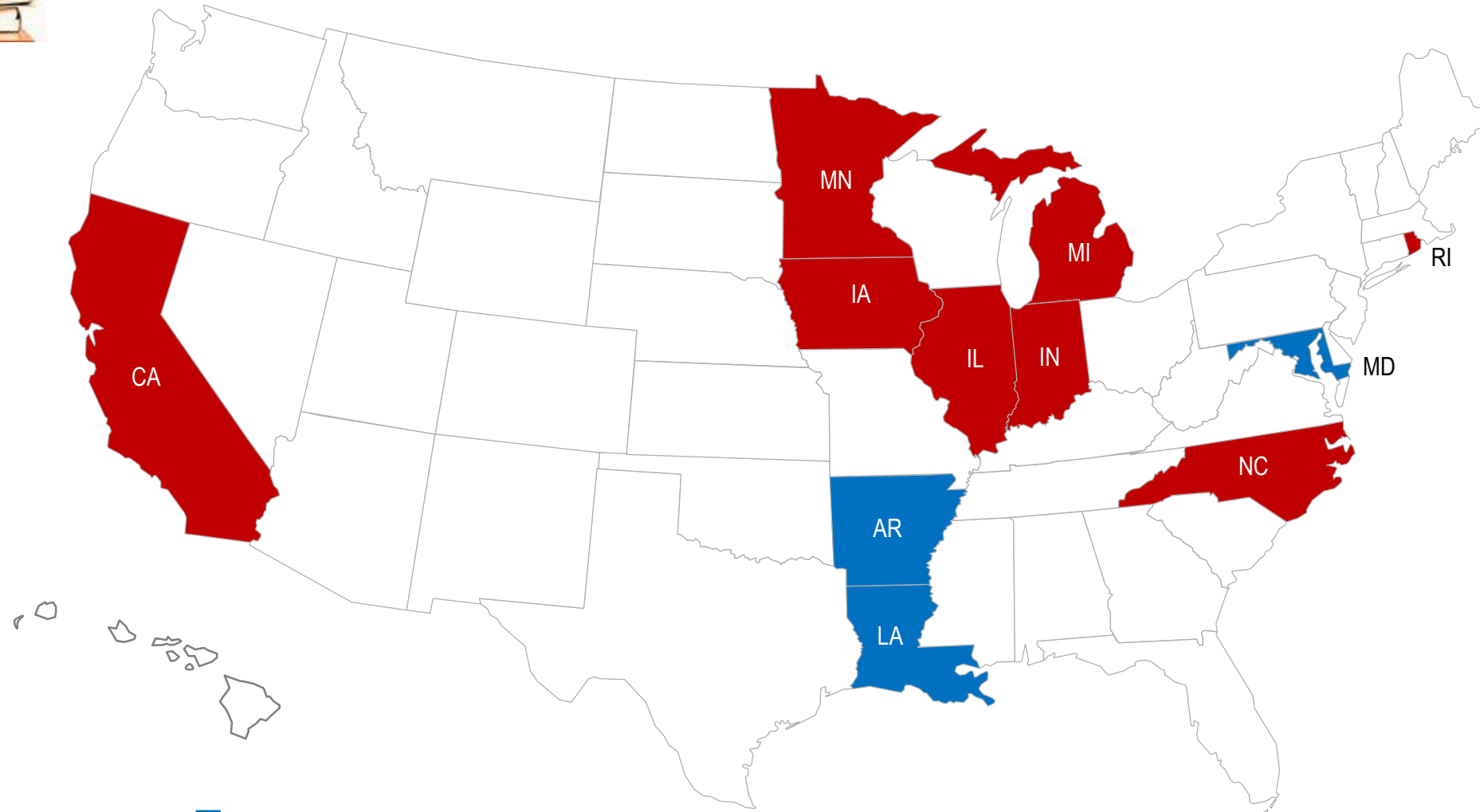
- Can add certainty
- Can improve position
- Know where it works and where it doesn't
- If you include one, be clear and make it exclusive

You and We consent, and irrevocably submit to, the exclusive jurisdiction and venue of the State and Federal courts of competent jurisdiction for Dallas, Texas and waive any objection to the jurisdiction and venue of such courts.



Controlling Venue

Which States to Keep in Mind



- Statutes recognizing that allowing an action in the state is valid
- Clauses requiring out-of-state venue generally void

Statutes Addressing Franchise Venue

Statute	In-State Venue Fine	Out-of-State Venue Clauses Void	Arbitration Exception
Arkansas Code 4-72-602 ¹	X		
Cal. Bus. & Prof. Code 20040.5		X	
815 Ill. Comp Stat. 705/4		X	X
Ind. Code 23-2-2.7-1(10)		X	
Iowa Code 523H.3(1)		X	
La. Rev. Stat. 12 § 1042	X ²		
Md. Code Regs. 02.02.08.16(L)(3)	X		
Mich. Comp. Stat. 445.1527(f)		X	X ³
Minn. R. 2860.4400		X	X
N.C. Gen. Stat. 22B-3		X ³	
R.I. Gen. Laws 19-28.1-14		X	

1: Statute applies to restaurants only

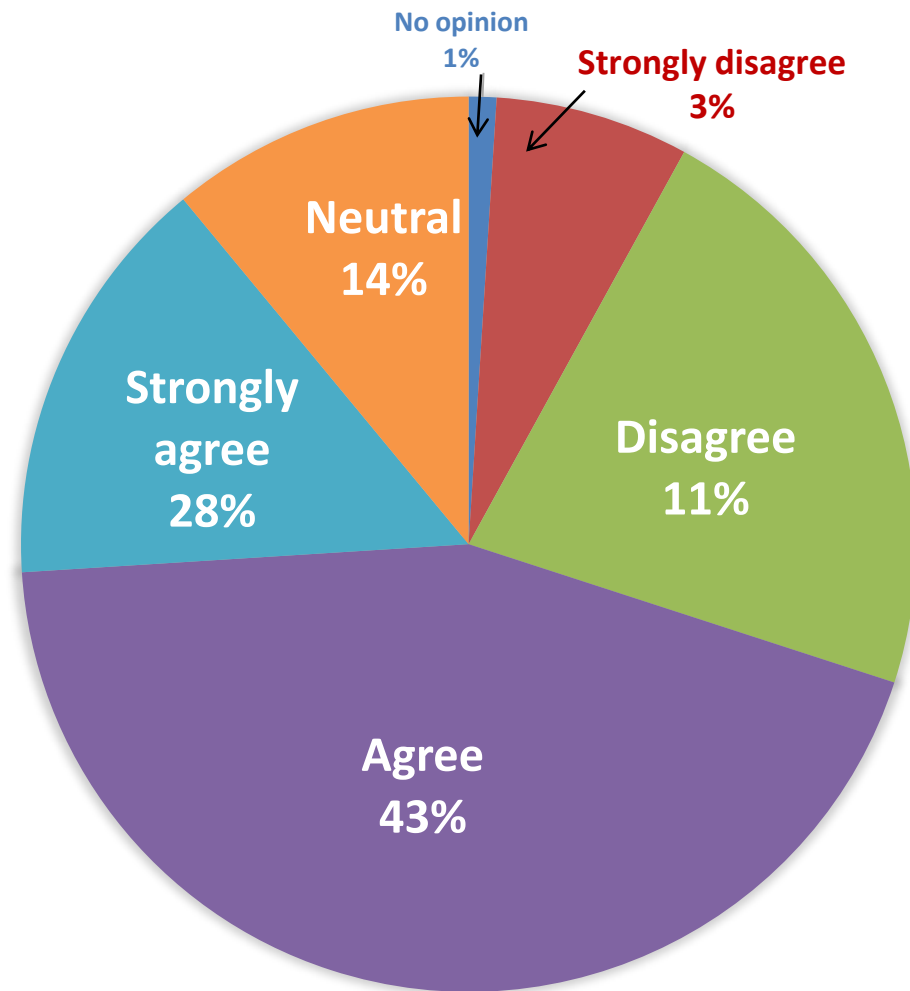
2: Franchise Agreement can specify an out-of-state venue

3: Allows for out-of-state venue if the franchisee agrees to that post-dispute

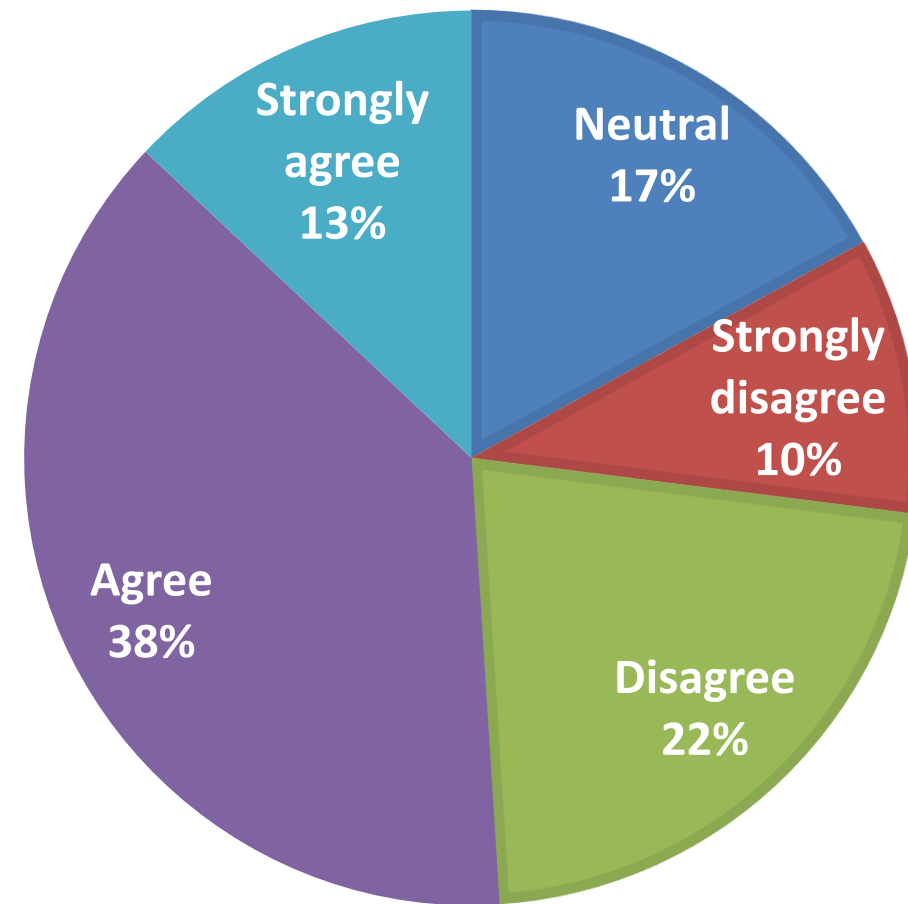
Controlling the Proceeding

What Do People Think?

Can arbitration save time?



Can arbitration save money?



Controlling the Proceeding

What Can You Control

- Time periods for everything, including hearing
- Type of discovery and amount
- Mandatory mediation
- Third-party discovery
- Type of award
- Motion practice

Don't Forget Your Forum Rules

COMMERCIAL

Commercial
Arbitration Rules and Mediation Procedures
Including Procedures for Large, Complex Commercial Disputes

 AMERICAN ARBITRATION ASSOCIATION®

Available online at adr.org/commercial
Subsidiaries and Electronic Center, LLC
P.O. Box 1400, Philadelphia, PA 19102



This Arbitration shall be governed by the JAMS Commercial Rules except that the following controls: (a) the Arbitrator’s final decision must be entered within 90 days of his/her appointment; (b) only written document requests can be served on each party; (c) unless agreed by the parties, each side shall take no more than three depositions and anyone not deposed cannot testify at the hearing; (d) there shall be no third party discovery; and (d) the final decision shall be a reasoned decision. Unless both parties agree, the parties shall mediate the dispute being arbitrated no later than ten days before the final hearing. Before any discovery occurs, each side shall have the right to present a motion to dismiss and such motion shall be ruled on by the Arbitrator in a written decision before the case proceeds with any discovery.

Delegation of Arbitrability

Eliminating Court Challenges

- General rule: courts will decide arbitration challenges
- You can change this
- Your clause can delegate all issues to the arbitrator
- Delegation clause must be “clear and unmistakable evidence”



Delegation of Arbitrability

Two Common Clauses

- **Clause A**: “All disputes arising between the parties in connection with, or arising from, or with respect to (1) ***any provision of this Agreement*** or any other agreement related to this Agreement between the parties; (2) the relationship of the parties; (3) the validity of this Agreement or ***any other agreement between the parties***, or any provision thereof, shall be submitted to arbitration pursuant to the AAA Commercial Arbitration Rules.”
- **Clause B**: “All disputes, controversies, claims, causes of action and/or alleged breaches or failures to perform arising out of or relating to this Agreement or the relationship created by this Agreement shall be submitted to arbitration ***pursuant to the AAA Commercial Arbitration Rules***.”

Delegation of Arbitrability

- Clause A: good because explicit that all issues as to validity of arbitration agreement (e.g., fraud in the inducement) submitted to arbitration
- Clause B: not explicit that all issues of validity of arbitration agreement submitted to arbitration
- Key issue as to Clause B: whether incorporation of arbitration panel's rules is "clear and unmistakable evidence" to delegate issues of arbitrability
 - Most courts agree
 - Minority of courts (e.g., Ninth Circuit) hold that mere incorporation is not sufficient, particularly where there is lack of bargaining power or one party is unsophisticated



- Key parts of a model clause – don't leave any confusion
 - ***Disputes concerning “any provision of this Agreement”***: evidence that disputes concerning validity of arbitration clause itself are delegated to arbitrator
 - ***“any other agreement between the parties” decided by arbitrator***: evidence that disputes concerning arbitration agreement itself are delegated to arbitrator
- Best way to prevent litigation and avoid unfavorable jurisdictions

Non-Signatory Issues

- Person/party who signs the Franchise Agreement is bound, but oftentimes investors, spouses, and others should be parties to the arbitration
- Better to have all disputes determined in one forum
 - Non-compete
 - Tortious interference
 - Breach of post-termination obligations



Non-Signatory Issues

Common Legal Theories To Bind Non-Signatories

- Ratification: non-signatory bound by conduct and approved by non-signatory and signatory (e.g., taken acts consistent with agreement)
- Estoppel: non-signatory who accepted the benefits of the agreement or insisted on being treated as a party, cannot repudiate the arbitration clause in the agreement
- Agency: non-signatory can be deemed an agent of the party

Non-Signatory Issues

Theories available to bind non-signatories

- **Cases Binding Non-Signatories:**
 - *Half Dental Franchise, LLC v. Houchin*, 2017 WL 3326425 (Nev. Aug. 3, 2017) (the arbitrators did not exceed their authority in binding non-signatory based on a theory of estoppel).
 - *Torres v. Simpatico, Inc.*, 781 F.3d 963, 971 (8th Cir. 2015) (“the language of the Agreement is sufficiently broad and inclusive to express an intent to benefit not only the actual signatories and named beneficiaries, but also the other Non-Signatory Parties, all of whom are owners, operators, agents, officers, or employees of the master franchisers”)
- **Cases Not Binding Non-Signatories:**
 - *Oudani v. TF Final Mile, LLC*, 2017 WL 5587648 (1st Cir. Nov. 21, 2017) (refusing to compel arbitration of class wage and hour claims brought by independent contractors because they were not “agents”)
 - *White v. Sunoco, Inc.*, 2017 WL 3864616 (3d Cir. Sept. 5, 2017) (denying non-signatory’s motion to compel arbitration because absence of “concerted conduct” between the non-signatory and signatory or reliance did not establish estoppel)

Non-Signatory Issues



- Include broad language in the Franchise Agreement
- Bind all potential parties
- Include representations and warranties that all investors, owners, spouses, and others are bound and agree to be included in arbitration

Sample Clause:

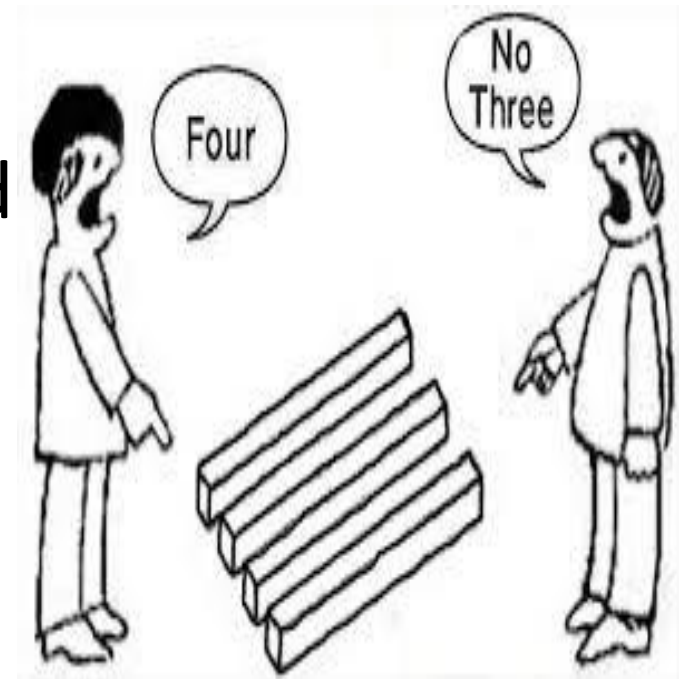
“Each and every investor, operator, spouse and affiliate of Franchisee are personally bound to each and every term of this Agreement, including but not limited to the agreement to arbitrate in Section X hereto, and You agree that You have obtained their consent and approval.”

Conditions Precedent to Litigation/Arbitration

- Including conditions in the arbitration clause that must be satisfied before any dispute can go forward
- Examples:
 - Settlement meeting between certain executives
 - Formal mediation
 - Pre-dispute notice, including details and support
- Potential benefits: resolution of dispute before litigation/arbitration, better understanding of the issues, etc.

Are Conditions Precedent Enforceable?

- Split of authority:
 - Some say: Conditions precedent are contract terms and litigation/arbitration dismissed if unsatisfied
 - Others: They're enforced and litigation/arbitration dismissed, but only if other party is prejudiced
- Conditions precedent should be reasonable and detailed
 - Time limits for negotiation or mediation
 - Who must participate and who pays
 - Litigation/arbitration dismissed if condition unsatisfied





The parties agree that each of the following conditions must be satisfied before arbitration begins:

- The party asserting a claim shall provide written notice to the other party describing the claim in reasonable detail.
- Within 30 days of receipt of written notice, the Franchisee and [insert position] of Franchisor shall meet at a mutually convenient time and place, in person, in an attempt to reach a resolution of the claim. This 30 day period may be extended once if one of the parties is unavailable during the initial 30 day period.
- To the extent no resolution is reached, the parties shall have 60 days to engage in mediation before [choose administrator] at a mutually convenient time and place. If the parties cannot reach agreement on the mediator, a mediator shall be appointed by [administrator]. This 60-day period may be extended once if the mediator is unavailable during the initial 60 day period.

Notwithstanding the foregoing, either party may seek injunctive relief in [choose court] if any of the foregoing conditions precedent would cause irreparable harm to such party.

Eliminating Risks and Narrowing Others



Limiting Damages

- Punitive
- Consequential
- Incidental
- Attorneys' Fees
- Caps on Damages



Limiting Damages

- **Statutory Rights Cannot Be Limited**
 - “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial forum.” - *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)
- **Requires A More Structured Approach to Drafting**
 - **Model Provision:** “The parties knowingly and voluntarily waive the right to recover punitive, consequential or incidental damages, unless expressly prohibited by statute.”
 - *McLeod v. General Mills, Inc.*, 854 F.3d 420 (8th Cir. 2017)(enforcing clause where statute permitted party to waive its rights under the ADEA knowingly and voluntarily)
 - **Be Sure To Include A Clear Severance Provision**
 - *Whitman v. Legal Helpers Debt Resolution, LLC.*, 2012 WL 6210591 (D. S.C. 2012)
(compelling arbitration despite provision limiting statutory damages being unconscionable because those provisions “are easily severable”)

Eliminating Class/Consolidated Proceedings

- Case law very favorable and keeps getting better
- *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011)
 - Sea change in the law
 - If done right, can eliminate any risk of class actions
 - Allows control over individual cases
- Can contract to avoid consolidation, too
- Better chance of waiver being enforced in arbitration
 - *Meyer v. Kalanick*, 185 F. Supp. 3d 448 (S.D.N.Y. 2016)(applying California law) (class waiver in consumer contract was unconscionable)



Eliminating Class/Consolidated Proceedings

Recent Helpful Cases

- *Carter v. Rent-A-Center*, 2017 WL 6333769 (9th Cir. Dec. 12, 2017)(upholding class action waiver under Nevada law)
- *Desimoni v. TBC Corp.*, 2017 WL 2116802 (M.D. Fla. March 13, 2017) (enforcing arbitration provision that mandated individual arbitrations)
- *Jacobson v. Snap-on Tools Company, et al.*, 2015 WL 8293164 (N.D. Cal. Dec. 9, 2015) (mandating arbitration on individual basis only)
- *Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173 (4th Cir. 2013)
- *Machado v. System4 LLC*, 989 N.E.2d 464 (Mass. 2013)



Preclusion and Res Judicata

- Goal: Prohibit re-litigation of claims/issues by locking in arbitral awards
- Courts differ on preclusive effect
- Include terms to make this clear





The parties agree that the award of the arbitrator, and the final decision of any court confirming the award of the arbitrator, is final and binding and the parties are precluded from filing new claims, whether in arbitrator or in court, or challenging in any other way, any of the issues that were decided in or led to the award of the arbitrator. This provision does not preclude a party from filing an action to enforce the award of the arbitrator.

Shortening the Time to Sue

Using Contractual Time Limitations as a Shield

- Other industries use contractual time limitations more effectively
- Well settled: parties can drastically limit the time to bring a demand
- What works:
 - 1 year limitations period
 - 6 month limitations period
 - 90 day limitations period
 - 30 day?
- Additional tool to eliminate claims



Shortening the Time to Sue

Using Contractual Time Limitations as a Shield



- Statute of limitations for breach of contract claim in Illinois is 10 years
 - Shorten time to assert contract claim to 60 days?
- Franchisee may claim statute of limitations does not apply in arbitration
 - NY, GA, and WA – only states with statutes expressly providing that statutes of limitations apply to arbitrations
 - Contractual time-bar provides further clarity that claims are time-barred

Including Contractual Time Limitations

Representative Cases

- *Sanders v. Comcast Cable*, 2008 WL 150479 (M.D. Fla. Jan 14, 2008) (1 year contractual time-bar to bring arbitration precluded claims despite 4 year SOL)
- *Letourneau v. FedEx Ground Package System, Inc.*, 2004 WL 758231 (D. N.H. April 7, 2004) (enforcing time for bringing wrongful termination claim to 90 days)
- *Tucker v. Fireman's Fund Agribusiness, Inc.*, 365 F. Supp. 2d 821, 824 (S.D. Tex. March 22, 2005) (claim filed in arbitration after expiration of contractual time limit barred)
- *Thurman v. DaimlerChrysler, Inc.*, 397 F.3d 352, 357-59 (6th Cir. 2004) (6-month time limitation reasonable)
- *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 673 n.16 (6th Cir. 2003) (enforcing one-year contractual time limitation in arbitration agreement)

Limiting Appeal Rights?



- Governing law already makes appeal difficult
 - FAA says: an award may only be appealed if the movant can show:
 - Corruption, fraud, or undue means;
 - Evident partiality or corruption;
 - Misconduct . . . or of any other misbehavior by which the rights of any party [are] prejudiced; or
 - The arbitrators exceeding their powers, or so imperfectly executing them that a mutual, final, and definite award upon the subject was not made.
- Can parties narrow this even further . . . (and do they want to)?



Limiting Appeal Rights – Courts Are Split

- Generally, California won't enforce provisions limiting appeal rights
 - “[T]he appeal provision in the arbitration clause imposes costs more prohibitive than the initial hearing and severely limits the consumer’s ability to appeal.” *Lau v. Mercedes-Benz USA, LLC*, No. CV-11-1940, 2012 WL 370557, *10 (N.D. Cal. Jan. 31, 2012) (finding arbitration provision unenforceable).
 - “The Court concludes that this provision is not substantively unconscionable, as it does not limit Plaintiff's ability to appeal.” *Asher v. E! Entertainment Television, LLC*, 2017 WL3578699, *9 (C.D. Cal. Aug. 16, 2017).
- BUT some courts have enforced such provisions
 - *Communications Consultant, Inc. v. Nextel Communications of Mid-Atlantic, Inc.*, 2005 WL 1634319 (3rd Cir. July 13, 2005) (enforcing provision eliminating ability to appeal arbitrator’s decision)
 - And . . . even California in some circumstances: *Mendoza v. Ad Astra Recovery Services Inc.*, No. 2:13-cv-06922-CAS (JCGx), 2014 WL 47777, at *5 (C.D. Jan. 6, 2014) (upholding arbitration term that limits appeals where the claim is for more than \$50,000).

Key Points to Consider

- Arbitration clauses do not need to be the same
- Think about what you want
- Control what you can control
- Eliminate risks
- Create the best dispute resolution terms you can



A Litigators Prospective on Arbitration- A Practical Session

Thank You

Hon. Jeffrey J. Keyes (Retired), Keyes ADR

Melissa Durso, Senior Supervising Counsel, Subway Restaurants

James Susag, Larkin Hoffman Daly & Lindgren

Paul Ferak, Greenberg Traurig, LLP