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ARE JURY TRIAL WAIVERS ENFORCEABLE?

Unfortunately, the courts are split as to enforcement of jury trial waiver provisions. Some Georgia cases indicate that courts in that state may not enforce the waiver of jury trial as contained in standard loan and lease documents. *American Southern Financial, Ltd. v. Yang*, 448 S.E.2d 450 (Ga. 1994).

Other courts focus on the procedural aspects of the jury trial waiver: Is the type legible, did the parties have access to counsel and reasonable bargaining power, etc. (These issues may be recast under UCC Article 2A as whether the waiver is "unconscionable".) See *Cooperative Finance Association, Inc. v. Garst*, 874 F.Supp. 1168 (N.D. Iowa 1995). Federal law, which was applied by the Iowa court in the *Garst* case and by other courts, seems to favor upholding such clauses where are reasonably negotiated. Clearly, the waiver should be conspicuous and easily understood. *Fairfield Leasing Corp. v. Techni-Graphics, Inc.*, 607 A.2d 703 (N.J. 1992).

We recommend that waivers of jury trial be conspicuous and, to avoid unconscionability and other defenses, that lender or lessor representatives inquire as to whether the borrower or lessee is represented by counsel and has experience in dealing with commercial transactions. A memo to file stating that these matters have been discussed should be a part of standard documentation if the lender or lessor wants to rely on boilerplate provisions such as the waiver of jury trial.

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