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## be careful who you pick as your arbitration provider!

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On August 10, 2023, a California federal district court refused to enforce an arbitration clause because the defendants' Terms of Use (sometimes called Terms of Service) named an arbitration provider whose lack of even-handed and transparent procedures rendered the clause unconscionable. *Heckman v. Live Nation Entertainment, Inc.*, CV22-0047 (C.D. Cal). While only a district court decision, the opinion stands as a reminder that all aspects of the arbitration process must remain fair and equitable or the court may choose not to enforce what would otherwise amount to mandatory arbitration.

Plaintiffs sued Defendants Live Nation Entertainment and Ticketmaster for antitrust violations, alleging they suffered damages from paying "supracompetitive fees on primary and secondary ticket purchases from Ticketmaster's online platforms." Citing a prior, similar case in which the court had ordered arbitration—*Oberstein v. Live Nation*—, Defendants in *Heckman* moved to compel arbitration.

Significantly, in the prior *Oberstein* litigation, the Defendants' terms of use had identified JAMS as the arbitration provider. After *Oberstein* had begun, however, Defendants updated their terms of use to select a newly formed arbitration provider, New Era ADR ("New Era"). The change applied to cases that arose before the amendment. Unlike JAMS, New Era offers standardized procedures for administering mass arbitrations. Plaintiffs claimed the designation of New Era as the arbitration provider was both procedurally and substantively unconscionable. The Court agreed and denied the motion to compel.

To prove unconscionability, a plaintiff must show that an agreement is both procedurally and substantively unconscionable. As an initial matter, Plaintiffs claimed the arbitration clause was unconscionable because New Era was biased: Defendants' law firm was an early advocate on behalf of New Era, and Live Nation and Ticketmaster were New Era's earliest customers. In denying the motion to compel, the Court gave little weight to this allegation.

### attorneys

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### practice areas

cybersecurity and privacy  
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Next, the Court analyzed the issue of procedural unconscionability, which "focus[ed] on the factors of oppression and surprise." The Court took umbrage at the way the Terms of Use were amended without notice after the *Oberstein* litigation began. The change in arbitration provider applied to "any dispute, claim or controversy ... **irrespective of when that dispute, claim, or controversy arose.**" (emphasis added.) Thus, the clause changing providers applied retroactively to already accrued claims without any notice to existing customers, while at the same time burying the true nature of the change in New Era's difficult to understand arbitration rules (as the Court put it). In other words, someone who had a claim under the JAMS arbitration process became subject to the New Era procedures if all they did was click on either ticket seller's website after the fact. Plus, to figure out the significance of the amendment, the user had to decipher the New Era procedures, which the Court found to be very convoluted.

The Court also found that whether one called it unconscionability or unfair surprise, the Defendants had violated the implied covenant of good faith and fair dealing by applying the amendment to accrued claims.

The district court also found New Era's "mass arbitration" administrative procedure problematic. Whereas the Defendants likened New Era's mass arbitration procedure to the procedures applicable to multidistrict litigation, the Court found the governing rules did not support such a conclusion. For example, New Era would group together cases involving common issues and then select three bellwether cases—one by each side, and one, according to an unspecified process, determined by a neutral. Once the neutral rendered a decision in these cases, the parties would be required to conduct settlement discussions and would be bound by the outcome of the bellwether cases. Then the arbitrator would supposedly use these bellwether cases as precedents for the many other pending cases as well. The district court found this process problematical because how precedent was to be applied was never clearly defined in New Era's rules. Neither did the New Era rules permit class actions.

Unlike the MDL process, the New Era procedures did not include a means to give notice to all parties or an opportunity for them to be heard. Nor was there an opportunity for claimants to opt-out. The Court also took issue with unnecessarily strict discovery, page, and record limitations. Neither did the arbitration agreement include the option to disqualify an arbitrator based on a mandated disclosure statement. And finally, there were also questions about the right to appeal.

The takeaway: if you are offering Terms of Use, those terms and conditions need to be fair and transparent, and the arbitration provider you name must have even-handed rules and procedures, preserving the basic rights that are standard in arbitration.