Trends In Video Game Company Quests To Arbitrate Cases

By **Matthew Woods and Austin Miller** (March 26, 2021)

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The global market for video games and peripherals is approaching $200 billion a year, with approximately $60 billion in the U.S. alone.[1] Given the size of that market, and its widespread integration into the broader entertainment industry, it is not surprising that participants in that industry have seen a significant increase in litigation of all types in the past five years.

From patent infringement and product defect cases, to claims about how games are accessed and distributed, to concerns about consumer and gambling issues, almost every aspect of the video game industry's business operations has been subject to legal challenge.

With this surge of litigation, developers and distributors of video games and gaming equipment have seen a measure of success in relegating certain claims to private arbitration, in lieu of a judicial resolution.

For example, earlier this month, the U.S. District Court for the Northern District of California ruled that a putative class action against Electronic Arts Inc. — the creator of such popular sports games as FIFA and Madden NFL — alleging that a feature of many EA games, the Ultimate Team Pack, violated California's gambling laws, should instead be resolved by mandatory arbitration.[2]

As further examples, Sony Corp.,[3] Nintendo Co. Ltd.[4] and Microsoft Corp.[5] have all been hit with allegations that the controllers for such console games as Xbox and PlayStation contain defects that cause the virtual character to involuntarily drift on the game screen. Nintendo and Microsoft have employed a similar strategy of demanding arbitration; Sony has done so in the past, and appears ready to do the same in a recent drift case — although one version of Sony's standard arbitration provision contains mechanism for a formal opt-out from its effect.[6]

In each of these situations, the developer or distributor has invoked clauses in their respective terms of service and/or end-user license agreements, or EULAs, mandating resolution of disputes via arbitration instead of court proceedings. While the exact language of such clauses varies, they tend to contain broad language generally coupled with express waivers of the right to a jury trial and/or the right to resort to collective or representative claims, such as class actions.

Such clauses are based upon the Federal Arbitration Act. The U.S. Supreme Court has repeatedly recognized that this act embodies a "national policy favoring arbitration and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[7]

Because arbitration is a creature of contract, the ability of a developer or distributor to disrupt a plaintiff's choice of forum depends upon whether: (1) there is clear evidence of an intent to be bound by the waiver provisions, and (2) the language of the subject clause is broad enough in scope to clearly cover the asserted claims.

As to intent, courts tend to enforce clickwrap or scrollwrap types of agreements, as long as there is evidence that the user took affirmative action — such as checking a box — and that the provision in question provides reasonable notice to the user, in terms of clarity of language and the use of conspicuous fonts and colors. However, where an agreement does not require a user to take affirmative action, or the language is either not conspicuous or contains confusing internal references and/or hyperlinks to multiple documents, courts are willing to reject a demand for arbitration.[8]

As to scope, clauses which purport to cover all claims relating to the underlying agreement, or any service provided by the developer and/or distributor, tend to be strictly enforced. Nonetheless, it is typical that intellectual property matters and small claims matters are excluded from its scope. Moreover, a clause that purports to limit the type of substantive relief that an arbitrator can grant — e.g., public injunctions — will be viewed with some skepticism by a court.

While the bar for compelling arbitration may be low, it does exist. For example, in Ackies v. Scopely Inc.[9] — a case claiming that a game developer fraudulently induced gamers to purchase character upgrades without disclosing that such upgrades lose their value in more advanced missions — the U.S. District Court for the District of New Jersey last year refused to dismiss the complaint and compel arbitration.[10]

The court found that there was not enough detail in the record as to whether the plaintiff had truly agreed to the arbitration clause, and whether the clause included the claims referenced in the complaint. The court ordered that the parties conduct threshold discovery as to arbitrability.

To preempt such a result, some developers and distributors faced with similar arguments have asked the court to use the doctrine of judicial notice to consider evidence of dealings outside of the pleadings. Other developers and distributors rely upon any language in the clauses saying that arbitrability is to be decided by the arbitrator, not the court.[11]

One complicating factor is the fact that games are often purchased by, or for, minors. This creates issues as to whether enforceable agreements have been created, insofar as minors are traditionally viewed as not having the capacity to enter into binding contracts.

Where a minor is the subject of an arbitration provision in a EULA, courts may rely on the theory of implied authority to enforce the arbitration clause accepted by a minor. This is not absolute, however, as courts may absolve minors of their requirement to arbitrate when there is clear disaffirmance of that provision.

Two cases are illustrative of the limits by which a court may bind a minor, both involving a EULA and the same company: Epic Games Inc., the creator of Fortnite.

In Heidbreder v. Epic Games,[12] the U.S. District Court for the Eastern District of North Carolina last year granted Epic's motion to compel individual arbitration of the claims of a putative class action alleging inadequate data security and cyber vulnerabilities in Fortnite allowing hackers to breach user accounts, resulting in fraudulent charges against the plaintiff's debit card.[13]

The plaintiff argued that he never accepted the terms, but rather, that his minor child agreed to the arbitration provisions of the EULA, and that the minor did not have the legal capacity to accept the contract.[14] The court disagreed, ruling that under basic principles of principal-agent law, the minor child-player was acting as the plaintiff's agent, and had

both actual and apparent authority to agree to the EULA and bind the plaintiff.

Relevant to this conclusion was the fact that: (1) the plaintiff created the Epic Games account in his name, but did not himself play; (2) the minor used the account; (3) the minor used the plaintiff's account every day to play Fortnite after the account was created; and (4) the minor knew or had access to the login credentials for the plaintiff's account.[15]

The court noted that the plaintiff initially opened the Fortnite account in his name, but did not play, instead giving his minor child "free rein over the account for over a year," creating a reasonable belief that the minor had the implied actual authority to click "agree" to the EULA when Epic required users to agree to updated terms[16] after the account was created.[17]

In contrast, the U.S. District Court for the Northern District of California has applied the California Family Code to permit minors to disaffirm arbitration provisions in EULAs. In Doe v. Epic Games Inc. last year,[18] the court denied Epic Games' motion to compel arbitration under the same EULA at issue in Heidbreder, finding that the minor had disaffirmed the EULA and arbitration provision contained therein.[19]

Prior to bringing suit, the plaintiff's counsel sent a letter to Epic Games alleging that it had "specifically target[ed] minors for in-App Purchases" without "includ[ing] any provisions to get parental consent," and purportedly put Epic Games on notice of its violations of California gambling laws.[20] The letter also stated that the plaintiff "can legally disaffirm contracts with [defendant] for in-App Purchases," including purchases that were made by using the minor's own money.[21]

The court held that this letter, and the plaintiff's filing of the complaint, "convey plaintiff's intent to repudiate the binding force and effect of plaintiff's in-App purchases." Because a "minor's power to disaffirm a contract is broad and can be invoked through any act or declaration that conveys his intent to repudiate a contract," those acts were sufficient to repudiate the effect of the EULA.[22] Accordingly, the plaintiff could not be compelled to arbitrate the dispute.[23]

For the time being, it appears that the side seeking arbitration has the upper hand — at least in the U.S. However, arbitration is not a panacea for beleaguered manufacturers and developers in all circumstances.

Procedural safeguards associated with traditional litigation — such as the right to conduct discovery, a trial governed by the rules of evidence and a substantive appeal — are not part of the arbitration bargain. Their absence can sometimes lead to unintended consequences.

For example, in TimeGate Studios Inc. v. SouthPeak Interactive LLC,[24] the U.S. Court of Appeals for the Fifth Circuit in 2013 reversed a district court's decision that an arbitrator had exceeded his authority by granting a video game distributor a perpetual license to the game developer's intellectual property. The underlying contract clearly contemplated a limited license, and the game distributor did seek a perpetual license.

Nonetheless, the arbitrator found the developer's conduct to be so egregious that it warranted essentially rewriting the contract. The Fifth Circuit chastised the district court for vacating that award, noting that courts owe a high deference to arbitral decisions, even where they are contrary to the law.

Meanwhile, Riot Games Inc. — the developer of popular video games and e-sports leagues

centered on its League of Legends brand — continues to find itself in the spotlight for trying to force gender discrimination and sexual harassment claims brought by certain of its employees into arbitration.[25]

Shortly after these claims surfaced in late 2018, Riot Games moved to compel arbitration, but backed away from that remand when employees threatened a large scale walkout because it was perceived the demand was a strategy to avoid having to address the concerns raised in the complaints.[26] Now that a potential settlement has cratered, Riot Games has renewed its demand for arbitration — this time coupled with a public relations statement extolling the benefits of arbitration.

While developers and distributors may have the upper hand for now in the U.S., they face a somewhat different situation in Canada. Canadian courts have begun to recognize the inherent limits of imposing arbitration when there exists an imbalance of bargaining power involving standard form contracts or contracts of adhesion.

In Uber Technologies Inc. v. Heller,[27] David Heller entered into several agreements with Uber in order to access Uber's ride software that required arbitration be brought in Amsterdam. Heller sought to bring a class action on behalf of Uber drivers, seeking, inter alia, a declaration that he and the other drivers are employees of Uber and, therefore, entitled to benefits under Ontario's Employment Standards Act.

In finding the arbitration clause unconscionable last year, Canada's Supreme Court stated that the purpose of the unconscionability doctrine is to provide relief from improvident contracts, and to protect vulnerable parties in the contracting process from loss or improvidence in the bargain that was made.

An agreement may be set aside by the courts as unconscionable where there is an inequality of bargaining power between contracting parties and where such inequality results in an improvident bargain. A contract is improvident if, at the time the contract is formed, it unduly advantages the stronger party or unduly disadvantages the more vulnerable party.

Finally, the results of last year's U.S. presidential election have revived chances of passage of H.R. 1423, the Forced Arbitration Injustice Repeal Act. The FAIR Act would dial back the applicability of the Federal Arbitration Act in many circumstances, especially as to claims involving consumer rights or allegations of antitrust violations. The FAIR Act has already passed the U.S. House, and both Senate Democrats and President Joe Biden have expressed some level of support.

Certainly, if some version of the act becomes the law, then developers and manufacturers of video games and equipment are likely to face the same type of aggressive litigation other industries have had to navigate. While this certainly will not be "game over" for them, it could deprive them of one powerful play in the litigation arena.

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[1] https://www.statista.com/statistics/246892/value-of-the-video-game-market-in-the-us/#:~:text=This%20timeline%20presents%20a%20forecast,worth%2060.4%20billion%20U.S.%20dollars.

[2] Ramirez v. Electronic Arts Inc. , 2021 U.S. Dist. LEXIS 43032, at *8 (N.D. Cal. Mar. 5, 2021).

[3] Turner v. Sony Corp. of America et al., No. 1:21-cv-01299 (S.D.N.Y.).

[4] Diaz v. Nintendo of America Inc., No. 2:19-cv-01116-TSZ (W.D. Wash.).

[5] McFadden v. Microsoft Corp., No. 2:20-cv-00640 (W.D. Wash.).

[6] https://www.ign.com/articles/ps5-dualsense-controller-drift-class-action-lawsuit-filed-against-sony.

[7] AT&T Mobility LLC v. Concepcion , 563 U.S. 333, 345-46 (2011); see also Epic Systems v. Lewis , 138 S. Ct. 1612, 1632 (upholding class and collective action waivers in employment context).

[8] See Rojas v. GoSmith Inc. , 2020 U.S. Dist. LEXIS 28922 (N.D. Ind. Feb. 20, 2020); see also Martin v. Wells Fargo Bank NA , 2013 U.S. Dist. LEXIS 169807 (N.D. Cal. Dec. 2, 2013).

[9] Ackies v. Scopely Inc. , No. 19-cv-19247, 2020 U.S. Dist. LEXIS 177846 (D.N.J. Sep. 28, 2020).

[10] Id. at *11-12.

[11] See Ramirez, 2021 U.S. Dist. LEXIS 43032, at *10.

[12] Heidbreder v. Epic Games , 438 F. Supp. 3d 591 (E.D.N.C. 2020).

[13] Id. at 595.

[14] Id. at 596.

[15] Id. at 596-97.

[16] Relatedly, the court rejected the argument that the arbitration provision is unconscionable where "users had meaningful choice over the arbitration provision" because Epic "provided users a 30-day window after accepting the EULA to opt-out of the arbitration provision."

[17] Id. at 597.

[18] 435 F. Supp. 3d. 1024 (N.D. Cal. 2020).

[19] California Family Code Section 6710 states that "[e]xcept as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards."

[20] Id. at 1034.

[21] Id.

[22] Id. at 1036 (internal citations omitted).

[23] Several other states have enacted laws similar to California permitting minors to disaffirm contracts, including: Washington (RCW26.28.030); Utah (Utah Code § 15-2-2); Oklahoma (15 OK Stat § 15-19); and South Dakota (SDCL § 26-2-6).

[24] 713 F.3d 797 (5th Cir. 2013).

[25] McCracken et al. v. Riot Games et al., case number 18STCV03957, in the Superior Court of the State of California, County of Los Angeles.
See https://www.gamesindustry.biz/articles/2021-01-29-riot-games-seeks-arbitration-in-gender-discrimination-lawsuit.

[26] Id.

[27] Uber Technologies Inc. v. Heller, 2020 SCC 16.