A threshold question in challenging an arbitration requirement in the context of a class action is whether the challenge must apply to all class members or just to the class representatives. A number of grounds listed below may apply to all class members, but others may not. Although the law is not settled in this area, many courts have found that, when a class representative is not bound by an arbitration requirement, the certification decision should not be affected by the fact that absent class members may be bound by an arbitration requirement. However, these courts often find that class members bound by an arbitration clause may be excluded from the class at a later stage in the litigation. Consequently, a class action will be more successful if there is a ground to challenge an arbitration requirement applicable to all class members.

A second wrinkle with regard to challenging an arbitration requirement comes when the arbitration clause provides that questions as to the enforceability of the arbitration requirement are for the arbitrator to decide. These are often called “delegation” clauses and are increasingly common in consumer agreements. If there is such a clear and unmistakable delegation clause, the consumer cannot go to court to initially challenge the arbitration agreement as a whole but instead should go to court first to challenge the delegation clause itself.

The Supreme Court has stated that the enforceability of an arbitration clause is for the court, unless the contract also contains a clear and unmistakable delegation clause. If there is such a delegation clause, then the question of enforceability is for the arbitrator. On the other hand, the Supreme Court treats the delegation clause as a separate agreement, and its enforceability is for the court. Thus the consumer must first challenge the delegation clause, either as not clear and unmistakable or on some other basis outlined elsewhere in this subsection (for example, unconscionability or that the defendant was not a party to the delegation clause). If the court throws out the delegation clause, then the court can hear the challenge to the whole arbitration clause.

This subsection lists a number of ways to challenge an arbitration clause, but far more detail is found in NCLC’s Consumer Arbitration Agreements.

- Federal law prohibits arbitration requirements in mortgage loans and manufactured home loans.
- Federal law prohibits arbitration clauses in certain loans to military servicemembers; starting in October, 2016, the prohibition applies to most non-purchase money credit and, a year later, will apply to credit cards as well.
- Certain cases in bankruptcy court cannot be forced into arbitration.
- Precedent is divided over whether the Magnuson-Moss Warranty Act prohibits arbitration of certain warranty claims.
- Department of Education rules (effective October 16, 2018) prohibit schools that participate in the federal student loan program from entering into certain arbitration agreements with students or that waive students’ rights to bring class actions.
- Federal regulations limit the ability of nursing homes and other long-term care facilities to enter into arbitration agreements, but a federal court has preliminarily enjoined those regulations.
- An arbitration requirement may be unenforceable when it conflicts with federal statutory rights, such as when the arbitration clause limits statutory remedies or when arbitration is too costly for the consumer to proceed.
- There is no arbitration requirement when the defendant cannot prove a binding arbitration clause and produce the actual clause agreed to by the parties.
- The contract cannot involve duress, minority, incompetency, or fraud in the factum, and the arbitration provision itself cannot be induced by misrepresentation.
- An arbitration requirement cannot be provided unilaterally after the contract is finalized.
- There is no arbitration requirement when the contract is never finalized (for example, in yo-yo sales) or the agreement is superseded by another agreement without the requirement.
- Contracts that provide for an unavailable arbitration forum like the NAF may be unenforceable.
- Arbitration clauses that are unconscionable under state law may be unenforceable.
- There may be no binding arbitration requirement when a contract does not cover the party that seeks to enforce the contract or does not apply to the consumer filing suit.
- The defendant’s actions may waive the right to compel arbitration by participating in the litigation or by refusing to pay its share of arbitration costs.

Footnotes

47 National Consumer Law Center, Consumer Arbitration Agreements § 2.6 (7th ed. 2015), updated at
1.7.2.3 Challenging the Arbitration Requirement

Published on NCLC Digital Library (https://library.nclc.org)
Date downloaded: September 25, 2020 10:37 am

www.nclc.org/library. See also § 10.6.3.7 [3], infra.


50 Id.


53 Id.


1.7.2.3 Challenging the Arbitration Requirement


Source: National Consumer Law Center, Consumer Class Actions [10th Ed.], updated at www.nclc.org/library
Source URL: https://library.nclc.org/class/01070203-0

Links
[1] https://library.nclc.org/nclc/link/ARB
[2] https://library.nclc.org/nclc/link/ARB.02.06
[3] https://library.nclc.org/nclc/link/Class.10.06.03.07
[4] https://library.nclc.org/nclc/link/ARB.04.02.02
[5] https://library.nclc.org/nclc/link/ARB.04.02.03
[6] https://library.nclc.org/nclc/link/ARB.04.03.03
[7] https://library.nclc.org/nclc/link/ARB.04.03.02
[8] https://library.nclc.org/nclc/link/ARB.04.02.04a
[9] https://library.nclc.org/nclc/link/ARB.04.02.04b
[10] https://library.nclc.org/nclc/link/ARB.04.04
[11] https://library.nclc.org/nclc/link/ARB.05.02
[12] https://library.nclc.org/nclc/link/ARB.06.09
[13] https://library.nclc.org/nclc/link/ARB.05.06
[14] https://library.nclc.org/nclc/link/ARB.05.07
[15] https://library.nclc.org/nclc/link/ARB.05.08
[16] https://library.nclc.org/nclc/link/ARB.06
[17] https://library.nclc.org/nclc/link/ARB.07
[18] https://library.nclc.org/nclc/link/ARB.08