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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023

Availability of injunctive relief in arbitration

THE EXTENT TO WHICH CALIFORNIA ARBITRATORS HAVE THE POWER TO GRANT INJUNCTIVE RELIEF

An injunction is a powerful tool that requires one party to a dispute to take, or refrain from taking, a specified action when necessary to protect the legal rights of another party. Temporary injunctions, such as TROs or preliminary injunctions, are issued pending the disposition of the merits of an ongoing case, and permanent injunctions are issued based on the adjudicated merits of a case. The purpose of this article is to consider to what extent California arbitrators have the power to grant injunctive relief.

The contractual nature of arbitration agreements

The prevailing arbitration statutes are contained in California Code of Civil Procedure sections 1280-1294 (collectively known as the "California Arbitration Act" (CAA)). While these code sections do not explicitly convey to an arbitrator the power to grant injunctions, they underscore the validity, enforceability, and irrevocability of a written agreement to submit a claim to arbitration. Since arbitration is a creature of contract – an agreement between parties to settle disputes privately – the answer as to what remedies are available to the arbitrator may be found in the arbitration agreement's language.

The parties to an arbitration agreement will, generally speaking, take one of three approaches: (1) Incorporate by reference specific rules promulgated by one of several different arbitral organizations, such as (and predominantly) JAMS or AAA; (2) provide for the availability of any remedies that a court could grant; or (3) attempt to limit the arbitrator's remedial powers to something less than a judge would have if the matter were in court.

- *Incorporation.* The majority of arbitration clauses in commercial and consumer contracts incorporate by reference specific rules generated by different arbitral organizations, such as (and predominantly) JAMS or AAA (American Arbitration Association), each of whom has sets of rules that hit the issue of injunctive relief head-on. For example, AAA's Commercial Rules specifically empower an arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable." (Commercial Arbitration Rules of the American Arbitration Association Rule 49 (a). JAMS has a very similar provision in Rule 24 (c) of its Comprehensive Arbitration Rules and Procedures.)
- *Remedies equivalent to those available in court.* Many arbitration agreements provide language to the effect that *"The arbitrator shall have the authority to award any relief authorized by law in connection with the asserted claims or disputes."* This would generally authorize the arbitrator to issue injunctive relief.
- *Limitations on the arbitrator's remedial powers.* Some arbitration agreements limit an arbitrator's power to issue injunctive relief. If the arbitration agreement provides that this remedy is reserved to the court, then the arbitrator would not have the power to issue an injunction, and the petitioner would be required to seek relief in court.

Sometimes the arbitration agreement limits the arbitrator's power to award injunctive relief without reserving the power to court. In other words, a petitioner has no forum to seek injunctive relief. In this situation, an arbitrator clearly does not have the power to award injunctive relief – the petitioner's only hope of pursuing injunctive relief will be to attack the enforceability of the arbitration agreement in court. This challenge will be based on available defenses under current California law (such as incapacity, fraud, duress, impossibility, violation of public policy [unconscionability]).

However, if the petitioner is seeking injunctive relief *that would benefit not only that petitioner, but the public at large,* the answer becomes more complex. This topic is discussed in more detail below.

Generally speaking, the party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the opposing party bears the burden of proving any defense. (*Pinnacle Museum Tower Association v. Pinnacle Market Development U.S., LLC* (2012) 55 Cal.4th 223, 226.)

Preliminary injunctions issued before the commencement of the arbitration process

Often, the agreement to, or appointment of, a single qualified arbitrator or an arbitration panel can be a protracted process. The procedures for appointment set forth in the arbitration agreement may be complex, or there may be issues with the availability of arbitrators possessing the required qualifications. In the meantime, an injunction may be urgently needed – for example, to prevent the disposal or spoilation of evidence, to protect the property that is the subject of the arbitration or to prevent the disclosure of information claimed to be protected or confidential.

In exigent circumstances, even where arbitration is expressed as the *exclusive* forum to resolve the parties' disputes, in California, a party to an arbitration agreement has two options: (1) to file an application in court seeking a provisional remedy, such as a TRO or preliminary injunction (Code Civ. Proc., § 1281.8) or, (2) with the consent of both parties, to have an arbitrator determine the issue of the injunction through a so-called "emergency relief" arbitral procedure.

JAMS, AAA, and other major arbitral organizations have established these emergency relief procedures by

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appointing and empowering an emergency arbitrator to grant relief necessary to protect a vital interest before the convening of the arbitration panel (this arbitrator will be involved for the sole purpose of the consideration of emergency relief and will not be part of the panel once convened).

When deciding which option to pursue, there are several considerations:

- *Consent*. Does the arbitration agreement allow for an emergency relief arbitral procedure, either expressly or by incorporation of emergency relief-specific rules of an arbitral body?
- *Appealability.* According to current California case law, while a preliminary injunction issued by a court is appealable, a preliminary injunction obtained from an emergency arbitrator is not. In the recent case of *Kirk v. Ratner* (2022) 74 Cal.App.5th 1052, the court of appeals upheld a superior court ruling that, because the emergency arbitrator's ruling was not an "award" under California Code of Civil Procedure section 1283.4, the court lacked jurisdiction to vacate the injunction.
- *Confidentiality.* Generally, a party will be able to maintain confidentiality in arbitration, while the same may not be true of an application to superior court.
- *Efficiency.* The emergency relief available through the arbitral organizations that offer emergency relief procedures provide an arbitrator within 24-48 hours.
- *Expertise*. While an arbitrator appointed to award emergency relief may not have all of the qualifications set forth in the arbitration agreement, the larger arbitral organizations will likely be able to identify from their roster an arbitrator with at least some expertise in a given subject matter where no such guarantee exists in a court proceeding.

Public injunctive relief and unconscionability

A petitioner may seek injunctive relief that, if awarded, will benefit groups or individuals who are not direct parties to the arbitration. This type of injunctive relief has been termed "public injunctive relief" by state and federal courts. In recent years, disputes have arisen regarding the enforceability of contracts that purport to submit claims for public injunctive relief to a private arbitrator for resolution. The law governing that determination has shifted repeatedly.

In the past decade, California state appellate courts, on the one hand, and federal appellate courts, on the other, have expressed contrary views regarding the Federal Arbitration Act (FAA) and its preemptive effect on state rules that purport to exempt claims – including claims for public injunctive relief – from arbitration per the terms of arbitration agreements. This has resulted in uncertainty among litigants regarding the enforceability of their arbitration agreements, especially where the agreements purport to submit public injunctive relief claims to arbitration.

The Broughton-Cruz rule

The California Supreme Court initially found claims for public injunctive relief inconsistent with arbitration and thus inarbitrable – the so-called "Broughton-Cruz" rule (*Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, and *Cruz v. PacifiCare Health Systems, Inc*., (2003) 30 Cal.4th 303.)

The impact of Concepcion

In 2011 in *AT&T Mobility LLC. v. Concepcion* (*AT&T Mobility LLC. v. Concepcion* (2011) 563 U.S. 333, a landmark ruling with massive implications for representative actions, the U.S. Supreme Court held that state laws which categorically render unenforceable class action waivers in arbitration agreements are preempted by the FAA, the principal purpose of which is to ensure that arbitration agreements are enforced according to their terms, even if those terms include a class action waiver.

The court reasoned that "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA." The *Concepcion* ruling meant that courts must now enforce the terms of an arbitration agreement in the same way they would enforce the terms of any other contract, but (and crucially) subject to the same valid defenses. Following the decision in *Concepcion*, the Ninth Circuit, U.S.D.C. Central District of California, and multiple state courts all held that the FAA preempts the *Broughton-Cruz* rule (*Ferguson v. Corinthian Colleges, Inc.* (9th Cir. 2013) 733 F.3d 928, 937.)

The McGill rule

In 2017, this issue was brought before the California Supreme Court in *McGill v. Citibank NA*. (2017) 2 Cal.5th 945, 961. In *McGill*, the arbitration agreement required all disputes to be submitted to arbitration. But the agreement also included a waiver of the right to pursue public injunctive relief, including "in any litigation in any court," effectively cutting the plaintiff off from any forum to seek public injunctive relief.

The court in *McGill* invoked section 2 of the FAA, which permits arbitration agreements to be declared unenforceable upon "such grounds as exist at law or in equity for the revocation of any contract." Finding the all-forum waiver contained in the arbitration agreement to be "contrary to California public policy and thus unenforceable under California law" specifically Civil Code section 3513 (providing that a law established for a public reason cannot be contravened by a private agreement), the Court held the arbitration agreement *"invalid and unenforceable under California law*."

In reaching this conclusion, the Court distinguished between claims seeking *private injunctive relief* – which it defined as relief to prevent injury to the individual plaintiff (or group of similarly situated individuals) and only benefitting the public incidentally (if at all) – and claims seeking *public injunctive relief*, which it defined as prohibiting "unlawful acts that threaten future injury to the general public" and only benefitting the plaintiff incidentally or as a member of the general public.

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Post-McGill

Much of the post-*McGill* case law has focused on the above distinction and definitions. (See e.g., *Blair v. Rent-A-Center, Inc.* (9th Cir. 2019) 928 F.3rd 819, 822; *Hodges v. Comcast Cable Communications, LLC*, (9th Cir. 2021) 12 F.4th 1108; *Capriole v. Uber Techs., Inc.* (9th Cir. 2021) 7 F.4th 854, 868; *Cottrell v. AT&T, Inc.* (9th Cir. October 26, 2021) U.S. App. LEXIS 32093, WL 4963246 – decisions clarifying the types of relief that can appropriately be considered "public injunctive relief").

In a 2021 decision of particular significance to representative actions, *DiCarlo v. MoneyLion* (9th Cir. 2021) 988 F.3d 1148, the Ninth Circuit held that an arbitration agreement that prevented the petitioner from pursuing an action as a private attorney general was not unenforceable under *McGill*. The court found that to be unenforceable under *McGill*, the arbitration clause had to *both* require all claims to be arbitrated *and* prohibit an award of public injunctive relief. Since the petitioner was still able to seek public injunctive relief as a remedy in her individual lawsuit, the *McGill* standard was not met and the matter was compelled to arbitration.

In a recent decision, the California Court of Appeals did not find the *MoneyLion* reasoning convincing. In *Jack v. Ring, LLC* (2023) 91 Cal.App.5th 1186, the court, ultimately distinguishing *MoneyLion*, held that language limiting injunctive relief in arbitration to the individual party seeking relief and only to the extent necessary to provide relief warranted by the party's individual claim is both commonly understood by parties to arbitration agreements to preclude public injunctive relief in arbitration, and interpreted by courts to preclude public injunctive relief in arbitration.

While the *McGill* rule remains good law in California and the Ninth Circuit, at least one federal case from a district court in the Eighth Circuit (*Swanson v. H&R Block* (W.D.Miss.2020) 475 F.Supp.3d 967, 978) has disagreed with *McGill* and its progeny, ruling that the FAA preempts the *McGill* rule. However, so far, no federal cases above the district court level have found the same.

It is also important to note that the effect of applying the *McGill* rule to arbitrability of claims issues will largely depend upon the balance of the terms of the subject arbitration agreement. Even in an agreement purporting to deprive the petitioner of public injunctive relief in any forum, the range of outcomes for a petitioner's claim(s) may differ tremendously depending upon the existence and terms of any severability or "poison pill" provision.

A potential expansion of claims supporting a request for public injunctive relief

The significant rulings on public injunctions have focused on claims seeking relief under various California consumer protection statutes, namely the California Unfair Competition Law; the California False Advertising Law and California Consumer's Legal Remedies Act, all of which expressly provide for injunction as a remedy. Recently, however, a claim under the Fair Employment and Housing Act (FEHA) (Gov. Code, §§ 12900 et seq.) was found to be a type of claim that could support a request for public injunctive relief within the *McGill* definition.

In *Vaughn v. Tesla* (*Marcus Vaughn et al. v. Tesla, Inc.* (2023) 87 Cal.App.5th 208), the Court of Appeal held that a FEHA claim based on a racially hostile work environment could support a claim for public injunctive relief. This decision holds for the first time in California caselaw that FEHA can be the basis of a public injunction claim.

The *Vaughn* court reasoned that, since the California Supreme Court has held injunctive relief is available under FEHA (*Aguilar v. Avis Rent A Car Sys.*, (1999) 21 Cal.4th 121, 131-132), the determinative issue in applying *McGill* is not the lack of an express provision in FEHA authorizing injunctive relief, but, instead, whether the relief sought "has the primary purpose and effect of prohibiting unlawful acts that threaten injury to the general public." (*McGill, supra* 2 Cal.5th 951.) The court found that the relief being sought by Vaughn did indeed have such a primary purpose. The reasoning in *Vaughn* could potentially implicate claims based on other FEHA-protected classes (noting that disputes based on sexual assault or harassment are already immune from arbitration) and non-FEHA claims where courts have recognized injunctive relief as an available remedy notwithstanding the absence of an express statutory entitlement thereto.

Enforcement of arbitrator-issued injunctive relief

One of the limitations to an arbitration award, whether an injunction, damages or other relief, is that standing alone, contractual arbitration awards have only the force and effect of a contract between the parties to the arbitration, unless court proceedings confirm them. Unlike a judgment obtained in court, an arbitrator's award is not directly or independently enforceable. (*Cinel v. Christopher* (2012) 203 Cal.App.4th 759, 765.) However, once confirmed by a court and rendered to judgment, "the judgment so entered has the same force and effect as and is subject to all the provisions of law relating to a judgement in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered." (Code. Civ. Proc., § 1287.4.)

Judicial confirmation of an award is considered a prudent course even where there is a reasonable degree of confidence that the "losing" party will voluntarily comply with it, particularly in a situation that involves ongoing activities, as is often the case with an injunction.

In California, judicial enforcement of an arbitration award can be achieved under the FAA (9 USC §§ 1-16, 201-208, 301-307) or under the CAA (Code Civ. Proc., §§ 1280-1294.2). The choice may be determined by a choice of law provision in the contract itself, especially

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if it incorporates an arbitral organization's terms; e.g., JAMS Comprehensive Arbitration Rules & Procedures Rule 25 provides that enforcement will be controlled and conducted in conformity with the FAA or applicable state law.

While detailed discussion regarding enforcement and other post-arbitration award procedures is outside the scope of this article, I can think of no better use of my available space than to refer the reader to John P. Blumberg's excellent article "Post Arbitration Award Procedures" that can be found at https://www.advocatemagazine.com/article/2020-november/post-arbitration-award-procedures.

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