



A Compelling Case for Arbitration: Tips for Successful Arbitration Motions

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Presenters



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Agenda

- **Arbitration Agreements: An Overview**
- **Enforcing Arbitration Agreements in Court**
- **Arbitration Agreements By and Against Nonsignatories**
- **Recent Developments**

Arbitration Agreements: An Overview

Arbitration Agreements: An Overview

To Arbitrate or Not To Arbitrate

• **Benefits of Arbitration**

- No jury
- No appeals (basically)
- Limits on discovery
- Privacy & confidentiality
- Cost / speed
- Ability to select forum and fact-finder
- Avoid class actions

• **Drawbacks of Arbitration**

- Increasing fees / decreasing speed
- Fewer offramps before trial
- Unpredictability & inconsistency
- No ability to establish precedent
- Public perception and fairness issues

Arbitration Agreements: Formation

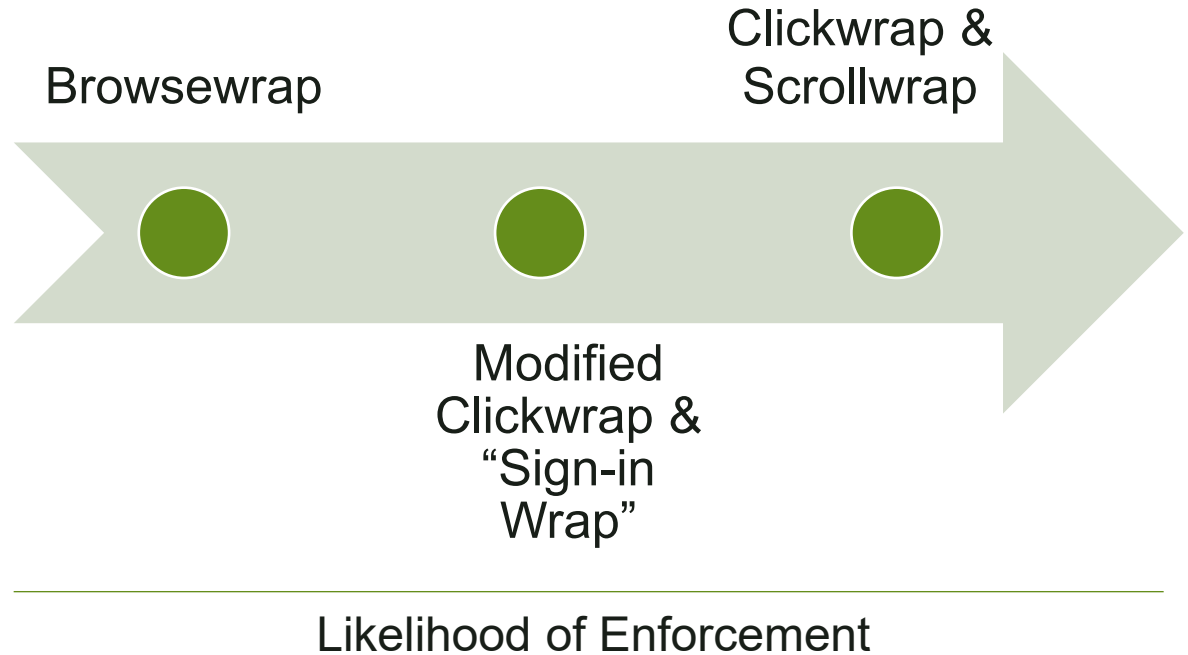
- Principles of Contract Formation
- Creating an Enforceable Contract
- Modification or Amendment of a Contract
- Unconscionability
- Best Practices

Arbitration Agreements: Formation

Principles Governing Formation of Online Contracts

- Conspicuous **notice** that the user is entering into a contract
- Conspicuous **notice** of the terms of that contract
 - “[T]he Terms are not just submerged—they are buried twenty thousand leagues under the sea.” *Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1221 (9th Cir. 2019)
- Affirmative manifestation of **assent** to those terms and the contract

Creating an Enforceable Online Contract



Browsewrap Agreements

- Website Text Gives Notice
- No Express Manifestation of Assent
- Assent Inferred from Website Use

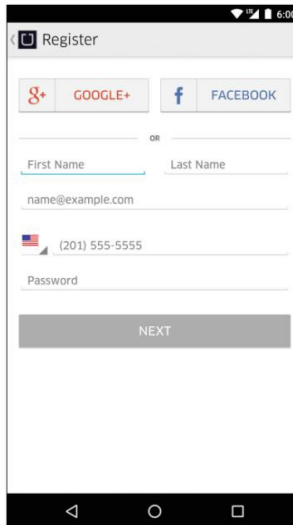
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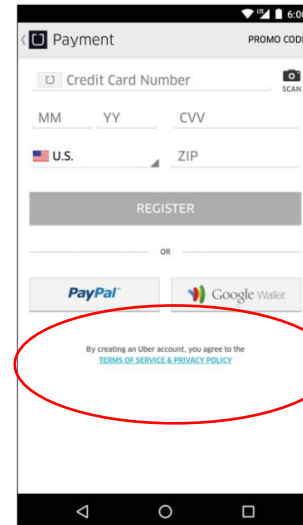
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Modified Clickwrap & “Sign-in Wrap” Agreements

- Consent Flow Discloses that Use = Acceptance
- Related, Affirmative Act Required
- Tied to Registration or Sign-Up



The screenshot shows the Uber 'Register' screen. At the top, there are buttons for Google+ and Facebook. Below these, there are input fields for 'First Name' and 'Last Name', followed by an email field with the placeholder 'name@example.com'. There is also a phone number field with a dropdown for the country (U.S.) and a field for the number '(201) 555-5555'. A 'Password' field is at the bottom. A 'NEXT' button is at the very bottom.



The screenshot shows the Uber 'Payment' screen. It has a 'PROMO CODE' field at the top. Below that is a 'Credit Card Number' field with a 'SCAN' button. There are also fields for 'MM', 'YY', and 'CVV'. A dropdown for the country (U.S.) and a 'ZIP' field are present. A 'REGISTER' button is in the middle. Below that, there are options for 'PayPal' and 'Google Wallet'. At the bottom, there is a line of text: 'By creating an Uber account, you agree to the [TERMS OF SERVICE & PRIVACY POLICY](#)'. This line of text is circled in red.

“By creating an Uber account, you agree to the [TERMS OF SERVICE & PRIVACY POLICY](#).”

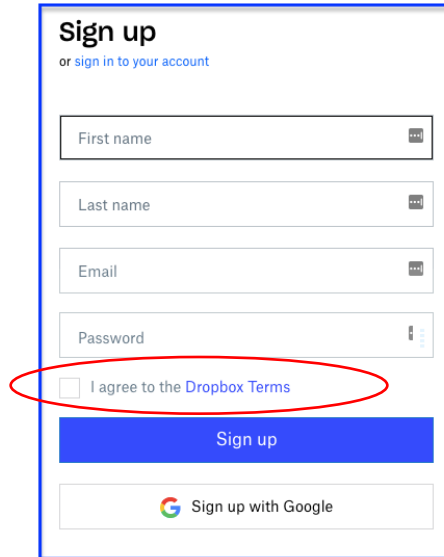
Modified Clickwrap & “Sign-in Wrap” Agreements

- A Note on Design

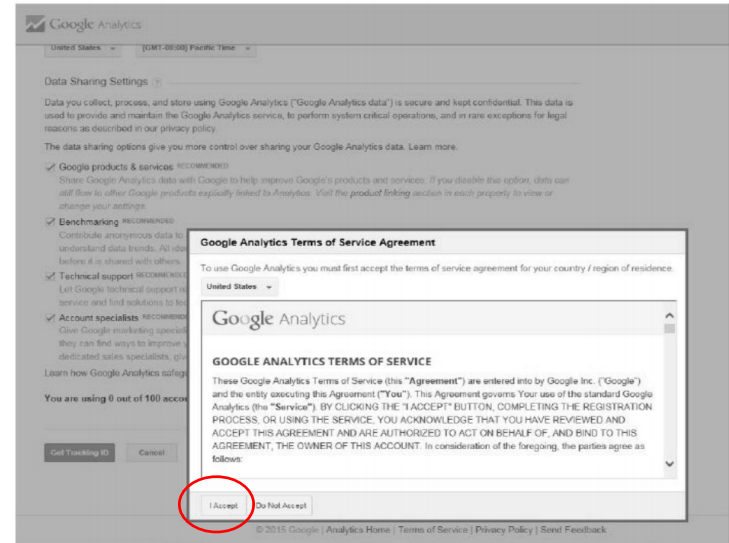
The screenshot displays the 'LINK CARD' interface. At the top, there are three buttons: 'CANCEL', 'LINK CARD' (highlighted with a green progress bar), and 'DONE'. Below these is a white input field containing the card number '1234 5678 9012 3456'. Underneath the input field are two options: 'scan your card' with a camera icon and 'enter promo code' with a circular arrow icon. A line of text states 'By creating an Uber account, you agree to the', followed by a button labeled 'The Terms of Service & Privacy Policy'. At the bottom is a numeric keypad with digits 1-9, 0, and a backspace icon (X).

Clickwrap & Scrollwrap Agreements

- **Clickwrap: Terms Available via Hyperlink; Viewing Terms not Required**
- **Scrollwrap: User MUST View Terms Before Proceeding (e.g., pop-up with forced scroll)**
- **Both: User Must Take Action to Accept Terms**



The image shows a 'Sign up' form for Dropbox. It includes fields for 'First name', 'Last name', 'Email', and 'Password'. Below these fields is a checkbox labeled 'I agree to the Dropbox Terms', which is circled in red. At the bottom of the form is a blue 'Sign up' button and a 'Sign up with Google' button.



The image shows a 'Google Analytics Terms of Service Agreement' pop-up. The pop-up contains the text 'GOOGLE ANALYTICS TERMS OF SERVICE' and a detailed description of the terms. At the bottom of the pop-up, there are two buttons: 'I Accept' and 'Do Not Accept'. The 'I Accept' button is circled in red.

Modification or Amendment

“A party can’t unilaterally change the terms to a contract; it must obtain the other party’s consent before doing so” . . . but assent may be inferred after party receives “proper notice of the proposed changes.”

Douglas v. U.S. Dist. Ct.
(9th Cir. 2007)

Must Notify Users of Modification

- **Insufficient**: “Last Updated”; Unilateral Change-of-Terms Clauses
- **Typically Sufficient**: Email Notice; In-App Pop-Up; Forced “Click” to Assent

Terms of Service Update

A change in our Terms of Service takes effect on February 12, 2014. Please read them carefully. A high-level summary of the changes is available [here](#).

☐ I accept the new Terms of Service.

Continue

Decline

Arbitration Agreements: Unconscionability

“A contract is unconscionable if it is both procedurally and substantively unconscionable.” *Douglas v. U.S. Dist. Ct.* (9th Cir. 2007)

- **Procedural**

- Contract of Adhesion (No Choice)
- Mandatory Provisions
- Unilateral Provisions
- Website Design Impacts Procedure

- **Substantive**

- Requires Analysis of Contract Terms
- Paper Contracts = Online Contracts
- Unreasonable, Oppressive Terms
- Special Requirements for Employment

Best Practices to Maximize Enforceability

- **Make the Contract and Terms Conspicuous**
 - Up-Front Flag; Standalone Agreement; Make the Hyperlink Pop; Uncluttered UI; Visible Terms (**Bold**; CAPS); Forced Scroll
- **Clickwrap is the Gold Standard for Assent**
 - For Formation **AND** Amendment; Ensure Requirement to Click is Precise; Sign-Up and Assent are Separate Clicks
- **Eliminate Conflicting Agreements**
 - Standardize Company Contracts; Re-Consent for New Agreements; Expressly State New Agreement Controls

Best Practices to Maximize Enforceability

- **Make it Conscionable**
 - **Don't Include**: Unilateral Modification; Too Much Legalese; Terms Blocking Core Remedy
 - **Include**: Opt-Out Provision; Translation; Ample Review Time
- **Other Considerations**
 - Agree to Arbitrate Broad Class of Claims
 - Arbitration Rules, Forum, and Initiation Mechanism
 - Waiver of Class, Representative, Mass Actions / Jury Trials
 - Choice of Law
 - Limitation of Liability / Waiver of Punitives
 - Confidentiality
 - Severability

Enforcing Arbitration Agreements in Court

Enforcing Arbitration Agreements in Court

- Enforcement Issues
 - Evaluating Whether to Move to Compel Arbitration
 - Same pros and cons discussed earlier; now evaluated through the lens of a specific case
 - Timing & Waiver
 - Procedural Considerations
 - A Case Study: *Bielski v. Coinbase*

Enforcement Issues: Timing & Waiver

- **No Firm Deadline to Move to Compel**
- **Right to Compel Arbitration Can be Waived**
 - Waiver requires: “(1) knowledge of an existing right to compel arbitration and (2) intentional acts inconsistent with that existing right.” *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023).
 - No prejudice required.
 - No longer a “heavy burden” for the party arguing waiver.

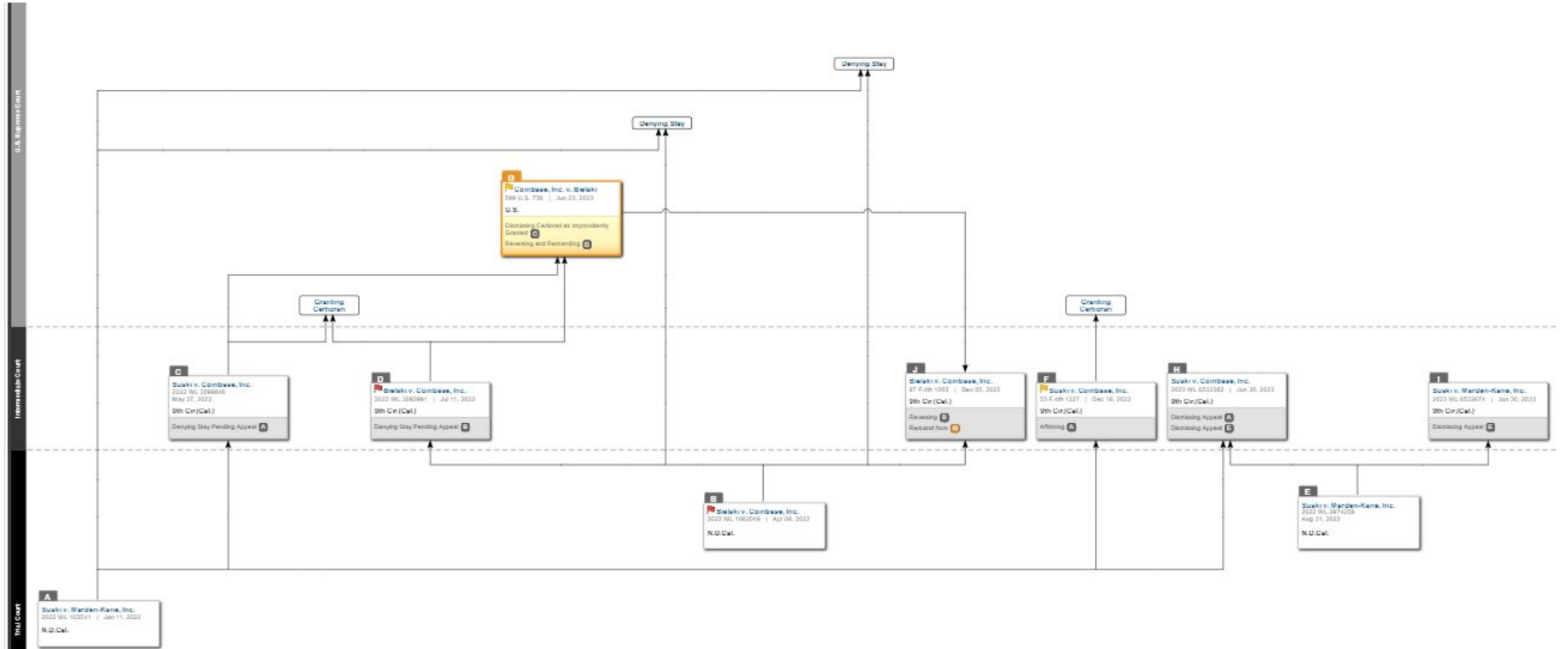
Enforcement Issues: Timing & Waiver

- **Waiver can be Express or Implied**
 - Express Waiver: “I don’t want to arbitrate.”
 - Implied Waiver: Prolonged Delays and Acts Inconsistent w/ Desire to Arbitrate
 - Prolonged Delay: A Year or More (*generally*)
 - Inconsistent Acts: Seeking a Ruling on the Merits (e.g., motion to dismiss with prejudice); Engaging in Discovery; Variety of Other Acts Inherent in Litigation

Enforcement Issues: Procedural Considerations

- **Relief Sought in Motion to Compel Arbitration?**
 - Stay the Action – Some or All Claims
 - Issues in Multi-Defendant Litigation
- **Simultaneous Motion to Dismiss?**
- **Separate Motion to Stay Discovery?**
- **Appeal?**

Case Study: *Bielski v. Coinbase*



Case Study: *Bielski v. Coinbase*

- Abraham Bielski opened a Coinbase account in May 2021 “for the purpose of buying and selling cryptocurrencies for his personal use.”
- “When creating a Coinbase account, individuals agree to the terms in Coinbase’s User Agreement. As relevant here, the User Agreement contains an arbitration provision...” (599 U.S. 736, 738–39.)
- In September 2021, “realized” that someone had hacked his account.
- “Immediately notified” the company but no “good faith effort ... to resolve the dispute, one way or another...”

Case Study: *Bielski v. Coinbase*

To Arbitrate or Not to Arbitrate

- Decided Early to Move to Arbitration
- Stipulated to Brief Arbitration Issues First; Move to Dismiss Later
 - Bielski Agreed to Terms of Service
 - Parties Agreed to Delegate All Questions to Arbitrator

This Arbitration Agreement includes, without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement. All such matters shall be decided by an arbitrator and not by a court or judge.


Case Study: *Bielski v. Coinbase*

District Court Denied Motion to Compel

discussed, Coinbase's tripartite complaint process requires users to jump through multiple, antecedent hoops before initiating arbitration. This order pauses to note the agreement also mentions a separate "hotline" for users to call if their account is compromised, a further checkbox for a user who has seen their account drained. There is no legitimate commercial need for this many burdensome obstacles prior to arbitrating disputes relating to a basic user agreement for services like those provided by Coinbase. See *Aremendariz*, 24 Cal. 4th at 117–18; *Pokorny*, 601 F.3d at 998–1000.

Case study: *Bielski v. Coinbase*

District Court Denied Motion to Compel

replace funds fraudulently taken from users' accounts. The United States District Court for the Northern District of California, William H. Alsup, J.,  2022 WL 1062049, denied operator's motion to compel arbitration based

- **“The delegation clause incorporates several defined terms ...”**
 1. “First, the user must contact Coinbase’s support team.
 2. Second, if that fails, “the user must pursue the formal complaint process.”
 3. Third, “should that process fail to resolve the grievance then, and only then, may the consumer seek arbitration.”

Case Study: *Bielski v. Coinbase*

District Court Denied Motion to Compel

*6 The lack of mutuality in Coinbase's complaint process is expressly incorporated into the delegation clause via defined terms. In other words, the delegation clause only delegates questions of arbitrability that emerge from the user agreement's tripartite dispute-resolution procedure, not arbitration, generally. Because the delegation clause imposes an onerous, unfair burden beyond that of a typical delegation clause, this order finds it substantively unconscionable.

Case Study: *Bielski v. Coinbase*

Notice of Appeal and Motion to Stay

- At the time, “denial of a motion to compel arbitration [did] not result in an automatic stay of proceedings pending appeal...” *Britton*, 916 F.2d 1405.
- Stays were discretionary, and district courts in the Ninth Circuit evaluated four factors:
 - (1) whether the appeal raises “serious legal questions”;
 - (2)–(3) who’s going to be irreparably or substantially injured by stay;
 - (4) where the public interest lies

Case Study: *Bielski v. Coinbase*

Supreme Court Decision, 599 U.S. 736 (Jan. 23, 2023)

- “The sole question before this Court is whether a district court must stay its proceedings while the interlocutory appeal on arbitrability is ongoing. The answer is yes.”
- “Because the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially ‘involved in the appeal.’”

Case Study: *Bielski v. Coinbase*

Ninth Circuit Decision, 87 F.4th 1003 (Dec. 5, 2023)

1. “[A] party resisting arbitration must mention that it is challenging the delegation provision and make specific arguments attacking the provision in its opposition to a motion to compel arbitration.”

Case Study: *Bielski v. Coinbase*

Ninth Circuit Decision, 87 F.4th 1003 (Dec. 5, 2023)

2. “In evaluating an unconscionability challenge to a delegation provision under California law, a court must be able to interpret that provision in the context of the agreement as a whole, which may require examining the underlying arbitration agreement as well.”

Case Study: *Bielski v. Coinbase*

Ninth Circuit Decision, 87 F.4th 1003 (Dec. 5, 2023)

3. “We reject Mr. Bielski's argument that the pre-arbitration dispute resolution process establishes surprise because the process is neither hidden nor beyond the reasonable expectation of the user.”

Case Study: *Bielski v. Coinbase*

Ninth Circuit Decision, 87 F.4th 1003 (Dec. 5, 2023)

4. “For the purpose of this analysis, we assume but do not decide that the User Agreement requires users, but not Coinbase, to arbitrate their claims....” But a one-sided contract is “not necessarily unconscionable.”

Whatever unconscionability exists, it “fail[s] to tip the scales to render the provision ... unenforceable.”

Post-Bielski

- Stay pending appeal is mandatory
- Significant impact on timing
- Potentially changes the calculus for party trying to avoid arbitration
- Open issues about application in multi-defendant cases

Arbitration Agreements By and Against Nonsignatories

Threshold Question

In certain circumstances, nonsignatories may enforce or be bound by arbitration clauses contained in contracts signed by other persons.

Who Decides?

- “Controlling Ninth Circuit authority provides that the **court**, not the arbitrator, decides questions of arbitrability involving judicial doctrines and nonsignatories.”

Nutanix v. Tessell, No. 24-CV-01729-AMO, 2025 WL 793652, at *4 (N.D. Cal. Mar. 12, 2025)
(emphasis added)

Bases for Binding Nonsignatories

Equitable
Estoppel

Agents

Third-Party
Beneficiary

Veil Piercing
or Alter Ego

Incorporation
by
Reference

Assumption

Equitable Estoppel

Applicable in two circumstances:

- (1) “when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are ***intimately founded in*** and ***intertwined with*** the underlying contract”
- (2) “when the signatory alleges ***substantially interdependent and concerted misconduct*** by the nonsignatory and another signatory and the allegations of interdependent misconduct [are] founded in or intimately connected with the obligations of the underlying agreement”

Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128-29 (9th Cir. 2013) (emphasis added).

Recent Developments

Heckman v. Live Nation Entertainment, Inc.

- Ninth Circuit decided on October 28, 2024
- **Issue Presented:** Whether a clause delegating to the arbitrator the authority to determine the validity of the mass arbitration agreement was unconscionable.
- **Conclusion:** The delegation clause—and the arbitration agreement as a whole—are unconscionable and unenforceable under California law, based on New Era’s “novel and unusual procedures,” including its mass arbitration protocols, procedural limitations, the limited right of appeal, and the arbitrator selection procedure.

Recent Changes: *Heckman* Continued

“Novel and unusual procedures” included:

- **Bellwether arbitration protocol** - inability of claimants to participate in, or even learn the details of, bellwether arbitrations that effectively bound non-bellwether claimants
- **Arbitrator selection** - “the neutral may be replaced at New Era’s sole discretion”
- **Asymmetric appeal rights**
- **Lack of discovery and other procedural limitations**

Recent Changes: *Coinbase v. Suski*

- Supreme Court decided on May 23, 2024
- **Issue presented:** Where parties enter into an arbitration agreement with a delegation clause, should an arbitrator or a court decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation?
- **Conclusion:** Where parties have agreed to two contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts—a court must decide which contract governs.

Recent Changes: *Smith v. Spizirri*

- Supreme Court decided on May 16, 2024
- **Issue presented:** Whether Section 3 of the FAA requires district courts to stay a lawsuit pending arbitration, or whether district courts have discretion to dismiss when all claims are subject to arbitration.
- **Conclusion:** When a district court finds that a lawsuit involves an arbitrable dispute and a party has requested a stay of the court proceeding pending arbitration, Section 3 of the FAA compels the court to *issue a stay*, and the court lacks discretion to dismiss the suit.

Thank you!
