

Drafting an Enforceable Franchise Agreement Arbitration Clause

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The U.S. Supreme Court declared more than two decades ago that the Federal Arbitration Act (FAA)¹ embodies “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”² The purpose of the Act, according to the Court, is to “move the parties out of court and into arbitration as quickly as possible.”³ Thus, in resolving challenges to an arbitration clause, the FAA “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”⁴



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With pronouncements like these coming from the highest court in the land, one would think that enforcing arbitration clauses in commercial contracts would be easy. Think again. In recent years, arbitration clauses have come under increased attack in many state courts, and even from some circuits in the federal system. The reasons vary. Some judges recoil at the idea of arbitration at all, believing it to be an inherently unfair and inferior method of resolving disputes.⁵ Others find certain terms of particular clauses objectionable because of the perceived overreaching by “big business” against the “little guy.”⁶ Although these decisions are directly at odds with the U.S. Supreme Court’s pronouncement that the “federal policy is . . . to ensure the enforceability, according to their terms, of private agreements to arbitrate,” they are nevertheless part of the judicial landscape that a franchisor must consider when drafting its arbitration clause.⁷

Does this mean that a challenge to the arbitration clause in a franchise agreement is likely to succeed? No. Most courts still follow the FAA and enforce franchise agreement arbitration clauses, and the chance of a franchisee successfully avoiding arbitration is still quite low. But the increased willingness of some judges to find creative ways to invalidate arbitration agreements requires franchisors and their counsel to draft clauses in a way that maximizes the likelihood of successful enforcement in even the most hostile jurisdictions.

Obviously, there is no single “model” arbitration clause. Most of the clauses in existing agreements ought to be enforced under a proper application of established law. More-

over, what will work for a particular franchisor depends on the particular needs of the franchise system. There are plenty of variations on some of the sample provisions set forth below that would be enforced by most courts and be workable for the franchisor. In addition, as with any area of the law, the law of arbitration is not static, and a franchisor needs to review regularly its arbitration agreement in light of new decisions. For example, as discussed below, the Ninth Circuit’s decision in *Ticknor v. Choice Hotels International, Inc.*,⁸ which invalidated an arbitration agreement under Montana law for a lack of mutuality, is currently at odds with the great weight of authority from other state and federal courts. Thus, at this point a franchisee challenging an arbitration clause outside the Ninth Circuit on mutuality grounds is still likely to fail. If, however, other state and federal courts begin striking down arbitration clauses for the reasons identified by the Ninth Circuit in *Ticknor*, the franchisor should be prepared to change the standard terms of its arbitration clause to eliminate the mutuality argument from the franchisee’s arsenal of defenses.

The Basics

As a starting point, any arbitration agreement needs to identify the parties, the scope of the claims to be arbitrated, the arbitration provider, the applicable arbitration rules, and the site of the arbitration. Here is a sample provision that addresses each question, with an explanation of its terms:

The parties further agree that

any controversy or claim arising out of or relating to this Agreement or the breach thereof (including, but not limited to contract, tort and statutory claims) shall be settled by arbitration under the auspices of [name of arbitration provider], pursuant to the [name of provider’s applicable arbitration rules] and judgment rendered on the arbitration award may be entered in any court having jurisdiction thereof. The costs of the arbitration will be borne equally by the parties. The parties agree that [city where franchisor is headquartered] shall be the site for all hearings held under this paragraph, and that neither party shall pursue class claims and/or consolidate the arbitration with any other proceedings to which the [franchisor] is a party.

The Scope

A franchisor that wants to resolve its disputes with franchisees through arbitration obviously wants to make its clause broad enough to cover claims that involve the franchise relationship. As the Second Circuit has observed, an arbitration agreement that covers any claims “arising out of or relating to” a contract is a “paradigm” of a broad arbitration clause, and the foregoing language would make it extremely difficult for a franchisee to argue successfully that its claims against the franchisor are outside the scope of the clause.⁹

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The Tribunal and the Operative Rules

Many franchise agreement arbitration clauses designate the American Arbitration Association (AAA) as the arbitration provider; however, many practitioners have found AAA arbitrations to be potentially expensive, disjointed affairs that can drag out for years and produce less than satisfying results. Before reflexively including a standard form AAA clause in the franchise agreement, the franchisor should compare the AAA to other arbitration organizations, such as JAMS, another nationwide alternative dispute resolution provider, or local arbitration organizations, both for arbitrator quality and the operative rules.¹⁰ Although it is impossible to generalize about all of the differences between the AAA and JAMS, it is fair to say that there are more former judges on the JAMS panel than are found on a typical AAA roster; that JAMS arbitrators also tend to be more expensive;¹¹ and that the JAMS rules include more of the formalities and procedures of litigation than are found in the AAA's Commercial Arbitration Rules.

The Site of the Arbitration

Clauses that require a franchisee to arbitrate in the franchisor's home state have spawned a flurry of litigation in recent years, in part because the franchise statutes of several states purport to invalidate such agreements. Most courts have held that the FAA preempts state law restrictions of this sort, and have enforced the franchise agreement arbitration clause according to its terms.¹² But there are exceptions. For example, many franchise offering circulars contain a statement (typically required by state regulators as a condition of selling a franchise) that a provision requiring the arbitration or litigation to be conducted outside the franchisee's home state is unenforceable under state law. Under those circumstances, a number of courts have held that there was no agreement to arbitrate in the franchisor's home state because the franchisee had a reasonable expectation that the arbitration clause incorporated the state law restrictions on the site of the arbitration.¹³ In addition, in *Bolter v. Superior Court*, the California Court of Appeal invalidated a provision of a franchise agreement that required the franchisees to arbitrate in Utah on the ground that arbitration outside the franchisees' home state was unconscionable.¹⁴

Despite this authority, in most jurisdictions a franchisor should be able to enforce an arbitration clause that requires franchisees to arbitrate in its own state. To reduce the chance that a franchisee could successfully argue that he or she was misled about the franchisor's intention to enforce the parties' designation of the locale for the arbitration, a franchisor should consider adding the following language somewhere in its arbitration agreement:

Clauses that require a franchisee to arbitrate in the franchisor's home state have spawned a flurry of litigation in recent years.

Any disputes concerning the enforceability or scope of the arbitration clause shall be resolved pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA), and the Franchisee acknowledges that, notwithstanding any contrary language in this Agreement or in the Franchisor's Uniform Franchise Offering Circular, the FAA preempts any state law restrictions on the enforcement of the arbitration clause in this Agreement according to its terms, including any restrictions on the site of the arbitration.

In addition, to make it less likely that a decision invalidating the venue provision of an arbitration clause would invalidate the clause in its entirety, the franchisor should consider adding an arbitration-specific severability clause like the one set forth below:

In the event that any provision of this arbitration agreement is unenforceable, that provision is severable from the remainder of this arbitration clause, and the balance of the arbitration agreement shall remain in full force and effect. In addition, any ruling invalidating any other portion of the Franchise Agreement shall not affect the validity of this arbitration clause.

The Parties

Unless an agreement to arbitrate specifically permits class or consolidated arbitrations, courts typically have not required parties to an arbitration agreement to arbitrate claims on a groupwide basis.¹⁵ Despite the clear weight of authority, however, a franchisor that wants to avoid the possibility of classwide or consolidated arbitrations would be well served to include language in its agreement that expressly prohibits them. For example, in *Sanders v. Kinko's, Inc.*,¹⁶ the California Court

of Appeal, applying California law, held that the trial court had the discretion to order an arbitration to proceed as a class action because the arbitration clause was silent on the issue. There is no reason for the franchisor to risk a similar result.

Franchisors should be aware that in consumer cases, provisions barring classwide arbitrations have been successfully challenged in some jurisdictions on unconscionability grounds. In *Szetela v. Discover*,¹⁷ another recent California Court of Appeal decision, the court held that an arbitration clause in a credit card agreement was unconscionable and violated California public policy because the contract barred consumers from pursuing class claims. Remarkably, the court barely mentioned the FAA in holding that the arbitration clause was unenforceable. Instead, it simply found that inclusion of the clause was unconscionable because the provision barring class actions supposedly gave Discover "a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies."¹⁸

As one commentator has noted, the applicability of arbitration decisions involving consumers to franchising is suspect because courts have frequently distinguished between

consumers and franchisees for purposes of enforcing agreements to arbitrate.¹⁹ Indeed, the decision in *Szetela* was heavily influenced by the court's belief that a class action was the only practicable means for the plaintiff to pursue a claim worth only \$29. Still, a franchisor doing business in a state like California, which has produced a recent flurry of anti-arbitration rulings, needs to understand that there is at least some risk that a state or federal court applying California law may attempt to extend *Szetela* and similar decisions to invalidate an arbitration clause that prohibits class claims.

Confirmation of the Award

The sample provision also expressly provides that each side consents to confirmation of the arbitration award as a final judgment in any court having jurisdiction over the dispute. Section 9 of the FAA provides that a court may confirm an arbitration award as a final judgment if the arbitration clause provides that "a judgment of the court shall be entered upon the award made pursuant to the arbitration."²⁰ As one commentator has noted, there is a split of authority on whether an arbitration clause must explicitly provide for judicial confirmation of an award before the award can be confirmed under section 9 of the FAA.²¹ Most federal courts have held that while the agreement to arbitrate must include some indication that the parties intend to be bound by an award, at least two circuits have held that language in an arbitration agreement stating that the arbitrator's decision shall be "final and binding" did not satisfy the requirements of section 9.²² Therefore, to eliminate any possibility that a federal court would decline to enforce an award, the arbitration clause should explicitly provide that both parties consent to confirmation of the award as a final judgment.

Other Considerations

Excluding Certain Disputes

For most franchisors, it is advisable to consider including a "carve out" in the arbitration clause that permits the franchisor to obtain injunctive relief from a court in the event that the franchisee is engaged in the unauthorized use of the trademark. For example, if the franchise has been terminated for the franchisee's violations of health and safety standards in operating the franchised business, it may cause incalculable harm to force the franchisor to wait for a full-blown arbitration to shut down the business. Although most arbitration rules give an arbitrator the authority to award injunctive relief, the franchisor's right to obtain an injunction against the franchisee's improper use of the mark may be of little practical value if the franchisee is able to prevent the selection of an arbitrator by initiating litigation in state court over the enforceability of the arbitration clause. Giving the franchisor an expe-

ditional alternative method to enforce its trademark rights in federal court would therefore afford it some protection against the diminution of the mark by the former franchisee.

The following sample provision should accomplish this purpose:

Notwithstanding the arbitration clause in paragraph 1(a), the Franchisor may bring an action for injunctive relief in any court having jurisdiction to enforce the Franchisor's trademark or proprietary rights, in order to avoid irreparable harm to the Franchisor, its affiliates, or the franchise system as a whole.

As noted above, a franchisor that "carves out" some disputes from the scope of the arbitration clause may face the argument that the agreement to arbitrate fails for a lack of mutuality. Despite the Ninth Circuit's highly publicized decision in *Ticknor*,²³ which struck down a similar arbitration clause under Montana law for a failure of mutuality, the overwhelming majority of state and federal courts have rejected the mutuality defense where the arbitration clause is part of a franchise agreement that is supported by consideration.²⁴ As the Second Circuit observed, all versions of the mutuality

doctrine are now "largely dead letters" and "defunct" in arbitration cases because the general contract law of most states does not require the parties to have identical rights and obligations in order for a contract to be enforced.²⁵ Rather, as long as there is consideration for the contract as a whole, the specific clauses

within that contract (including arbitration clauses) cannot fail for a lack of mutuality.²⁶

Discouraging Franchisees from Trying to Avoid Arbitration

Oftentimes a franchisee will sue a franchisor's area representative in state court in an effort to prevent the franchisor from removing the case to federal court, leaving an alternative route open for the franchisee to avoid arbitration.²⁷ To discourage this kind of gambit, a franchisor should consider adding the following language to its arbitration agreement:

The sole entity against which the Franchisee may seek damages or any remedy under law or equity for any arbitrable claim is the Franchisor or its successors or assigns. The Franchisee agrees that the shareholders, directors, officers, employees, agents and representatives of the Franchisor and of its affiliates, shall not be liable nor named as a party in any litigation or other proceedings commenced by the Franchisee where the claim arises out of or relates to this Agreement. The Franchisee further agrees that each of the foregoing parties are intended beneficiaries of the arbitration clause, and that all claims against them that arise out of or relate to this Agreement must be resolved through arbitration with the Franchisor.

In addition, to reduce the likelihood that a franchisee will reflexively initiate litigation in his or her state court if a dispute arises, the franchise agreement should force the party seeking to avoid arbitration to bear the costs of any unsuccessful attempt to litigate the dispute:

[Most] courts have rejected the mutuality defense where the arbitration clause is part of a franchise agreement that is supported by consideration.

If, before an Arbitrator's final decision, either the Franchisor or the Franchisee commences an action in any court of a claim that arises out of or relates to this Agreement (except for the purpose of enforcing the arbitration clause or as otherwise permitted by this Agreement), that party will be responsible for the other party's expenses of enforcing the arbitration clause, including court costs, arbitration filing fees and attorneys' fees.

Limitations on Damages

There are a number of provisions often included in arbitration clauses that limit a franchisor's risk from an adverse result. These include prohibitions on punitive damages, consequential damages, and caps on compensatory damages.²⁸ These provisions may be desirable to include in other portions of the franchise agreement (or at least in separate paragraphs of the dispute resolution section), but are more likely to be viewed by some courts as examples of franchisor overreaching.²⁹ Accordingly, a franchisor that wants to limit its risk should consider including these clauses in other sections of the contract, and make clear that any limitations on damages are severable from the arbitration agreement itself. That way, if a court concludes that the damage limitation is unenforceable under an applicable state or federal statute, the arbitration clause will not be affected.

Heightened Standard for Judicial Review

Under the FAA and most state arbitration statutes, arbitration awards may only be set aside where (1) the award was procured by fraud, corruption, or undue means; (2) the arbitrator exceeded the scope of his or her authority, or failed to issue a final, definite award; (3) an arbitrator failed to disclose a relationship with one of the parties, or otherwise displayed "evident partiality"; or (4) the arbitrator was guilty of misconduct in refusing to postpone the hearing, or refusing to hear evidence pertinent and material to the dispute.³⁰ As a result, arbitration awards are virtually impossible to challenge for errors of law or fact. As the U.S. Supreme Court explained, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."³¹

If a franchisor or other established business arbitrates with any degree of regularity, chances are that it will eventually be on the losing end of an arbitration that is explainable by neither the law nor the record. To cope with this risk, some businesses have added a provision to their standard arbitration agreements that provides for a heightened standard of judicial review beyond the grounds identified in the FAA and comparable state arbitration statutes. One drawback of this approach is that it would make favorable arbitration awards much harder to enforce because the franchisee would have the right to have the award subject to the heightened standard of review. A second problem with this approach is that it may not be enforceable, and could cause a court to invalidate the arbitration agreement in its entirety. Although some courts have enforced such provisions, this is far from a settled issue, and there is a strong argument that as a jurisdictional matter, parties cannot compel a federal court to apply a different stan-

dard of review to an arbitration agreement than the one provided for in the FAA.³² As a result, any franchisor that wants to enhance its ability to challenge the occasionally misguided award may risk invalidating its arbitration agreement as a whole. For those franchisors interested in managing their risk by avoiding the prospect of jury trials, this does not seem to be a sensible trade-off.

Conclusion

No matter what a franchisor does to make its arbitration clause seem balanced and fair, there are some judges who will always believe that arbitration is an inferior method of resolving disputes and will go to great lengths to invalidate a seemingly bulletproof agreement to arbitrate. But, owing to the presumption in favor of arbitration embodied in the FAA, a franchisor should still be able to draft a straightforward franchise agreement arbitration clause that will be enforceable in the overwhelming majority of cases.

Endnote

1. 9 U.S.C. §§ 1-16 (1925), as codified July 30, 1947 (61 Stat. 669) and amended Sept. 3, 1954 (68 Stat. 1233); July 31, 1970 (84 Stat. 692); Oct. 1988 (Pub. L. No. 100-669); Aug. 15, 1990 (Pub. L. No. 101-369); and Dec. 1, 1990 (Pub. L. Nos. 101-669 and 101-702).

2. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1984).

3. *Id.* at 22.

4. *Id.* at 24-25.

5. The reaction of two Montana Supreme Court judges to the U.S. Supreme Court's decision in *Doctor's Assocs., Inc.(DAI) v. Casarotto*, 517 U.S. 681 (1996), is an extraordinary example of the hostility to arbitration that can be encountered in some state courts. In *Casarotto*, the U.S. Supreme Court reversed and remanded the Montana Supreme Court's decision that the arbitration clause in the Subway franchise agreement was unenforceable under Montana law. On remand, two of the Montana Supreme Court judges who issued the original decision invalidating the arbitration clause refused to sign an order staying the case pending arbitration, reasoning that "[w]e cannot in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the U.S. Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." *Casarotto v. Lombardi*, No. 93-488 (Mont. Sup. Ct. July 16, 1996). Mr. Kennedy's firm represented DAI, the Subway franchisor, in the U.S. Supreme Court case.

6. *See, e.g., Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001) (invalidating an arbitration agreement for lack of mutuality under Montana law), *cert. denied*, 122 S. Ct. 1075 (2002); *Bolter v. Superior Court*, 104 Cal. Rptr. 2d 888 (Cal. Ct. App. 2000), *review denied*, 2001 Cal. LEXIS 4031 (2001) (declaring unconscionable an out-of-state forum selection clause in an arbitration agreement).

7. *Volt v. Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).

8. 265 F.3d 931 (9th Cir. 2001).

9. *See Collins & Aikman Prod. Co. v. Bldg. Sys.*, 58 F.3d 16, 21-23 (2d Cir. 1995); *accord, Sarju Ltd. P'ship v. Choice Hotels*, No. Civ.A.3:01-CV-2605-X, 2002 WL 107171, at *2 (N.D. Tex. Jan. 2002) (observing that broad arbitration clauses that cover "any controversy or claim arising out of or relating to" a franchise agreement "are not limited to claims that literally arise under the contract, but rather embrace all disputes having a significant relationship to the contract regardless of the label attached to the dispute" (quoting *Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998)); *Doctor's Assocs., Inc. v. Quinn*, 42 F. Supp. 2d 184, 186-67 (D. Conn. 1999). Mr. Kennedy represented the franchisor in *Quinn*.

10. The AAA rules (www.ard.org) and the JAMS rules (www.jam-sadr.com) are available online.

11. The JAMS panel in Chicago, for example, which consists primarily of retired judges, starts at \$400 per hour and reaches as high as \$600 per hour.

12. See, e.g., *Bradley v. Harris Res., Inc.*, 275 F.3d 884 (9th Cir. 2001) (holding that California statute requiring out-of-state franchisor to resolve disputes in California was preempted by the FAA); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (holding that state law restrictions on arbitrable forum selection clauses are preempted by the FAA); *KKW Enter., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50–52 (1st Cir. 1999) (citing *Hamilton* with approval, and holding that FAA preempted Rhode Island Franchise Investment Act's requirement that all claims arising out of the Act must be resolved in Rhode Island); *Mgmt. Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 856 (6th Cir. 1997) (concluding that if state law "imposed an absolute requirement of in-state arbitration notwithstanding the parties' agreement to arbitrate . . . its validity would be in serious doubt as a result of the preemptive effect of the FAA"); *M.C. Constr. Corp. v. Gray Co.*, 17 F. Supp. 2d 541 (W.D. Va. 1998) (same); *Southland Corp. v. Keating*, 465 U.S. 1, 20 (1984) (FAA preempted a provision of the California franchise law that purported to bar arbitration of claims arising under the statute). Mr. Kennedy represented the franchisor in *Hamilton*.

13. See, e.g., *Great Earth Co. v. Simons*, 288 F.3d 878 (6th Cir. 2002) (holding that franchisor fraudulently induced franchisees to arbitrate in New York by including an addendum in its offering circular that acknowledged that Michigan franchise law required all disputes to be resolved in the State of Michigan); *Laxmi Invs., LLC v. Golf USA*, 193 F.3d 1095 (9th Cir. 1999) (directing arbitration in California where statements in franchise offering circular that California law barred out-of-state arbitration precluded finding that franchisee agreed to arbitrate in Oklahoma); *Alphagraphics Franchising, Inc. v. Whaler Graphics*, 840 F. Supp. 708 (D. Ariz. 1993) (compelling arbitration in Michigan, rather than Arizona, because the franchisor's Uniform Franchise Offering Circular disclaimed any intention to arbitrate outside the State of Michigan).

14. See *Bolter v. Superior Court*, 104 Cal. Rptr. 2d 888 (Cal. Ct. App. 2000).

15. See, e.g., *Champ v. Siegel Trading Co.*, 55 F.3d 269, 374–75 (7th Cir. 1995) (refusing to order arbitrations to proceed as a class action where the arbitration clause itself was silent on the issue).

16. 121 Cal. Rptr. 2d 766 (2002).

17. 118 Cal. Rptr. 2d 862 (2002).

18. *Id.* at 869.

19. See *Edward Wood Dunham, Flattery Will Get You Nowhere*, 20 FRANCHISE L.J. 103 (2001) (quoting *Bishop v. We Care Hair Dev.*, No. 1-00-0528, 2000 WL 1459799, at *10 (Ill. App. Ct. Sept. 29, 2000)). See also *Doctor's Assocs., Inc. v. Jabush*, 89 F.3d 109 (2d Cir. 1996) (rejecting unconscionability defense to arbitration, in part, because the parties challenging the clause were franchisees rather than consumers or employees). Mr. Kennedy represented the franchisors in *Bishop* and *Jabush*.

20. 9 U.S.C. § 9.

21. See *Erika Van Ausdale, Confirmation of Arbitral Awards: The Confusion Surrounding Section 9 of the Federal Arbitration Act*, 49 DRAKE L. REV. 41, 44 (identifying split among the circuits over whether explicit language providing for judicial confirmation is not mandated by the FAA).

22. *Id.* (citing *PVI, Inc. v. Ratiopharm GmbH*, 135 F.3d 1252 (8th Cir. 1998) and *Commonwealth Enters. v. Liberty Mut. Ins. Co.*, No. CA 91-55892, 1992 WL 59019 (9th Cir. Mar. 27, 1992) (unpublished)).

23. *Ticknor v. Choice Hotels Int'l Inc.*, 265 F.3d 931 (9th Cir. 2001).

24. See, e.g., *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) (rejecting mutuality defense under Pennsylvania law); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 792 (8th Cir. 1998) ("under Oklahoma law, mutuality of obligation is not required for arbitration clauses so long as the contract as a whole is supported by consideration") (citation omitted); *Design Benefit Plans, Inc. v. Enright*, 940 F. Supp. 200, 205 (N.D. Ill. 1996) (rejecting mutuality claim under Illi-

nois law where contract as a whole was supported by consideration); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 451–53 (2d Cir. 1995), *cert. denied*, 522 U.S. 948 (1997) (*Distajo I*) (surveying cases and rejecting mutuality defense under Connecticut law, reasoning that "where the agreement to arbitrate is integrated into a larger unitary contract, the consideration for the contract as a whole covers the arbitration clause as well"); *Wilson Elec. Contractors v. Minnotte Contracting Corp.*, 878 F.2d 167, 169 (6th Cir. 1989); *Sablosky v. Edward S. Gordon Co.*, 535 N.E.2d 643, 646 (N.Y. 1989) (applying New York law); *W.L. Jordan & Co. v. Blythe Indus.*, 702 F. Supp. 282, 284 (N.D. Ga. 1988) (applying Georgia law); *LaBonte Precision, Inc. v. LPI Indus. Corp.*, 507 So. 2d 1202, 1203 (Fla. Dist. Ct. App. 1987) (applying Florida law); *Kalman Floor Co. v. Joseph L. Muscarelle, Inc.*, 481 A.2d 553, 556–60 (N.J. Super. Ct., App. Div. 1984), *aff'd*, 486 A.2d 334 (N.J. 1985); *Willis Flooring v. Howard S. Lease Constr. Co. & Assocs.*, 656 P.2d 1184, 1185 n.5 (Alaska 1983). Mr. Kennedy represented the franchisor in *Distajo I*.

25. *Distajo I*, 66 F.3d at 451, 453.

26. *Id.*

27. See, e.g., *Stuart*, 85 F.3d at 975; *Kroll v. Doctor's Assocs., Inc.*, 3 F.3d 1167 (7th Cir. 1993). Mr. Kennedy represented the franchisor in *Stuart* and *Kroll*.

28. For an excellent debate on the use and enforceability of damage limitations and other risk management provisions in franchise agreement arbitration clauses, see *Edward Wood Dunham, Enforcing Contract Terms Designed to Manage Franchisor Risk*, 19 FRANCHISE L.J. 91, 98–99 (2000); *Jean R. Sternlight, Protecting Franchisees from Abusive Arbitration Clauses*, 20 FRANCHISE L.J. 45, 70–83 (2000); and *Dunham, supra* note 19, at 103–05.

29. See, e.g., *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582 (D.S.C. 1998) (holding that an arbitration clause in an employment agreement was unconscionable where the clause deprived the employee of numerous substantive remedies under Title VII, including back pay, front pay, punitive damages, and attorneys' fees). It is unclear whether the damage limitations, standing alone, would have been enough to invalidate the clause in *Hooters* because there were numerous other objectionable provisions in the arbitration agreement. Among other things, the clause gave *Hooters* the unilateral right to virtually handpick the arbitrator and to appeal any adverse award, and was completely one-sided on the parties' prehearing obligations. Because of all of these factors, the trial court concluded that the arbitration process, as a whole, was a complete "sham . . . deliberately calculated to advantage *Hooters*"). *Id.* at 620.

30. See 9 U.S.C. § 10.

31. *United Paperworkers, Int'l v. Misco, Inc.*, 484 U.S. 29, 38 (1987); see also *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 650 (7th Cir. 2001) ("neither error nor clear error nor even gross error is a ground for vacating an award").

32. *Compare Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001) (holding that "parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own," including vacatur standards borrowed from state law) and *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997) (enforcing agreement to expand judicial review beyond grounds provided for under the FAA) with *Crowell v. Downey Hosp.*, 115 Cal. Rptr. 2d 810 (Cal. Ct. App. 2002) (holding that parties could not contract to expand the court's jurisdiction to review arbitration award, and that arbitration clause was therefore unenforceable in its entirety); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001) (holding that "parties may not contract for an expanded standard of review"); *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991) (same).