

Cannabis-Related Contract Enforcement: Solution Presents Itself?

Article By:

Cannabis Law Coverage at Wilson Elser

One of many concerns regarding the cannabis industry is the federal courts' refusal to enforce cannabis-related partnership agreements, loan agreements, and various contracts related to business formation and operation. While there are a few state courts in Colorado that have rejected arguments that agreements related to cannabis should be void automatically as a violation of federal law – these instances have been few and far between, occurring only at the trial court level and none have been subject to an appeal. But it appears that the solution to the issue of agreement enforceability may have finally presented itself: specific mandatory arbitration agreements and choice-of-law provisions.

While federal courts have somewhat famously relied upon the ***Federal Controlled Substance Act*** to justify not resolving cannabis-related disputes, that does not necessarily mean that business partners, employees and insurance companies are without recourse should relationships sour. The U.S. Supreme Court held in ***Buckeye Check Cashing, Inc. v. Cardegna***, 546 U.S.440, 163 L.E.2d 1038 (2006), that parties to a contract cannot avoid arbitration just because the underlying agreement is void for possible illegal activity. To the contrary, the U.S. Supreme Court was clear that, in either state or federal courts, unless a challenge involving a contract is specific to the arbitration clause, then the issue of a contract's validity is something for the arbitrator to consider.

Led by the recent launch of the [Cannabis Dispute Resolution Institute \(CDRI\)](#) in *Denver, Colorado*, companies within the cannabis industry are finding some success in enforcing their rights by turning toward detailed, specific arbitration agreements and choice-of-law provisions. These highly specific provisions not only state that Colorado law shall apply but also secure the parties' agreement to waive defenses involving violation of federal law. Moreover, companies such as the CDRI are taking those protections a step further by providing in their terms of service that arbitrators exceed their powers if they void or refuse to enforce any contracts or agreements that are cannabis-related in nature. The result is that parties to an agreement can come as close as possible to ensuring that illegality under federal law arguments are essentially mooted and that their claims will be evaluated on the merits of the respective agreements.

This gives rise to two additional questions: (1) whether a state court can refuse to confirm an award that is against federal law or public policy and (2) whether another state can refuse to enforce an arbitration award that has been confirmed by the courts of the state in which the arbitration took

place.

- As for the first question, the answer will vary state by state. However, in Colorado, a review of awards for illegality based on public policy is foreclosed. For example, in *Coors Brewing Company v. Federico Cabo, et ano*, 114 P.3d 60 (2004), the Court of Appeals of Colorado found that in the absence of a statutory ground for *vacatur*, the Colorado Revised Statute section 13-22-223 mandates confirmation of the award. Illegality based on public policy is not an enumerated ground for *vacatur*.
- With regard to the second question, the ruling set forth in 1908 by Justice Oliver Wendell Holmes Jr. in the Supreme Court decision *Fauntleroy v. Lum* 210 U.S. 230, 52 L.Ed. 1039, states that after an arbitration award has been confirmed by a state court, illegality is not a ground upon which a sister state court can refuse to recognize and enforce the judgment pursuant to the Full Faith and Credit Clause of the U.S. Constitution (Article 4, section 1).

Analysis

The advantages of mandatory arbitration over alternative methods of resolution are well documented. It provides a far more expeditious manner of dispute resolution, often is significantly less expensive, and increases confidentiality, privacy and security. Now, through the CDRI, parties to a contract can ensure that disputes will be resolved by industry-experienced arbitrators, which will ease the fear of public policy arguments or the invoking of the Federal Controlled Substances Act. The recent creation of the CDRI gives the industry and its investors and insurers a ray of hope that they may enter into agreements with a realistic possibility of enforcing their rights if necessary.

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