How Artful Drafting and Good Compliance Practices Can Save Contracts from an Untimely Death

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If you're like most consumer financial services providers you probably called up your lawyer years ago and had them draft an arbitration clause requiring claims or disputes to be resolved before an arbitrator, rather than through a traditional court proceeding. You inserted it into your transaction documents. And you probably haven't thought about it since. If this is you, you certainly aren't alone. But what happens when your arbitration clause arguably doesn't evolve to address changes in the law or the industry? On October 16, 2018, the Supreme Court of Missouri issued its ruling in *A-1 Premium Acceptance, Inc. v. Hunter*, answering this very question.

In 2006, Meeka Hunter took out several loans from A-1 Premium Acceptance, Inc. ("A-1"). Each of the loan agreements Hunter signed included the same arbitration agreement, which provided that "any claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, **shall be resolved by binding arbitration by the National Arbitration Forum**." In 2009, the National Arbitration Forum entered into a consent decree with the Minnesota Attorney General which prohibited the National Arbitration Forum from providing arbitration services for consumer claims nationwide.

Now fast forward 9 years later to 2015. A-1 sued Hunter for defaulting on the loans. In response, Hunter counterclaimed and requested class certification. A-1 then moved to compel arbitration. In doing so, it argued that, though the arbitration clause required arbitration by the National Arbitration Forum (which was now prohibited from arbitrating consumer claims), a new arbitrator should be designated by the court. In its motion, A-1 relied upon section 5 of the Federal Arbitration Act ("FAA"), which requires the court to appoint an arbitrator "If for any other reason there shall be a lapse in the naming of the arbitrator."

The Missouri Supreme Court upheld the lower court's denial of the motion, holding that, because the arbitration clause expressly required arbitration by a specific, albeit now-defunct, arbitrator, Hunter could not be compelled to arbitrate before another arbitrator. In reaching this decision, the court applied basic principles of contract interpretation – divining the intent of the parties by looking at the plain words of the contract. In other words, rather than merely identifying an arbitrator, A-1 *mandated* use of the National Arbitration Forum. Further, A-1 drafted the arbitration agreement, had the option of selecting any number of arbitrators, and instead chose to limit its choice to one.

The court also found that section 5 of the FAA could not be used to select an arbitrator when the

arbitration agreement mandated that a specific arbitrator be used. That is, section 5 of the FAA allows a court to intervene and designate an arbitrator only when the parties have failed to do so. However, here, the court concluded the parties did not fail to designate an arbitrator and, instead, expressly agreed to arbitrate in front of the National Arbitration Forum.

The court held that A-1 self-imposed a mandatory requirement to arbitrate only in front of the National Arbitration Forum, and thus their arbitration clause essentially died in 2009, when the National Arbitration Forum stopped arbitrating consumer actions. Whether or not the Missouri Supreme Court is correct in its conclusion may ultimately be determined by the U.S. Supreme Court. Regardless, the issue could have been avoided by contract drafting and good compliance practices. But, never fear, you can save your arbitration agreement (and other contract terms) from an untimely death by taking a few simple steps:

- **Consider Impact of Rigid Contractual Terms.** When drafting an arbitration agreement, or any contractual agreement for that matter, be mindful of when and when not to use rigid contract terms. Obviously certain terms can and should be rigid but not all terms. A-1 might have succeeded in its motion to compel arbitration if it had only used the word “may” instead of the word “shall.” The company may yet still succeed but will have to spend some additional legal dollar regardless.
- **Embrace Adaptability.** While no one has a crystal ball, try to anticipate possible changes to both the law and the industry, and how those changes could impact the contract. By taking time to add qualifying language acknowledging the possibility of a change (such as “unless otherwise required by applicable law”), you’ll have the flexibility to apply the current state of the law, even if you haven’t had the chance to revise your contract to specifically reflect it.
- **Routine Review.** It is important to have your contracts, documents and disclosures regularly reviewed and updated. The law changes. Industry changes. And your documents must change too. Implement a compliance calendar that sets specific dates for reviewing and revising transaction documents, as well as policies and procedures. Establishing a concrete deadline will help you stay on top of changes, instead of pushing it to the back burner.

The bottom line is that your company’s contracts, documents and disclosures shouldn’t be put on a shelf and forgotten about – it’s up to you to make sure that they live to see another day.