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ARBITRATION AS A SOLUTION TO COMMERCIAL CANNABIS CONTRACT CLASHES

Steven Frydman

With seventeen states completely legalizing recreational cannabis use and many other states having legalized it for medical use or at least having decriminalized it, it is no surprise that the cannabis industry is growing, and with its growth comes a need for laws regulating it.¹ Despite these changes in state law, cannabis is still an illegal drug on the federal level, classified as a “Schedule I” drug under the Controlled Substances Act.² Of course, this dichotomy in the law creates federalism concerns and problems for those in the cannabis industry when they attempt to access the courts for relief in the case of a dispute.³ Further, a general rule in contract law is that an agreement illegal on its face should not be enforced by the courts.⁴ To resolve these issues, the commercial cannabis industry has turned to arbitration as a solution.

The first piece of the solution comes from a 2006 Supreme Court decision, *Buckeye Check Cashing, Inc. v. Cardegna*, which involved a contract that the plaintiffs alleged to be criminal usury.⁵ The Court stated that arbitration provisions are severable from the remainder of the contract, and that challenges to the contract’s validity, unless those challenges are to the arbitration clause itself, are to be considered by the arbitrator.⁶ So, a party to a contract that may, on its face, be illegal, can still compel arbitration through the courts if that contract contained a valid arbitration provision.⁷

When parties put an arbitration provision in their contract, they may also choose the law that governs the arbitration.⁸ The arbitration provision should state that any dispute arising from the agreement, including the determination of the scope of the agreement to arbitrate, shall be determined exclusively by arbitration in some chosen forum state.⁹ The chosen forum state need only be a state that has legalized recreational marijuana use.¹⁰ The provision should further state that the parties consent to the exclusive jurisdiction of the chosen forum state’s courts to compel arbitration and to confirm the arbitration award.¹¹ Additionally, the provision should allow the parties to seek enforcement of any of the forum state courts’ judgments in any other state court,¹² and it should also waive any rights the parties may have to remove the case to federal court.¹³

¹ *Map of Marijuana Legality by State*, DISA GLOB. SOLS., <https://disa.com/map-of-marijuana-legality-by-state> [perma.cc/7V9K-8BVA] (last visited Nov. 27, 2021).

² Controlled Substances Act, 21 U.S.C. § 812(c) (1970).

³ U.S. CONST. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

⁴ 15 CORBIN ON CONTRACTS § 79.1 (2021).

⁵ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

⁶ *Id.* at 445–46.

⁷ *Id.*

⁸ See Cindy G. Buys, *The Arbitrators’ Duty to Respect the Parties’ Choice of Law in Commercial Arbitration*, 79 ST. JOHN’S L. REV. 59 (2005).

⁹ Madeline G. Landry, *From “Arbitrary” to Arbitration: Using ADR’s Popular Favorite to Resolve Commercial Marijuana Disputes*, 14 HASTINGS BUS. L.J. 139, 152 (2018).

¹⁰ *Id.* at 155.

¹¹ *Id.* at 153–54.

¹² *Id.* at 154.

¹³ *Id.* at 152–54.

Once the aggrieved party has received an award from the arbitrator, it may seek enforcement in the chosen forum state's courts through the operation of the Federal Arbitration Act ("FAA").¹⁴ Finally, if necessary, the enforcement of the arbitral award in a state that is not the chosen forum is possible through the Full Faith and Credit Clause.¹⁵ As the Supreme Court has opined, "A final judgment in one State . . . qualifies for recognition throughout the land."¹⁶

In conclusion, parties to commercial cannabis contracts can have their agreements enforced, despite federal illegality and general principles of contract law, by (1) including an arbitration provision in their contract;¹⁷ (2) choosing a forum state that has legalized cannabis recreationally for the law governing the arbitration;¹⁸ (3) using the forum state's courts and the FAA to enforce the arbitral award;¹⁹ and (4) using the Full Faith and Credit Clause to enforce the judgment in any other U.S. state.²⁰

¹⁴ Federal Arbitration Act, 9 U.S.C. § 9 (1947).

¹⁵ U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

¹⁶ *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

¹⁷ Landry, *supra* note 9, at 152.

¹⁸ *Id.* at 155.

¹⁹ 9 U.S.C. § 9.

²⁰ U.S. CONST. art. IV, § 1; *Baker*, 522 U.S. at 233.