Published on *The National Law Review* https://natlawreview.com

# Cheek Survives Concepcion: What Broker-Dealers Need To Know About Enforcing Arbitration Agreements In Maryland

Article By:

Litigation Practice

Broker-dealers seeking to enforce arbitration agreements in Maryland should consider utilizing stand-alone arbitration agreements — signed by both parties — that explicitly commit both the client and the broker-dealer to arbitrate disputes. Why?

Unlike New York law, under which mutuality of obligation is not required to enforce an arbitration agreement[1], under Maryland law, an arbitration agreement is enforceable only if it requires both parties to arbitrate. *See* ***Cheek v. United Healthcare of the Mid-Atlantic***, 378 Md. 139, 141-43 (Md. 2003). The United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), raised questions about the ongoing viability of the *Cheek*decision. However, on February 26, 2013, the United States Court of Appeals for the Fourth Circuit rejected the argument that the **Federal Arbitration Act** ("**FAA**") preempts the law set forth in *Cheek. See Noohi v. Toll Bros., Inc.*, 708 F.3d 599 (4th Cir. 2013). Thus, broker-dealers seeking to enforce mandatory pre-dispute arbitration clauses in Maryland need to be aware of some nuances of Maryland law.

In *Cheek*, an employer required employees to arbitrate all employment related disputes pursuant to the employer's policy. The employment handbook, however, provided that the employer reserved the right to alter, amend, modify or revoke the policy in its discretion at any time. Based on the unilateral right to revoke the arbitration at any stage, the Court of Appeals held that the employer's agreement to arbitrate was illusory and, therefore, unenforceable.[2]

In contrast, in *Holloman v. Circuit City Stores, Inc.*, 391 Md. 580, 582 (Md. 2006), the Court of Appeals enforced a similar mandatory pre-dispute arbitration agreement that required the employer to provide thirty days' notice before any amendments to its policy went into effect and bound the employer to the arbitration rules and procedures in effect at the time the employee requested arbitration. A similar provision was enforced in *Harby v. Wachovia Bank, N.A.*, 172 Md. App. 415 (Md. Ct. Spec. App. 2007) (allowing the bank to alter the terms of its deposit agreement that contained an arbitration clause if depositors were notified thirty days in advance of any such changes adverse to the depositor).[3]

In 2011, in *Concepcion*, the U.S. Supreme Court held that the FAA preempted California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts. Relying on that decision, the defendants in *Noohi* moved to compel arbitration in the Maryland federal court,

even though the arbitration agreement provided that only the "Buyer" agreed to arbitrate all disputes.[4] Finding that the arbitration agreement bound only the plaintiffs and, therefore, lacked the mutuality of obligation required by *Cheek*, the Fourth Circuit held that the*Cheek* rule remained binding. After careful consideration, the Fourth Circuit found that the*Cheek* rule did not single out an arbitration provision within a contract; rather, it treated the arbitration clause like a stand-alone contract, requiring separate consideration.[5]

So, what does this all mean for broker-dealers? Often broker-dealers (1) include arbitration provisions as part of a larger client agreement that (2) the broker-dealer may amend and, (3) within the arbitration provision itself, only the client agrees to arbitrate disputes (and only the client signs the agreement). All three of these practices can potentially complicate enforcement of arbitration agreements in Maryland.

First, while some courts understand that broker-dealers, as members of the Financial Industry Regulatory Authority ("FINRA"), are bound to arbitrate client disputes,[6] other courts sometimes will overlook those rules as outside the "four corners" of the arbitration agreement, which is all that courts can consider when evaluating the enforceability of an arbitration agreement.[7] Thus, while it may be obvious to the broker-dealer — and to FINRA — that the broker-dealer cannot avoid arbitration initiated by a client (even if the broker-dealer may amend the other terms of the client agreement), clients and courts in Maryland might not recognize that fact.

Moreover, where an arbitration agreement is but a provision within a larger contract (particularly where the arbitration agreement is informed by FINRA rules and procedures), the courts might have a difficult time in determining precisely what "four corners" it should be evaluating.[8] If a court looks solely to one paragraph of a client agreement, a changes clause in the overall agreement might not be incorporated into the arbitration agreement — but the FINRA rules might not be considered part of the arbitration agreement either.

Finally, as in *Noohi*, agreements signed only by the client and which include words to the effect of "**I** [or **You** or **The Client**] agree to arbitrate all disputes . . ." might not be interpreted as "the parties hereby agree to arbitrate all disputes." Because broker-dealers must arbitrate such disputes, there is no downside for them to clarify that intent in their arbitration agreements.

Thus, because the rule in *Cheek* remains the law — i.e., arbitration agreements must bind both parties to some degree[9] — broker-dealers seeking to enforce arbitration agreements in Maryland should consider utilizing stand-alone arbitration agreements (thereby defining the "four corners" for the court to consider), that are signed by both parties, and that explicitly commit both the client and the broker-dealer to arbitrate disputes (thereby clarifying that consideration exists for arbitration agreement itself). These simple steps, while not required, should increase the likelihood that a broker-dealer will be able to enforce an agreement to arbitrate in a Maryland court.

---

[1] *See, e.g., Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133 (1989) (holding that an arbitration agreement is not unenforceable for lack of mutuality if there is consideration for the agreement as a whole).

[2] Under *Clancy v. King*, 405 Md. 541 (2008) — explaining the meaning of good faith by, *inter alia*, quoting from a Jerry Seinfeld episode — the Court of Appeals might have concluded that the agreement was not *per se* unenforceable but, rather, subject to the exercise of the employer's good faith.

However, that was not the conclusion reached by the Court of Appeals in*Cheek*.

[3] A federal district court in Houston, Texas, recently granted a motion to compel arbitration — over the plaintiffs' objection that the clause was illusory

— where an employer maintained the right to amend its arbitration program but such amendments would not apply to claims of which the company had notice at the time of the amendment and no such amendment would apply until the employees had received ten days' notice of it. *See Gonzales v. Brand Energy & Infrastructure Servs., Inc.*, 2013 WL 1188136 (S.D. Tex. Mar. 20, 2013).

[4] The defendant contended that, by offering the agreement, it too was bound to the terms. The United States District Court for the District of Maryland did not accept that argument, nor did the Fourth Circuit.

[5] Although not mentioned in the decision, that analysis is consistent with *Buckeye Check Cashing v. Cadegna*, 546 U.S. 440, 445-46 (2006), which held that a court can consider the enforceability of a severable arbitration agreement but only the arbitrator can address the enforceability of the underlying agreement as a whole.

[6] *See Karsner v. Lothian*, 532 F.3d 876, 879-880 and n.1 (D.C. Cir. 2008) (citing FINRA Rule 12200).

[7] *See, e.g., Cheek*, 378 Md. at 152-53 (an arbitration clause is a severable contract to be analyzed separately), citing *Holmes v. Coverall North Am. Inc.*, 336 Md. 534 (Md. 1994), adopting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 338 U.S. 395 (1967).

[8] *See, e.g., Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540 (4th Cir. 2005) (applying *Cheek* and reversing an order denying a motion to compel arbitration because the District of Maryland looked at a separate "Internal Dispute Solution" program document in evaluating the consideration for the separate signed arbitration agreement).

[9] Even under *Cheek*, the agreement need not have a complete mutuality of obligation. For example, in *Walther v. Sovereign Bank*, 386 Md. 412 (Md. 2005), the Court of Appeals enforced an arbitration agreement that required borrowers to arbitrate all disputes but allowed the lender to maintain its right to a judicial foreclosure, explaining that "[m]utuality, however, does not require an exactly even exchange of identical rights and obligations between the two contracting parties before a contract will be deemed valid." *Id*. at 433 (citation omitted)



National Law Review, Volume III, Number 107

Source URL:https://natlawreview.com/article/cheek-survives-concepcion-what-broker-dealers-need-to-know-about-enforcing-arbitrati