

Hasty Opinion Presents Cautionary Tale for In-House Counsel Drafting Arbitration Agreements



Arbitration agreements have become such a fixture in contracts that busy in-house counsel might understandably rely on standardized clauses without scrutinizing the language. However, that would be a mistake in California, which has strict regulatory enforcement requirements.

Arbitration agreements shouldn't be an afterthought for businesses, especially when they contain boilerplate language and generic terms. These crucial contractual clauses are an important strategic tool, generally offering a quicker, more economical way to resolve legal issues than traditional litigation – with a degree of finality attached to the result.

If your company's arbitration agreement doesn't hold up when challenged, it might as well not exist. That's something many businesses discover the hard way after years of litigation and appeals.

One recent California appellate ruling provides a cautionary tale for in-house counsel regarding the enforceability of arbitration agreements. In *Aljarice Hasty v. American Automobile Association of Northern California, Nevada & Utah*, the court ruled the employer's arbitration agreement was unenforceable because it was "permeated with unconscionability."

Nothing tests the strength of an arbitration agreement like litigation, but there are steps in-house counsel can take to reduce the likelihood of a legal challenge – or loss. Below are the key takeaways from Hasty and best practices for drafting enforceable arbitration agreements under California law.



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What invalidates an arbitration agreement?

When considering the enforceability of an arbitration agreement, California courts look for evidence of procedural and substantive unconscionability (i.e., unfairness). If they find both, that invalidates the agreement. Procedural unconscionability relates to how the contract was negotiated and formed and whether any unequal bargaining power resulted in oppression or surprise. Substantive unconscionability pertains to the agreement's terms and whether they are overly harsh or one-sided.

Hasty provides a textbook example of how a court assesses arbitration agreements and underscores the importance of careful drafting, creating a process for obtaining signatures and ensuring the contract is easy to read and understand.



What happened in Hasty?

Hasty arose after a former employee at the American Automobile Association of Northern California, Nevada & Utah (AAA) filed a lawsuit alleging racial discrimination, harassment, wrongful discharge and retaliation. The employer moved to compel arbitration, pointing to the plaintiff's signature on its standard employment agreement.

The employee, Aljarice Hasty, pushed back, challenging the agreement she'd signed electronically. She argued the contract was unconscionable, claiming it was not mentioned during her interview or verbal acceptance of her job offer. Hasty also argued she couldn't review the contract properly as she had relied solely on her smartphone to complete the onboarding paperwork. She testified that she didn't own a tablet or computer at the time and was not given a hard copy.

At trial, the court sided with the plaintiff regarding the arbitration agreement's enforceability. AAA appealed to the Court of Appeal of the State of California Third Appellate District, which [affirmed the decision](#). The resulting ruling capped a four-year legal battle focused not on the case's merits but, instead, on an avoidable technical issue.

How can other companies (and their in-house counsel) avoid a similar fate? That will require scrutiny of any arbitration agreement used in contracts and a solid understanding of the tests courts use to assess procedural and substantive unconscionability.





What is considered procedurally unconscionable?

As mentioned above, procedural unconscionability refers to the circumstances in which the agreement was formed. When considering this, judges will analyze evidence of oppression or surprise. An oppressive agreement lacks negotiation and meaningful choice, while surprises come in the form of allegedly unconscionable provisions hidden within lengthy forms.

Oppressive circumstances

The agreement in *Hasty* was an adhesion contract — meaning it was standardized and offered to the prospective employee on a take-it-or-leave-it basis as a condition of employment. While that is an example of superior bargaining power, adhesion contracts aren't necessarily unlawful; they just draw more scrutiny from judges to ensure fairness.

Oppression, on the other hand, means the agreement is improperly one-sided or overly harsh toward the weaker party.

The following circumstances can establish oppression:



How long the party had to consider the proposed contract



The extent and type of pressure exerted on the party to sign



The length of the proposed contract and the length and complexity of the offending provision



The party's education and experience



Whether the party had the assistance of an attorney when reviewing the proposed contract

In *Hasty*, the court didn't find an "appreciable degree of oppression" beyond what is typically found in an employment agreement. The plaintiff was given the new-hire forms on February 27, 2019 and told it would be preferable to complete them before her first day on March 4. There was also no evidence that she lacked the experience or education necessary to understand the document, having previously worked with insurance agencies.

Surprises

Surprises can be fun, but not where contracts are concerned. In *Hasty*, the court found there was an element of surprise in how AAA presented the arbitration agreement to the plaintiff.

Here's why:



Readability: For one thing, the font size was “smaller than average,” according to the ruling (specifically, the 8.5-point font on a phone, according to the plaintiff). The paragraphs were also complex, dense and spanned “two single-spaced, letter-size pages filled with statutory references and legal jargon,” according to the opinion. Arbitration agreements presented in this way are typically found to have the element of surprise because they undermine informed consent.



Access: The employer only gave the plaintiff the option to review and sign the agreement electronically before starting work, despite her offer letter saying she could do so on her first day. The plaintiff testified that she had to sign it via her phone because she didn't have a computer or tablet. The court also found no evidence that the employer checked whether the plaintiff could view the documents electronically and didn't appear to provide an alternative. In the court's view, that limited access to the agreement exacerbated the readability issues.



Consent: The agreement's electronic signature page was separate from the arbitration agreement itself, which meant the plaintiff could technically click “I agree” without actually reviewing it. What's more, the only consent information on the signature form referenced agreeing to electronically sign “various employment agreements proposed to me from time to time during my employment.” The court also found that the term “this document” in the signature statement was ambiguous because it didn't specify which document.

After considering the above factors, the court concluded that the agreement was presented to thwart rather than promote the plaintiff's understanding.

Best practices for businesses to avoid procedural unconscionability include:

- ✔ Ensure the signing party has ample time to review the document and some agency over how they do so.
- ✔ Read the document from the signing party's point of view, checking for confusing language, small font and unnecessarily long paragraphs.
- ✔ Provide hard copies of arbitration agreements or other means for the signing party to review before signing.
- ✔ Ensure the signature statement explicitly references what the signing party will be agreeing to, avoiding ambiguous language such as “this document” or “various employment agreements.”

What is considered substantively unconscionable?



When considering whether an arbitration agreement is substantively unconscionable, judges will examine the fairness of its terms. If they're overly harsh and unreasonably favorable to the more powerful party, they could be unenforceable.

Here's what to consider:

□ Mutuality

An arbitration agreement must have a “modicum of bilaterality,” meaning the signing party typically can't be forced into agreeing to arbitrate their claims if the drafter isn't required to do the same. There are some exceptions for a lack of symmetry if there is a reasonable business-related justification. And, as the California Supreme Court has previously found, “Lack of mutuality can be manifested as much by what the agreement does not provide as by what it does.” In *Hasty*, all disputes related to the plaintiff's employment were subject to arbitration, so the court found there was mutuality. The panel noted that the agreement mentioned certain statutes and claims that employees usually bring against employers but found that it didn't cast doubt on the mutuality of the agreement because it clarified that the list wasn't meant to be exhaustive.

□ Waivers of administrative remedies

Arbitration agreements that require the signing party to give up their right to compensation or relief in other contexts can be one-sided. In *Hasty*, one provision said that either party could file a charge or complaint with an appropriate governmental administrative agency but they'd waive their right to any remedy or relief from those charges. The court found this provision had nothing to do with arbitration and seemed one-sided against the employee since government agencies generally enforce statutes and regulations against employers rather than employees. “A waiver of administrative remedies and relief, hidden in an arbitration agreement, is overly harsh and shocks the conscience,” the opinion said.

□ Referencing related rules

The more clarity and specificity you can provide about the rules you're referencing, the better. The *Hasty* opinion took issue with the agreement's reference to Judicial Arbitration and Mediation Services (JAMS) rules for two reasons. First, the agreement included a broken hyperlink to the JAMS Employment Arbitration Rules and Procedures. Second, the agreement said arbitration would be conducted “in accordance with the applicable employment rules of JAMS then in effect.” As the court put it, “It is unclear how an employee would know what terms he, she or they were agreeing to at the time of signing the agreement when the rules and procedures may be different when a dispute arises in the future.”

□ Confidentiality requirements

Agreements requiring employment-related proceedings to be confidential must outline a commercial reason for that, according to the California Supreme Court. In *Hasty*, the court found AAA didn't provide such justification despite including a provision that said all disputes would be resolved “to the fullest extent permitted by law, by final, binding and confidential arbitration.” Though AAA argued that it only applied to the “extent permitted by law,” the court reasoned that employees would have no way of knowing what the provision did or didn't cover.

□ Waivers of representative action

Provisions that block any Private Attorneys General Act (PAGA) claims or proposed class action lawsuits can be unconscionable because they require the signing party to waive an unwaivable right. Although *Hasty* hadn't brought PAGA or class action claims, the court still found it unconscionable that the agreement included a waiver requiring any claims to be brought in an individual capacity.

Best practices for businesses to avoid substantive unconscionability include:

- ✔ Ensure the same arbitration requirement applies to both the signing and drafting parties unless there's a legitimate business-related reason not to.
- ✔ Double-check that all website links are correct and functioning.
- ✔ If referencing particular rules, regulations and laws, use clear and specific language to avoid confusion about which rules apply.
- ✔ Remove waivers requiring the signing party to give up their rights to administrative remedies, PAGA claims, proposed class-action lawsuits or other remedies that are unrelated to arbitration.
- ✔ Back up any confidentiality requirements with a legitimate commercial reason.

Enforceability is measured on a sliding scale

As no two cases are the same, California judges will weigh all the above elements on a sliding scale. The more substantively oppressive an arbitration agreement is, the less evidence of procedural unconscionability is necessary. In *Hasty*, because the arbitration agreement featured a high degree of procedural unconscionability, a relatively low degree of substantive unconscionability would have been enough to make the contract unenforceable.

The ultimate issue in every case is whether the contract is unfair in light of the circumstances — and that means it's crucial to act in the interest of promoting the signing party's understanding of the document.



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