Kluwer Arbitration Blog

Swiping Right to Arbitration: An Imperfect Match?

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Dating apps are now a central part of many people's lives. Yet many users perhaps overlook that use of this kind of app usually comes with an arbitration agreement. Almost all major dating apps—including Bumble, eHarmony, Grindr, Hinge, Match, OkCupid, Plenty of Fish, and Tinder— incorporate broad arbitration clauses in their terms of service ("TOS"). France-based Happn is an exception.

Almost all of these TOS include agreements for individual arbitration, procedures under the rules of an arbitral institution seated in the United States ("U.S.") (either the American Arbitration Association or National Arbitration and Mediation) and class-action waivers, often complemented by choice-of-law clauses pointing towards business-friendly jurisdictions such as Texas.

For the dating apps, most of which are also headquartered in the U.S., this approach would seem an ideal match.

But for users, especially those outside the U.S., whenever they log in and swipe right (or left), they could end up with an awkward dispute-resolution mechanism, seated in a geographically distant, costly and legally unfamiliar location. Users may also forgo the ability to bring class actions in court. In the realm of private legal actions, multi-party claims offer perhaps the best assurance of structural relief to address systemic issues, given the availability of class-wide injunctive relief and the name-and-shame scrutiny that comes with public lawsuits.

Indeed, recently there have been pressing calls for structural relief as safety and privacy concerns rise in prominence.

For instance, a 2022 Australian study found that three in four users had been subjected to sexual violence facilitated by dating apps in the prior five years. Market leaders Tinder and Grindr, and other dating apps, have come under fire for allegedly not doing enough to address this issue. On privacy, Grindr has also been criticised for allegedly allowing users to be outed through the sale of supposedly anonymised data, and for disclosing users' HIV status to third parties without their consent.

Considering these serious issues, this blogpost explores the ability of Australian users to bypass arbitration and seek recourse against these dating apps for safety- or privacy-related claims in court.

Desirability of Arbitration to Dating Apps

Before turning to user prospects, however, it is helpful to look at why dating apps might seek to use arbitration.

Dating apps typically run on a lean business model that requires significant scale to achieve profitability, given their relatively modest average per-user monetisation. In significant part, they rely on network effects supported by the goodwill of users to achieve such scale.

Given their locations of incorporation or headquarters in the U.S., large-scale class actions in state or federal court would be among the largest risks for dating apps. Multi-state class actions present an especially notorious risk of judgments with the potential for bankrupting a company. This is particularly so where the defendant is a startup business or lacks strong financial reserves. Court-based litigation will typically also constrain a business to "air its dirty laundry" for all to see, another key risk apps would wish to avoid.

Outside the U.S., the volume and spread of dating-app users internationally means that platforms might be summoned into court in any one of hundreds of jurisdictions. This could require platforms to defend multiple costly, complex and public litigations, possibly in jurisdictions which are unfriendly to dating apps generally, or those directed at certain groups (especially LGBTQIA+ users).

Therefore, resolving disputes confidentially through arbitration under defined procedural rules, and applying specified substantive laws, can assist platforms in preserving their financial viability and goodwill, and with that their ability to engage in continued innovation, for the ultimate benefit of users.

Prospects for Bypassing Arbitration to Bring Safety or Privacy Claims in Court

Assuming a user or group of users wish to seek the types of relief and advantages that court-based litigation can offer—including class-wide permanent injunctions in class actions, structured class-action settlements and ongoing oversight, transparency and public scrutiny, and the creation of binding precedent—what prospects do they have for bypassing TOS arbitration agreements?

Contract Formation Challenges

None of the dating apps surveyed for this blogpost adopt the inconspicuous and passive "browsewrap" approach to procuring user acceptance of TOS rejected or cautioned against by courts in the early online-contracts era.

Instead, all those dating apps now adopt a form of "clickwrap," endorsed by courts in the U.S. and Australia—noting that for Australian users, given the American choice-of-law provisions, they would likely have to craft challenges to the validity of the contract primarily under U.S. law.

Therefore, as a matter of modern contract law, users should expect that it would be difficult to circumvent TOS on formation-defect grounds.

Unconscionability Doctrines

After formation challenges, the next place users might look to escape an arbitration agreement could be on enforceability grounds under doctrines of unconscionability.

However, common-law formulations of unconscionability are notoriously difficult to invoke. Under the law of most U.S. states—again the likely governing law—typically both procedural and substantive unconscionability must be present, with unfairness or oppression rising to a level that "shocks the conscience."

Legislative efforts in Australia, however, have established a lower bar compared to judicial doctrines.

In particular, joint efforts between state and federal governments in 2009 led to the enactment of special unconscionability and unfair terms regimes in the *Australian Consumer Law* ("ACL").

Importantly, Australian courts have confirmed that the ACL cannot be circumvented by contractual choice-of-law provisions. So, these statutory requirements would ostensibly apply mandatorily in any context where a plaintiff's claim arises out of a dating app's carrying on business in Australia.

The ACL lists illustrative examples of where terms can be considered unfair, including conferral of unilateral modification rights, limitations on rights to sue, and curtailment of rights to present evidence. Each of these might be relevant to a plaintiff seeking to challenge dating-app TOS.

To date, in the specific context of dating-app TOS, unfair-terms challenges appear to be judicially untested.

That said, under the three-part test that applies under the ACL, a business can prevail by showing its terms reasonably further a legitimate business interest. In an arbitration-agreement context, the Federal Court of Australia has already handed wins to businesses against unfair-terms claims, holding, for instance, that "the avoidance of litigation in multiple jurisdictions around the world is a legitimate business interest worthy of protection."

Therefore, on statutory enforceability grounds, prospects for a challenge would also seem relatively limited.

Arbitrability Vulnerabilities

A last avenue for challenges might be simple non-arbitrability, given that Australian courts have recognised the general possibility that a dispute with a strong public interest may not be suitable for arbitration.

In a safety or privacy context, especially if the claims relate to systemic patterns of conduct by a dating app, the argument would be that this subject matter implicates compelling public interests. On that basis, the argument might run that courts should find, for example, that the subject matter is not capable of settlement by arbitration under section 7 of the *International Arbitration Act 1974 (Cth)* ("IAA"). Those arguments could be bolstered by a user pointing to current efforts to

strengthen protections under the *Privacy Act 1988* (Cth) ("*Privacy Act*") and the Commonwealth Government's recent pressure on dating apps which led to their voluntary adoption of the *Online Safety Code for Dating Services* (which commenced on 1 October 2024).

However, few examples exist in Australia where a party has prevailed on non-arbitrability grounds. Courts might also be concerned about the knock-on effect that such a decision could have on the otherwise pro-arbitration stance of Australian courts.

Message from Lawsuits Abroad

Nevertheless, the existence of several ongoing class actions and individual court proceedings against dating apps in the UK and the U.S.—some of which, given filing dates, would appear to have survived preliminary attempts to compel arbitration—does suggest there could be some leeway for plaintiffs to force the hand of dating apps in litigation in Australian courts.

Government Steps to "Bridge the Gap" between Arbitration and User Protection

In any event, governments seem to be taking matters into their own hands, intervening through public-law enactments and regulatory pressure to protect user interests where arbitration may have proved ineffective or inappropriate.

Paralleling steps by some U.S. states to promote safety and privacy, Australia at a federal level has been moving to strengthen general privacy legislation and to encourage the adoption of safety codes.

Existing protections under the *Privacy Act* allow individuals to make complaints to the Australian Information Commissioner, who may in turn commence enforcement action against a business, bypassing arbitration agreements.

Recent amendments to the *Privacy Act* have further strengthened those powers and added additional measures, including allowing courts to order compensation to privacy complainants during an enforcement action.

Also, the *Online Safety Code for Dating Services* that recently took effect obligates dating apps to take substantial steps to enhance the safety of users. This includes requiring platforms to roll out effective mechanisms for user safety and privacy complaints and to cooperate proactively with law enforcement agencies.

Conclusion

User safety and privacy clearly highlight the tension between the benefits of arbitration and some of its shortcomings.

For those in the arbitration space, something to monitor will be whether plaintiffs increasingly find success suing dating apps on safety and privacy claims in court, especially those implicating

widespread issues.

In the meantime, however, public law and government interventions will likely continue to operate as the main avenue for improving the safety and privacy of dating-app users.

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