Kluwer Arbitration Blog

What You Should Know About Nevada's Specific Authorization Rule for Arbitration Agreements

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Businesses that are party to an arbitration agreement governed by Nevada law should understand that a little-known Nevada statute renders these agreements unenforceable if a contract lacks so-called "specific authorization" indicating that a person affirmatively assented to the arbitration provision itself. While the Nevada Supreme Court has applied this rule to invalidate arbitration agreements, a recent United States Supreme Court opinion reiterated that the Federal Arbitration Act (the "FAA" or "Act") preempts state rules that treat arbitration agreements differently than other contracts. While a court has yet to consider whether the FAA preempts the Nevada statute, it is unlikely to survive a preemption analysis.

Nevada's Specific Authorization Rule

Nevada's general arbitration statute, like the FAA, contains a savings clause that allows arbitration agreements to be invalidated "upon a ground that exists at law or in equity for the revocation of a contract." NRS 38.219(1). The key difference is that the Nevada statute also includes a specific authorization rule, Nevada Revised Statute 597.995, which provides an additional ground to void an arbitration agreement. This rule renders only the arbitration provision "void and unenforceable" if an underlying contract is devoid of "specific authorization" indicating that the person has affirmatively agreed to that provision. NRS 597.995(1). The rule does not define "specific authorization," but, as shown below, the standard is exacting.

***Fat Hat, LLC v. DiTerlizzi* ("*Fat Hat*")**

The Nevada Supreme Court's unpublished opinion in *Fat Hat* "does not establish mandatory precedent" for Nevada appellate courts (*see* NRAP 36), but it's notable in that the court addressed Nevada's specific authorization rule for the first time. In particular, the court considered whether arbitration clauses in several contracts between a Las Vegas nightclub and its employees were valid under the rule. It held that some of the contracts did not contain the required "specific authorization" because the employees signed a "general signature line indicating consent to all the terms of the contract," but gave no indication of specific assent to the arbitration provision itself. The court was not persuaded by the fact that this signature line immediately preceded the arbitration provision. Similarly, the court was not convinced that an employee affirmatively agreed to the arbitration provision even where she "initialed at the bottom of every page," including the page with the arbitration provision. *Fat Hat, LLC v. DiTerlizzi*, 385 P.3d 580 (Nev. 2016).

The *Fat Hat* court held that other contracts did pass muster under the rule. "In addition to a signature line at the end of the contracts," the employees filled "in their names and addresses in the blank spaces of the [arbitration] provision, explicitly stating that the agreement to arbitrate was effective." *Id*. Likewise, in *Larson v. D. Westwood, Inc*., a Nevada federal court held that a three-page arbitration provision forming part of an eight-page contract satisfied the Nevada's specific authorization rule because "[t]he arbitration provision is set apart from the other provisions by boldface capital letters," "required a separate initialing," and the contract's signature page contained a boldface heading stating that "Employment Shall be Deemed to Be Acceptance of the Arbitration Policy." *Larson v. D. Westwood, Inc*., 2016 WL 5508825, at *2 (Sept. 27, 2016). The federal court rejected the plaintiff's argument that an arbitration provision must be a standalone agreement to comply with Nevada's specific authorization rule.

Still, neither *Fat Hat* nor *Larson* considered whether Nevada's specific authorization rule is preempted by the Act. In fact, the *Fat Hat* court confirmed that the parties made "no argument that the [Act] applies" and "[w]e therefore do not address NRS 597.995's validity of application under the FAA." *Fat Hat, LLC*, 385 P.3d at 580 n.1.

The FAA's Equal Treatment Principle

It is well established that the FAA is broad in its scope: it preempts state law and governs the enforceability of all arbitration agreements in contracts involving interstate commerce. *See* 9 U. S. C. § 2. In *Kindred Nursing Centers L.P. v. Clark*, a nearly unanimous decision issued just last month, the United States Supreme Court reaffirmed the Act's "equal treatment principle" in striking down Kentucky's "clear-statement rule," which, as discussed below, is similar to Nevada's specific authorization rule. The Court explained that, while courts "may invalidate an arbitration agreement based on 'generally applicable contract defenses,'" they may not do so based on "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" 581 U. S. __ (2017) (slip op. at 4). Indeed, the Act preempts "any state rule discriminating on its face against arbitration" or disfavors contracts that "have the defining features of arbitration agreements."

In *Clark*, the petitioner nursing home (represented by Mayer Brown LLP) sought to enforce two arbitration agreements executed by the relatives of its now-deceased residents; each relative had a power of attorney. But the Kentucky Supreme Court invalidated the agreements based on its court-created clear-statement rule—*i.e*., "a power of attorney could not entitle a representative to enter into an arbitration agreement with *specifically* saying so." *Id*. (slip op. at 3). The court said that, because the right to trial by jury is a constitutional right, "an agent could deprive her principal an 'adjudication by judge or jury' only if the power of attorney 'expressly so provide[d].'" *Id*. The Court held that the clear statement rule "fails to put arbitration agreements on an equal plane with other contracts" and its required "specific authorization" to waive a jury trial couldn't "survive the FAA's edict against singling out" arbitration agreements "for disfavored treatment." *Id*. (slip op. at 4).

Likewise, in *Doctor's Associates, Inc. v. Casarotto*, the Court held that a Montana law declaring an arbitration agreement unenforceable unless notice of it is "typed in underlined capital letters on the first page of [a] contract" was incompatible with the Act. 517 U.S. 681, 683 (1996). Moreover, state and federal courts, following the Supreme Court's direction, have regularly struck down laws requiring special notice for arbitration agreements, (*see, e.g., Erickson v. Aetna Health Plans of California, Inc*., 71 Cal. App. 4th 646 (Cal. Ct. App. 1999)), that arbitration agreements be in

writing, (*Brown v KFC Nat'l Mgmt. Co.*, 921 P.2d 146 (Haw. 1996)), or prohibiting mandatory arbitration clauses for certain types of disputes (*In re Managed Care Litig.*, 132 F. Supp. 2d 989 (S.D. Fla. 2000)).

Conclusion

Where a plaintiff challenges the enforceability of an arbitration agreement that is governed by Nevada law based on a lack of specific authorization, defendants should look to FAA preemption arguments in response. To avoid the expense and delay involved in litigating preemption, parties entering into arbitration provisions incorporated into broader contracts should require explicit assent to those provisions, separate and distinct from the contract as a whole.

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