

Computer Law Reporter

A MONTHLY JOURNAL OF COMPUTER LAW AND PRACTICE

Publisher:
Neil J. Cohen, Esq.

Volume 64, Number 6

Washington, D.C.

February 2017

ARBITRATION CLAUSES

Dang v. Samsung Electronics Co. Ltd. No. 15-16768 (9th Cir. Jan. 19, 2017)

Norcia v. Samsung Telecommunications America, LLC, No. 14-16994 (9th Cir. Jan. 19, 2017)

Ninth Circuit: In-Box Arbitration Clause Not a Binding Contract

Alan S. Kaplinsky, Daniel JT McKenna,
Mark J. Furletti, Kim Phan & Sarah T. Reise

The Consumer Financial Services Group

Ballard Spahr LLP

Copyright © 2017 by Ballard Spahr LLP. The content is intended for general information purposes only. It should not be construed as legal advice or legal opinion on any specific facts or circumstances.

Adding more complexity to the issue of arbitration contract formation, the Ninth Circuit has rejected Samsung's attempt to compel individual arbitration of fraud claims asserted by plaintiffs in two class actions. Ruling in *Dang v. Samsung Electronics Co., Ltd.* and *Norcia v. Samsung Telecommunications America, LLC*, the court held that no agreement to arbitrate was formed under California law when Samsung included a warranty brochure containing the arbitration clause inside the boxes for its smartphones, even though the plaintiffs had the right to opt out of the arbitration clause.

Samsung had argued that the Ninth Circuit should follow a well-known earlier decision of the Seventh Circuit, *Hill v. Gateway 2000, Inc.* That decision concluded that an arbitration clause inside a shipping box containing a computer purchased by the plaintiff was enforceable because practical considerations allow sellers to enclose full legal terms along with their products and the plaintiff kept the computer beyond the 30-day return period. However, the Ninth Circuit distinguished *Hill*. It reasoned that the Samsung

plaintiffs were not on notice that the warranty brochure contained an arbitration clause, and in any event under California law a failure to opt out does not constitute consent.

Samsung also argued that one of the plaintiffs had agreed to arbitrate because he signed a purchase receipt which incorporated the wireless carrier's customer agreement and expressly referred to arbitration. Nevertheless, the Ninth Circuit found that the customer agreement was between the plaintiff and the wireless carrier and there was no evidence they intended to make Samsung a third-party beneficiary.

These opinions underscore the importance of ensuring that the arbitration clause has a firm contractual foundation. Although the U.S. Supreme Court held in *AT&T Mobility, LLC v. Concepcion* that a state unconscionability law is preempted by the Federal Arbitration Act, whether or not an "agreement" to arbitrate exists is generally a matter of state contract law. We routinely counsel companies on the procedures for implementing arbitration programs contractually, both in original agreements and through change of terms procedures.

Ballard Spahr's Consumer Financial Services Group is nationally recognized for its guidance in structuring and documenting new consumer financial services products, its experience with federal and state consumer credit laws throughout the country, and its skill in litigation defense and avoidance (including pioneering work in pre-dispute arbitration programs).