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DRAFTING LESSONS FROM THE RECENT PAST:
AVOIDING THE PITFALLS OF RECENT LITIGANTS WHEN DRAFTING ARBITRATION
AGREEMENTS

By
Shari Maynard*

I. INTRODUCTION

The resolution of civil disputes through arbitration has become prominent.¹ This is partly attributable to the desirability of adjudicating disputes in arbitration rather than litigation. Arbitration boasts efficiency, adjudicators who are experts in their field, costs relatively lower than litigation, and a private forum in which parties can preserve confidentiality.² Moreover, “arbitration is a matter of contract.”³ As such, parties are generally free to tailor their arbitral process to suit their needs.⁴

Although these aspects of arbitration are quite attractive, other features of the process illustrate the importance of drafting a sound arbitration agreement. In most cases, arbitration is final and binding and appeal is permissible only in truly exceptional circumstances.⁵ Arbitration may also become costly where parties contest the validity of an arbitration agreement in court.⁶ Moreover, contesting an arbitration agreement in court prolongs the proceeding and invites potentially unsavory interference into the arbitral process.⁷ With this much at stake, a well-drafted arbitration agreement is essential. In addition to avoiding the above consequences, a skillfully written arbitral agreement expedites the process, eliminates needless confusion, provides the arbitrator with clear rules, and honors the parties’ intent to arbitrate.

Moreover, there is an “emphatic federal policy in favor of arbitral dispute resolution.”⁸ Consistent with this policy, arbitration agreements are presumptively

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¹ See Georgios I. Zekos, *Constitutionality of Commercial/Maritime Arbitration*, 45 J. MAR. L. & COM. 35, 38 (2014) (discussing the prevalence of arbitration).

² See Christopher R. Drahozal, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 451-52 (2010).

³ *Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 220 (3d Cir. 2014) (citing *Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999)).

⁴ *Id.*

⁵ See Drahozal, *supra* note 2, at 433, 455.

⁶ See William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act And Modern Labor Arbitration*, 55 EMORY L.J. 609, 649 (2006) (arguing that judicial interference in arbitration “delays the process and makes it more costly.”).

⁷ See *id.*

⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985).

enforceable.⁹ This favor is generous, but not unconditional. Under the FAA, a court may invalidate an arbitration agreement “on such grounds as exist in law or in equity for the revocation of any contract.”¹⁰ These grounds include “generally applicable contract defenses, such as fraud, duress, or unconscionability.”¹¹ Additionally, courts may vacate arbitral awards in some circumstances, such as when an arbitrator exceeds his authority.¹²

There has been no shortage of recent cases in which drafting deficiencies in arbitration agreements caused extensive litigation, leading parties to seek invalidation of their arbitral clause or vacatur of the arbitrator’s award. Accordingly, this article will explore recent court decisions from United States jurisdictions where deficient arbitration agreements resulted in litigation because of issues that could have been prevented at the drafting stage. The primary focus is on assessing the mistakes these litigants made and proposing ways for future drafters to avoid the same missteps. Part II is organized in accordance with the deficiencies courts have recently found in arbitration agreements: general contract defenses (namely, unconscionability and lack of mutuality); equitable estoppel; ambiguous or otherwise poorly written clauses; and excess of authority. After a critical discussion of recent cases, Part III addresses strategies future drafters may employ to avoid the pitfalls examined. In this section, the arbitral clauses discussed are rewritten where particularly instructive.

There is no foolproof method to prevent future disputes regarding an arbitration agreement or ensure its enforcement if challenged. However, assessing the costly mistakes of past litigants and taking practical steps to avoid them significantly strengthens one’s own agreement and decreases the likelihood of tedious disagreements and their attendant detriments in the future.

⁹ See *Milloul v. Knight Capital Grp., Inc.*, No. A-1953-13T2, 2015 N.J. Super. Unpub. LEXIS 2115, at *10 (N.J. Super. App. Div. Sept. 1, 2015).

¹⁰ *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014) (citing 9 U.S.C. § 2).

¹¹ *Id.*

¹² See *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671-72 (2010) (citing 9 U.S.C. § 10(a)(4)).

II. DRAFTING DEFICIENCIES OF ARBITRATION AGREEMENTS AS DISCUSSED IN RECENT COURT DECISIONS

A. General Contract Defenses

1. Unconscionability

Unconscionability is one of the most common grounds on which parties challenge the validity of arbitration agreements.¹³ It has two forms: procedural and substantive.¹⁴ Procedural unconscionability concerns the manner in which the agreement was formed.¹⁵ In this respect, the emphasis is on whether there was oppression arising from an “inequality of bargaining power,” or surprise arising from the inconspicuous nature of the arbitral agreement.¹⁶ Factors that contribute to procedural unconscionability include adhesiveness and conspicuousness of the agreement.¹⁷ Substantive unconscionability concerns the content of the agreement, specifically whether the terms produce “overly harsh or one-sided results.”¹⁸ Imposition of significant costs on the weaker party and designation of an arbitrator with a conflict of interest are examples of substantively unconscionable terms.¹⁹ Courts typically assess the substantive and procedural aspects of an agreement independently to determine whether it is unconscionable.²⁰ Numerous drafting errors can contribute to a finding of unconscionability. An assessment of recent cases involving unconscionability challenges to the enforcement of arbitration agreements is illustrative.

In *Caplin Enters. v. Arrington*, the plaintiffs signed one of two versions of an arbitration clause, one old and one new, as part of their contractual agreement with Zippy Check, a check cashing business.²¹ When the plaintiffs brought suit alleging that Zippy Check engaged in fraudulent misrepresentation and predatory lending, the business

¹³ Nicole F. Munro & Peter L. Cockrell, *Drafting Arbitration Agreements: A Practitioner's Guide for Consumer Credit Contracts*, 8 J. BUS. & TECH. L. 363, 366 (2013).

¹⁴ *Caplin Enters. v. Arrington*, 145 So.3d 608, 614 (Miss. 2014).

¹⁵ See *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1077 (2014); see also Munro & Cockrell, *supra* note 13, at 367.

¹⁶ See *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1205 (N.D. Cal. 2015); see also *Ortiz*, 52 F. Supp. 3d at 1077.

¹⁷ See *Mohamed*, 109 F. Supp. 3d at 1205; see also Munro & Cockrell, *supra* note 13, at 368.

¹⁸ *Ortiz*, 52 F. Supp. 3d at 1077; see also *Mohamed*, 109 F. Supp. 3d at 1207.

¹⁹ See *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 812 (Mo. 2015); see also Munro & Cockrell, *supra* note 13, at 369.

²⁰ *Ortiz*, 52 F. Supp. 3d at 1077; *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 433 (Mo. 2015).

²¹ *Caplin*, 145 So. 3d at 611.

moved to compel arbitration while the plaintiffs asserted that the agreement was unconscionable.²²

The court ruled in favor of the plaintiffs.²³ Procedurally, the old version constituted “several unnumbered paragraphs in fine print.”²⁴ Substantively, the agreement permitted the defendant to “pursue all judicial remedies to collect on the debt” yet required that the plaintiffs arbitrate all of their claims.²⁵ Further, under the agreement, Zippy Check’s liability could not exceed the amount that the plaintiffs paid for its services, which ranged from \$65 to \$72.²⁶ Because the costs of arbitration would have likely exceeded these amounts, Zippy Check effectually drafted the agreement to ensure that its liability would be so “nominal that it has the practical effect of avoiding almost all responsibility for a breach.”²⁷ The newer version of the agreement was similarly deficient.²⁸

Hewitt presents another opportunity to assess drafting errors that contribute to unconscionability.²⁹ The plaintiff, Todd Hewitt, was employed by the St. Louis Rams, an affiliate of the National Football League (“NFL”).³⁰ His employment contract included an arbitration clause, which stated that the plaintiff was “legally bound by the Constitution and By-Laws and Rules and Regulations of the National Football League and by the decisions of the Commissioner.”³¹ The stated rules gave the NFL commissioner “full, complete, and final jurisdiction and authority to arbitrate.”³² When plaintiff was informed that his employment contract would not be renewed, he brought suit against his employer alleging age discrimination under the Missouri Human Rights Act.³³ The plaintiff argued that the arbitration agreement was procedurally unconscionable because it was adhesive and offered to him hurriedly.³⁴ The plaintiff also argued that the agreement was substantively unconscionable because it did not specifically provide for the arbitration of

²² *Caplin*, 145 So. 3d at 613.

²³ *Id.* at 617.

²⁴ *Id.* at 611.

²⁵ *Id.* at 616.

²⁶ *Id.* at 617.

²⁷ *Caplin*, 145 So. 3d at 617.

²⁸ *Id.*

²⁹ *Hewitt*, 461 S.W.3d 798.

³⁰ *Id.* at 803.

³¹ *Id.* at 803-04.

³² *Id.* at 823.

³³ *Id.* at 804.

³⁴ *Hewitt*, 461 S.W.3d at 804.

statutory rights, did not state or describe the arbitration guidelines, and designated the NFL commissioner as sole arbitrator.³⁵

The court concluded that the agreement was not procedurally unconscionable because procedural unconscionability requires more than “inequality in bargaining power.”³⁶ However, the court found that the agreement was substantively unconscionable.³⁷ The arbitral contract encompassed “any dispute” between the parties and this broad language included statutory claims.³⁸ No arbitration guidelines were incorporated into the agreement because the guidelines were not clearly identified and described.³⁹ Furthermore, the appointment of the commissioner as sole arbitrator was one-sided because the commissioner, as an NFL employee, was in “a position of bias” that could unfairly prejudice the plaintiff in the arbitral proceeding.⁴⁰

Yet another example of an arbitral agreement challenged on unconscionability grounds is the agreement at issue in *Gutierrez v. Carter Bros. Sec. Servs. LLC*.⁴¹ There, Carter Brothers employed the plaintiffs to install AT&T security systems.⁴² Plaintiffs were required to sign an “Independent Contractor Agreement” that included an arbitration clause.⁴³ They later brought suit, arguing that the defendants required them to sign the agreement to avoid the legal consequences of deeming them employees.⁴⁴ The defendants moved to compel arbitration, resulting in the plaintiffs’ claim that the contract was unconscionable.⁴⁵

In denying the defendant’s motion, the court found that the arbitration agreement was both procedurally and substantively unconscionable and therefore invalid.⁴⁶ Procedurally, the agreement was adhesive: it was offered to plaintiffs as a condition of employment, with no opportunity for negotiation or modification.⁴⁷ Substantively, the plaintiffs, who lived and worked in California, were required to travel to Atlanta and

³⁵ *Hewitt*, 461 S.W.3d at 804.

³⁶ *Id.* at 809-10.

³⁷ *Id.* at 814.

³⁸ *Id.*

³⁹ *Id.* at 811.

⁴⁰ *Hewitt*, 461 S.W.3d at 813.

⁴¹ *Gutierrez v. Carter Bros. Sec. Servs., LLC*, 63 F. Supp. 3d 1206 (E.D. Cal. 2014).

⁴² *Id.* at 1209.

⁴³ *Id.* at 1209-10.

⁴⁴ *Id.* at 1209.

⁴⁵ *Id.* at 1210.

⁴⁶ *Gutierrez*, 63 F. Supp. 3d at 1210.

⁴⁷ *Id.*

evenly split the costs of arbitration with the defendants.⁴⁸ Because the costs of complying with these two financial requirements would likely exceed the plaintiffs' maximum potential recovery, the agreement effectively barred the plaintiffs from resolving their claims and was therefore substantively unconscionable.⁴⁹

In each of these cases, it is evident that the drafters of the arbitration agreements at issue could have avoided litigation if they had removed or changed provisions that could raise unconscionability concerns. In some cases, prominent display of the arbitration agreement would have bolstered the defendant's case, while in others, including terms more considerate to the other parties' financial constraints would have gone a long way. These errors and their remedies will be addressed in Part III.

2. Lack of Mutuality

Some courts require that when parties enter an arbitration agreement, the promise to arbitrate must be mutually binding on all parties.⁵⁰ Lack of mutuality is evident where "one provision of a contract is inconsistent with the contract's arbitration clause and the two cannot be harmonized"⁵¹ or "when one party retains the unilateral right to amend the agreement and avoid its obligations."⁵² In some jurisdictions, lack of mutuality is merely one factor that courts consider in assessing substantive unconscionability.⁵³ In others, lack of mutuality alone is sufficient to invalidate an agreement.⁵⁴ Because of this difference in jurisdictional treatment, lack of mutuality will be considered separately from unconscionability.

In *Greene v. Alliance Auto*, the plaintiff bought a vehicle from the defendant, which the defendant later repossessed.⁵⁵ In response to the plaintiff's suit for damages, the defendant filed a motion to compel arbitration pursuant to the arbitral clause in the purchase agreement.⁵⁶ The plaintiff argued that the arbitral clause was unconscionable because, among other things, a self-help provision undermined the defendant's mutual promise to arbitrate.⁵⁷

⁴⁸ *Gutierrez*, 63 F. Supp. 3d at 1214.

⁴⁹ *Id.*

⁵⁰ See Heather Bromfield, *The Denial of Relief: The Enforcement of Class Action Waivers in Arbitration Agreements*, 43 U.C. DAVIS L. REV. 315, 320, 326-27 (2009).

⁵¹ *Alltel Corp. v. Rosenow*, 2014 Ark. 375 at 8.

⁵² *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 776 (Mo. 2014).

⁵³ See, e.g., *Eaton* 461 S.W.3d at 434; see also *Greene v. Alliance Auto., Inc.*, 435 S.W.3d 646 (Mo. Ct. App. 2014) (finding that a lack of mutuality was one factor that rendered the arbitration agreement unconscionable).

⁵⁴ *Alltel*, 2014 Ark. 375 at 6; *Baker*, 450 S.W.3d at 772 n.1.

⁵⁵ *Greene*, 435 S.W.3d at 648.

⁵⁶ *Id.*

⁵⁷ *Id.* at 649-50.

The court agreed, finding that the agreement lacked mutuality. The agreement stated that “no party waives its right to elect arbitration . . . by exercising self-help remedies.”⁵⁸ Thus, despite requiring the plaintiff to arbitrate her disputes, the arbitral clause allowed the defendant to seek arbitration and self-help simultaneously to remedy the same harm suffered from the plaintiff’s alleged breach.⁵⁹

In *Baker v. Bristol Care, Inc.*, the plaintiff’s employment contract contained an arbitration agreement stating that defendant employer “reserves the right to amend, modify or revoke this agreement upon thirty (30) days’ prior written notice to the Employee.”⁶⁰ When a dispute arose between the parties, the plaintiff sought litigation while the defendant sought arbitration.⁶¹ The court found that the agreement lacked mutuality, as the defendant retained the unilateral right to rescind its mutual agreement to arbitrate.⁶² That a notice period was provided was immaterial, as this did not provide for negotiation or consent from the plaintiff.⁶³

Greene and Baker illustrate the drafting errors that can be made by a party who desires arbitration only when an exit strategy is available. However, if arbitration is the preferred mode of dispute resolution, this preference should be effectively reflected in the arbitration agreement, sans language undermining arbitral intent.

B. Equitable Estoppel

Equitable estoppel refers to the general rule that a non-signatory party will be restricted from “embracing a contract” and later refusing to comply with the terms of that contract in their entirety.⁶⁴ In some instances, it is equitable to require a party to arbitrate a dispute, although that party is not a signatory to an arbitration agreement, because that party’s actions have indicated a desire to arbitrate.⁶⁵ Equitable estoppel is not a defense to the enforcement of arbitration agreements, as are the other grounds discussed here. However, it can be asserted where the agreement by which the parties’ relationship was governed was poorly drafted or should have been amended in light of changed circumstances.

Flintkote v. Aviva effectively illustrates the relationship between the doctrine of equitable estoppel and imprudent drafting.⁶⁶ The plaintiff, a supplier of asbestos products,

⁵⁸ *Id.* at 653-54.

⁵⁹ *Id.*

⁶⁰ *Baker*, 450 S.W.3d at 773.

⁶¹ *Id.*

⁶² *Id.* at 777.

⁶³ *Id.*

⁶⁴ *Flintkote*, 769 F.3d at 221.

⁶⁵ *Id.* at 220.

⁶⁶ *Id.*

bought insurance policies from several London insurance carriers.⁶⁷ After numerous claims against the plaintiff arose, the plaintiff entered a settlement agreement (the “Wellington Agreement”) with all of the insurance companies, save for the defendant.⁶⁸ The agreement stipulated that disputes would be resolved in mediation, then arbitration if mediation was unsuccessful.⁶⁹ A separate mediation agreement existed, which did not reference arbitration.⁷⁰ The plaintiff and the defendant then entered an agreement providing that future disputes would be resolved by litigation.⁷¹ When the relationship between the plaintiff and the insurance companies deteriorated, the defendant aligned with the companies subject to the Wellington Agreement by participating in their mediation, retaining the same attorneys, and jointly requesting relief from the plaintiff.⁷² When the defendant later sought to litigate a dispute, the plaintiff moved to compel arbitration, arguing that defendant was equitably bound to arbitrate under the Wellington Agreement.⁷³

Applying Delaware law, the court discussed two types of equitable estoppel.⁷⁴ Under the “knowing exploitation” rule, “a non-signatory is equitably precluded from embracing a contract and then turning its back on the portions of the contract, such as an arbitration clause, that it finds distasteful.”⁷⁵ Also, “when . . . by his conduct [a party] intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment” he is equitably estopped from renouncing the arbitration agreement.⁷⁶ The court did not compel arbitration.⁷⁷ The court concluded that the defendant did not “clear[ly] and convincing[ly]” embrace the Wellington Agreement because it participated in mediation only.⁷⁸ Also, because there was an unambiguous contract requiring the defendant to litigate its claims against the plaintiff, the plaintiff’s reliance on the defendant’s alignment with the other insurance companies was unreasonable.⁷⁹

⁶⁷ *Id.* at 217.

⁶⁸ *Id.*

⁶⁹ *Flintkote*, 769 F.3d at 217.

⁷⁰ *Id.* at 218.

⁷¹ *Id.*

⁷² *Id.* at 218-19.

⁷³ *Id.* at 219.

⁷⁴ *Flintkote*, 769 F.3d at 221.

⁷⁵ *Flintkote*, 769 F.3d at 221.

⁷⁶ *Id.* at 223.

⁷⁷ *Id.*

⁷⁸ *Id.* at 222.

⁷⁹ *Id.* at 223.

As is evident from the preceding discussion, equitable estoppel is difficult to establish, particularly where there is a contrary written agreement. By pre-selecting arbitration or amending the existing contract when the need arises, the drafter may avoid the burden of compelling arbitration in this manner.

C. Ambiguous and Otherwise Poorly Written Clauses

1. Ambiguity

It is especially difficult to enforce an arbitration agreement if the court cannot even understand it. Here is where the problem of ambiguity arises. In such cases, the language of the arbitration agreement or one of its essential provisions is so unclear or inconsistent that the meaning cannot be discerned and judicial enforcement becomes futile.

Milloul v. Knight is instructive in this respect.⁸⁰ In that case, the plaintiff-employee contended that the arbitration agreement, which defendant-employer required all employees to sign, did not convey that the employee was relinquishing his right to litigation of future disputes.⁸¹ The agreement stated, in part, that the employee agreed to:

settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application for employment, my employment or the cessation of my employment . . . by final and binding arbitration . . . Such claims include but are not limited to claims under federal, state and local statutory law or common law.⁸²

The court found that the agreement was ambiguous and unenforceable.⁸³ Although arbitration agreements must be “read liberally to find arbitrability if reasonably possible,”⁸⁴ such deference was unjustified in this instance because the agreement failed to communicate that the employee was forfeiting his right to a trial and that discrimination disputes were subject to arbitration.⁸⁵

In *PCH Mut. Ins. Co. v. Cas. & Sur., Inc.*, PCH and CSI entered a contractual agreement under which CSI would provide PCH with administrative support services for

⁸⁰ *Milloul*, 2015 N.J. Super. Unpub. LEXIS 2115, at *1.

⁸¹ *Id.* at *2.

⁸² *Milloul*, 2015 N.J. Super. Unpub. LEXIS 2115, at *6-7.

⁸³ *Id.* at *20.

⁸⁴ *Id.* at *10.

⁸⁵ *Id.* at *19-20.

PCH's insurance liability programs.⁸⁶ Their contract contained an arbitration agreement stating, in part, that: "[a]ny disputes concerning any aspect of this agreement may be submitted to binding arbitration. The prevailing party shall be entitled to recover all costs incurred, including reasonable attorney's fees."⁸⁷ PCH later brought suit against CSI, resulting in CSI's motion to compel arbitration.⁸⁸ CSI argued that the agreement mandated arbitration of all disputes, while PCH contended that the language was permissive and merely designated arbitration as an option for resolving future disputes.⁸⁹

The court exhibited little sympathy for CSI's position, noting that it would accord the agreement its plain meaning.⁹⁰ The provision was ambiguous because it could be interpreted in more than one way.⁹¹ The court noted that if the agreement were deemed permissive, then another provision permitting injunctive relief to enforce the agreement would be moot.⁹² However, "as a general matter of contract law, the word 'may' is viewed as a permissive term, particularly when used in contraposition to the word shall."⁹³ Accordingly, the plainly permissive language of the agreement did not bind the parties to arbitration.⁹⁴

Knight and *PCH Mut. Ins. Co.* teach that inconsistency breeds ambiguity. This, in turn, undermines the parties' recourse to arbitration. With thorough drafting, however, these errors can be excluded from the arbitration agreement.

2. Otherwise Poorly Written Clauses

This catchall category concerns errors which may seem obvious or insignificant at the drafting stage, but could become major sources of contention when a dispute actually arises. Errors include referencing nonexistent rules and using awkward or peculiar phrasing.

A drafting error of this nature led to bizarre results and extensive litigation when the parties in *Grelu Consulting, Inc. v. Patel* attempted to enforce their arbitration agreement.⁹⁵ Four individuals entered a partnership agreement, which included an

⁸⁶ *PCH Mut. Ins. Co. v. Cas. & Sur., Inc.*, 750 F. Supp. 2d 125, 132 (D.D.C. 2010).

⁸⁷ *Id.* at 143.

⁸⁸ *Id.* at 129.

⁸⁹ *Id.* at 143-44.

⁹⁰ *Id.* at 142.

⁹¹ *PCH Mut. Ins. Co.*, 750 F. Supp. 2d at 143.

⁹² *Id.* at 144.

⁹³ *PCH Mut. Ins. Co.*, 750 F. Supp. 2d at 144.

⁹⁴ *Id.* at 149.

⁹⁵ *Grelu Consulting, Inc., v. Patel*, No. A-3042-11T3, 2013 WL 2435348, at *1 (N.J. Super. App. Div. June 6, 2013).

arbitration clause, for the purpose of purchasing two Dunkin' Donuts franchises.⁹⁶ The partnership deteriorated.⁹⁷ Resolution of the disputes began in court.⁹⁸ However, three of the partners, who had aligned together and were jointly represented by one firm, moved to compel arbitration.⁹⁹

Though the court granted the motion to compel arbitration, this did not end the conundrum.¹⁰⁰ The parties disagreed fundamentally about the meaning of the arbitrator selection provision.¹⁰¹ That provision stated that “[e]ach party shall appoint one . . . arbitrator, and such arbitrator shall appoint another arbitrator . . . [and] the decision of [a] majority of such arbitrators . . . shall be conclusive upon the parties.”¹⁰² The plaintiffs argued that “each party” was synonymous with “each partner,” while the defendant argued that the phrase meant “each side” of the dispute.¹⁰³ The plaintiffs further contended that the provision permitted each partner to appoint one arbitrator, who would in turn appoint one arbitrator, for a total of eight arbitrators.¹⁰⁴ The defendant vehemently opposed this construction, arguing that the resultant panel would be skewed in the plaintiffs’ favor.¹⁰⁵ Instead, the defendant argued that the provision permitted the plaintiffs to jointly appoint one arbitrator, the defendant to appoint one arbitrator, and a court to appoint a third arbitrator, for a total of three arbitrators.¹⁰⁶ The lower court adopted the plaintiffs’ construction, much to the defendant’s dismay.¹⁰⁷

On appeal, the court ruled in favor of the defendant, acknowledging that the arbitration agreement “would certainly not win any awards for legal drafting.”¹⁰⁸ Another section of the agreement stated that “[i]f the arbitrator appointed shall fail, within ten (10) days after the last of the arbitrators shall have been appointed, to select another arbitrator,” then a court “shall be authorized and empowered to appoint such *third* arbitrator.”¹⁰⁹ The appellate court also noted that interpreting the provision as plaintiffs

⁹⁶ *Id.* at *1.

⁹⁷ *Id.*

⁹⁸ *Id.* at *1-2.

⁹⁹ *Id.* at *2.

¹⁰⁰ *Grelu Consulting*, 2013 WL 2435348, at *2.

¹⁰¹ *Id.* at *5.

¹⁰² *Id.*

¹⁰³ *Id.* at *3.

¹⁰⁴ *Grelu Consulting*, 2013 WL 2435348, at *3-4.

¹⁰⁵ *Id.* at *3.

¹⁰⁶ *Id.* at *4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *5.

¹⁰⁹ *Grelu Consulting*, 2013 WL 2435348, at *7 (emphasis added by the court).

desired would be prejudicial against the defendant and produce an “unusually large and, consequently expensive” panel.¹¹⁰ Accordingly, the court modified the agreement to require a three-member panel of arbitrators by making two changes.¹¹¹ First, the court added an “s” to the offending provision.¹¹² Thus, instead of “[e]ach party shall appoint one (1) such arbitrator, and such arbitrator shall appoint another arbitrator,” the provision was changed to “[e]ach party shall appoint one (1) such arbitrator, and such arbitrators shall appoint another arbitrator.”¹¹³ The court made similar changes to the section addressing timely arbitrator appointments.¹¹⁴ Additionally, the court found that “party” was synonymous with side.¹¹⁵

The magnitude of harm a drafter can cause by making a simple mistake or using overcomplicated language in the agreement is evident from the preceding discussion. The drafter must steer clear of these practices and implement more pragmatic techniques, as will be discussed in Part III.

D. Excess of Authority

Arbitrators may act contrary to the parties’ arbitration agreement by “decid[ing] matters not properly before [them].”¹¹⁶ As previously noted, where an arbitrator exceeds his authority in this way, a court may vacate the award.¹¹⁷ If an arbitration agreement is drafted in a manner that fosters doubt about the extent of the arbitrator’s powers, an excess of authority challenge is more probable.

Leshin v. Oliva presents a prime example.¹¹⁸ There, a couple organized a partially revocable family trust governed by an arbitration agreement.¹¹⁹ When the wife died, the husband set up separate trusts, one of which allotted certain property to the defendant upon the husband’s death.¹²⁰ The plaintiff was appointed as a successor trustee. When the husband died, the defendant accused the plaintiff of improprieties.¹²¹ The result of the

¹¹⁰ *Id.* at *13.

¹¹¹ *Id.* at *10.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Grelu Consulting*, 2013 WL 2435348, at *10.

¹¹⁵ *Id.* at *13-14.

¹¹⁶ *Leshin v. Oliva*, No. 04-14-00657-CV, 2015 WL 4554333, at *8 (Tex. App. San Antonio July 29, 2015).

¹¹⁷ *Stolt-Nielsen*, 559 U.S. at 671-72.

¹¹⁸ *Leshin*, 2015 WL 4554333, at * 1.

¹¹⁹ *Id.* at *2.

¹²⁰ *Id.* at *3.

¹²¹ *Id.* at *3-4.

requisite arbitration was a judgment against the plaintiff in his individual capacity.¹²² The plaintiff brought suit seeking to vacate the award, arguing that the arbitrator exceeded his authority by rendering a judgment against him in his individual rather than trustee capacity.¹²³ The defendants argued that the broad language of the agreement and its reference to American Arbitration Association rules suggested that the plaintiff assented to the arbitrator's determination regarding arbitrability.¹²⁴ This included whether the plaintiff was personally bound by the agreement and was required to satisfy the judgment from his personal funds.¹²⁵

Ultimately, the court decided that the arbitrator exceeded his authority “by implicitly determining [that the plaintiff], individually, was a party to the arbitration agreement, and thereby bound by any award in his individual capacity.”¹²⁶ In arriving at this conclusion, the court emphasized that no language in the agreement clearly gave the arbitrator the power to bind the plaintiff personally.¹²⁷

Expressly defining the scope of the arbitrator's authority in the arbitration agreement reduces the probability of an excess of authority challenge. Though the drafter should not overcomplicate the agreement by launching into copious detail, some specificity is desirable, as this will maximize the chances that a challenged award will be upheld.

III. A DRAFTER'S GUIDE TO AVOIDING THE PITFALLS OF RECENT LITIGANTS

A. General Contract Defenses

1. Unconscionability

a. Procedural unconscionability

To draft an agreement devoid of procedural unconscionability, there are several factors to consider. First, conspicuousness should be a top priority. If the arbitration agreement is a clause within a larger contract, it should be placed somewhere noticeable

¹²² *Id.* at *5.

¹²³ *Leshin*, 2015 WL 4554333, at *6.

¹²⁴ *Id.* at *13.

¹²⁵ *Id.* at *13.

¹²⁶ *Id.* at *22.

¹²⁷ *Id.* at *22-23.

to the reader, such as near the beginning of the contract.¹²⁸ Also, the content of the agreement must appear presentable to the reader.¹²⁹ Fine print and jumbled or unorganized text are unsuitable. A readable font, generous spacing, and separation by sections, where appropriate, are optimal. Second, if the agreement is part of a larger contract, other portions of the contract should draw attention to the arbitration agreement by prompting the reader to review the arbitration clause.¹³⁰ Finally, a signature line at the end of the arbitration agreement to indicate that the signatory has read and understands the agreement is invaluable, regardless of whether the arbitration agreement is embedded in a larger contract.¹³¹

If negotiating the terms of a contract is impracticable or undesirable, as is often the case with adhesive contracts, the party who has drafted the agreement should notify the other party of its existence, explain its significance, and provide sufficient opportunity for the other party to review, comment, and perhaps opt out.¹³²

b. Substantive unconscionability

Because substantive unconscionability concerns the terms of the agreement, the drafter has considerable control over protecting the arbitration agreement against a challenge on this basis. Provisions that impose one-sidedness, are particularly severe when applied, or appear excessively beneficial to one party at the expense of another should be excluded.

Specifically, the drafter should avoid provisions that impose all or a substantial portion of the costs of arbitration on a party who is obviously in a weaker position. In *Gutierrez*, for example, the employer should have paid all or a substantial portion of the costs of arbitration, rather than attempting to impose half of this cost on the workers.¹³³ The drafter may also include a provision waiving its right to recover costs and fees from the party on whom the agreement is imposed.¹³⁴

Furthermore, as was evident in *Caplin*¹³⁵ and *Gutierrez*,¹³⁶ the agreement should not impose costs on a party when such costs would outweigh the party's maximum allowable recovery. Courts will likely interpret this tactic as a guise for avoiding liability for a breach of the agreement. Accordingly, the drafter may ease the financial burden of

¹²⁸ See Munro & Cockrell, *supra* note 13, at 377.

¹²⁹ See *id.* at 378.

¹³⁰ *Id.*

¹³¹ *Id.* at 377.

¹³² *Id.* at 378.

¹³³ See *Gutierrez*, 63 F. Supp. 3d at 1214.

¹³⁴ Munro & Cockrell, *supra* note 13, at 380.

¹³⁵ *Caplin*, 145 So.3d 608.

¹³⁶ *Gutierrez*, 63 F. Supp. 3d 1206.

arbitration on the other party by stipulating that the proceedings will occur in a forum that is convenient for that party,¹³⁷ and by including the above suggested provisions regarding costs and fees.¹³⁸

Finally, arbitrator selection clauses should either designate an arbitrator free of any actual or apparent biases, or describe a process for selecting an impartial arbitrator. For example, in *Hewitt*, where the defendant's arbitration agreement designated its own employee as sole arbitrator,¹³⁹ the drafter could have instead selected a neutral party to appoint an arbitrator, or permitted each party to select an arbitrator, who would then jointly appoint a third neutral arbitrator.

2. Lack of Mutuality

To eliminate lack of mutuality in the arbitration agreement, it is helpful to assess the pitfalls of the drafters in *Greene*¹⁴⁰ and *Baker*.¹⁴¹ Rather than permitting unilateral recourse to remedy a breach of the contract, each provision of the arbitration agreement should reflect both parties' intent to arbitrate. A provision that permits the drafter to pursue non-arbitral remedies without waiving the right to arbitrate should afford the other party a comparable legal right, such as seeking injunctive relief or other equitable remedies in court.¹⁴² If the drafter finds this consolation undesirable, then the drafter should either eliminate the alternative remedies provision altogether or mitigate the provision. For instance, a mitigated provision could provide that exercising alternative remedies waives the right to arbitrate.

The following changes would have likely avoided the dispute in *Greene*. There, the self-help provision at issue read:

Notwithstanding this arbitration agreement, the Parties retain the right to exercise self-help remedies and to seek provisional remedies from a court, pending final determination of the Dispute by the arbitrator. No Party waives the right to elect arbitration of a Dispute by exercising self-help remedies, filing suit, or seeking or obtaining provisional remedies from a court.¹⁴³

To avoid contention, the following is a suitable alternative:

¹³⁷ Munro & Cockrell, *supra* note 13, at 380.

¹³⁸ See *supra* note 134 and accompanying text.

¹³⁹ See *Hewitt*, 461 S.W.3d at 804.

¹⁴⁰ *Greene*, 435 S.W.3d 646.

¹⁴¹ *Baker*, 450 S.W.3d 770.

¹⁴² Munro & Cockrell, *supra* note 13, at 380.

¹⁴³ *Greene*, 435 S.W.3d at 652.

All Parties retain the right to exercise alternative remedies, including self-help and seeking provisional remedies from a court. If a Party exercises these non-arbitral remedies, that Party waives the right to arbitrate any dispute arising under this agreement.

Furthermore, the ability to amend, modify or revoke the arbitration agreement must only be offered where the consent of all parties would be required to validate the change and where all parties have an equal right to propose such changes. The deficient provision in *Baker* is illustrative:

[The employer has] the right to amend, modify or revoke this agreement upon thirty (30) days' prior written notice to the Employee.¹⁴⁴

The drafter ought to have either eliminated the provision or changed it to:

Each party has the right to propose amendments, modifications or revocation of this agreement. Such changes shall take effect upon written consent of all parties. All parties must consent within (30) days of any proposed amendment, modification or revocation.

In summary, each provision of the arbitration agreement must be congruent with all others and embody a unified instrument. Accordingly, provisions that undermine the mutual promise to arbitrate should be reviewed, re-written, and harmonized with the remainder of the agreement.

3. *Equitable Estoppel*

Special difficulties exist in drafting an arbitration agreement that undermines or supports an equitable estoppel claim. This is because, in cases where equitable estoppel is asserted, there is often either no written agreement or a contrary written agreement. However, the circumstances of *Flintkote*¹⁴⁵ imply some appropriate suggestions.

First, if a main contract governing the parties' relationship exists, the contract permits amendments or modifications, and one party's actions suggest amenability to arbitration, then the party desiring arbitration ought to amend the main contract by adding an arbitral clause. Second, if there is a separate contract requiring litigation, then the drafter can include a provision stating that certain enumerated acts suggesting a desire to arbitrate will bind a party to arbitration and void the original agreement. Any such provision must be written clearly and with sufficient specificity to avoid complicating the existing contracts. If these steps are taken, reliance on equitable estoppel to compel

¹⁴⁴ *Baker*, 450 S.W.3d at 773.

¹⁴⁵ *Flintkote*, 769 F.3d 215.

arbitration will likely become unnecessary. For example, in *Flintkote*,¹⁴⁶ the supplier could have provided that:

If any Party acts inconsistently with its intent to resolve disputes in a judicial forum, that Party waives its right to such forum and must submit all future disputes to final and binding arbitration. “Acting inconsistently” includes aligning with other entities or individuals subject to an arbitration agreement and participating in dispute resolution processes governed by an agreement that mandates arbitration in later phases of a dispute.

B. Ambiguity/Otherwise Poorly Written Clauses

Clarity and consistency are essential when drafting the arbitration agreement. As such, each provision should be written clearly, consistently, and with a singular meaning. In *PCH*,¹⁴⁷ where the arbitral clause used permissive language in one sentence and compulsory language in the next, the drafter could have simply employed consistent language throughout the agreement reflecting the nature of the parties’ intent to arbitrate.

Additionally, the drafter should test the application of provisions when reviewing unfinished versions of the arbitration agreement to ensure that each provision produces rational results. If the parties in *Grelu Consulting*¹⁴⁸ had done this, they would have discovered the bizarre panel that their arbitrator-selection provision created. Furthermore, the drafter and all parties to the contract will be well-served if overcomplicated clauses are excluded from the agreement. Recall that the relevant text of the agreement in *Grelu Consulting, Inc.* stated that:

[e]ach party shall appoint one . . . arbitrator, and such arbitrator shall appoint another arbitrator . . . [and] the decision of [a] majority of such arbitrators . . . shall be conclusive upon the parties.¹⁴⁹

The court resolved the dispute by pluralizing two words, finding that “party” was synonymous with “side,” and in so doing imposed a three-member panel. A simpler alternative that achieves the same result reads:

Each side in the dispute shall appoint one arbitrator. The arbitrators appointed by each side shall then jointly appoint one arbitrator. The decision of a majority of this three-member panel of arbitrators shall be conclusive upon all parties.

¹⁴⁶ *Id.*

¹⁴⁷ *PCH Mut. Ins. Co.*, 750 F. Supp. 2d 125.

¹⁴⁸ *Grelu Consulting*, 2013 WL 2435348 1.

¹⁴⁹ *Grelu Consulting*, 2013 WL 2435348, at *5.

Finally, the arbitration agreement should definitively provide that the signatory forfeits the right to a trial by assenting to the contract and state the types of claims subject to arbitration.

C. Excess of Authority

An arbitrator could improperly exceed his or her authority in spite of the content of the arbitration agreement. Nevertheless, the arbitration agreement should specify at a minimum, the types of disputes the arbitrator can decide and the classes of persons bound by the arbitral award. If the agreement includes this language, it is less likely that the arbitrator will overstep his contractually imposed boundaries in these respects. This is because blatant violation of the agreement probably will not withstand judicial scrutiny. For instance, the following provision defining the scope of the arbitrator's authority would have been valuable in *Leshin*:¹⁵⁰

The arbitrator's decision shall be final and binding upon each party in the capacity in which he acts under this agreement.

An even simpler alternative would have been:

The arbitrator shall have no power whatsoever to bind any trustee who is a party to this agreement in his individual capacity.

IV. CONCLUSION

The arbitral process is invaluable for resolving civil disputes. The arbitration agreement plays an integral role in ensuring that arbitration functions efficiently and expeditiously. Accordingly, the drafter of the arbitration agreement must avoid drafting errors that could undermine the parties' recourse to arbitration, prolong the dispute resolution process, or cause the parties unnecessary expense.

In recent cases, drafting mistakes relating to unconscionability, lack of mutuality, equitable estoppel, ambiguity, poor writing, and excess of authority have caused contention among parties to arbitration agreements. Examination of these cases reveals that the issues could have been prevented if the drafters had employed certain strategies when writing the agreement. Learning from these mistakes, understanding why they were so costly, and implementing the appropriate drafting techniques to avoid similarly undesirable outcomes is invaluable for drafters of future arbitration agreements.

¹⁵⁰ *Leshin*, 2015 WL 4554333 1.