

Drafting the Perfect ADR Provision and Litigating All of the Rest

What every Commercial Litigator and Transactional Lawyer should know about Recent Cases in the area of Alternative Dispute Resolution Clauses and their Enforcement

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I. OVERVIEW OF THE LAW GOVERNING ALTERNATIVE DISPUTE RESOLUTION (“ADR”) PROVISIONS

A. Arbitration

1. The California Arbitration Act (Code of Civil Procedure sections 1280 - 1294.2); Rule 371, Cal. Rules of Court. *Cf.* Judicial Arbitration, Code of Civil Procedure sections 1141.10 - 1141.31, and Rules 1600 - 1618, Cal. Rules of Court.
2. The U.S. Arbitration Act, also known as the Federal Arbitration Act (9 U.S.C. section 1 - 16).
3. Statutes dealing with arbitration in specific types of contracts.
 - a. Home Construction Contracts (Business & Professions Code section 7191). See *Woolls v. Superior Court* (2005) 127 Cal.App.4th 197.
 - b. Health Care Contracts dealing with Arbitration of Medical Malpractice Claims (Code of Civil Procedure sections 1295).
 - c. Health Care Service Plans (Health & Safety Code section 1363.1). See *Malek v. Blue Cross of Cal.* (2004) 121 Cal.App.4th 44.
 - d. Real Estate Sale or Lease Contracts (Code of Civil Procedure section 1298).
 - e. Attorney Engagement Letters (Business & Professions Code section 6201).
 - f. Common Interest Development By-laws, CC&R's or Agreements (Civil Code sections 1363.810 - 1363.850).
 - g. Public Construction Contracts (Code of Civil Procedure section 1296).

- h. See also statutes summarized in W. Knight, *Cal. Practice Guide: Alternative Dispute Resolution* (2004) Appendix A.
4. Recent and / or Important Cases dealing with Arbitration Clauses.
- a. *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.
 - b. *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495.
 - c. *Aguilar v. Lerner* (2004) 32 Cal.4th 974.
 - d. *Cruz v. PacifCare Health Systems, Inc.* (2003) 30 Cal.4th 303.
 - e. *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064.
 - f. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.
 - g. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951.
 - h. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1.
 - i. *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807.
 - j. *Ting v. AT&T* (9th Cir.2003) 319 F.3d 1126.
 - k. *Independent Assn. Of Mailbox Center Owners, Inc. V. Superior Court* (Sept. 16, 2005) __ Cal.App.4th __ [2005 WL 2249918].
 - l. *Jones v. Humanscale Corp.* (2005) 130 Cal.App.4th 401.
 - m. *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253.

- n. *Greenbriar Homes Community v. Superior Court* (2004) 117 Cal.App.4th 337.
- o. *Garcia v. DIRECTTV, Inc.* (2004) 115 Cal.App.4th 297.
- p. *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638.
- q. *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702.
- r. *Liska v. The Arns Law Firm* (2004) 117 Cal.App.4th 275
- s. *Hedges v. Carrigan* (2004) 117 Cal.App.4th 578
- t. *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107.
- u. *Lopez v. Charles Schwab & Co., Inc.* (2004) 118 Cal.App.4th 1224.
- v. *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702.
- w. *Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955.
- x. *Kalai v. Gray* (2003) 109 Cal.App.4th 768.
- y. *Jaramillo v. JH Real Estate Partners, Inc.* (2003) 111 Cal.App.4th 394.
- z. *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094.
- aa. *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519.

B. Judicial Reference

1. Code of Civil Procedure section 638.
2. Important Cases dealing with Judicial Reference Clauses.
 - a. *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081.
 - b. *Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723.
 - c. *Greenbriar Homes Community v. Superior Court* (2004) 117 Cal.App.4th 337.
 - d. *Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950.

C. Jury Trial Waivers

1. California Constitution, Article I, section 16.
2. Code of Civil Procedure section 631.
3. Important Cases dealing with Jury Trial Waivers.
 - a. *Exline v. Smith* (1855) 5 Cal. 112.
 - b. *Trizec Properties, Inc. v. Superior Court* (1991) 229 Cal.App.3d 1616.
 - c. *Grafton Partners LP v. Superior Court* (2005) 36 Cal.4th 944.

D. Mediation

Civil Action Mediation Act (Code of Civil Procedure sections 1775 - 1775.15).

II. FOR THE LITIGATOR, WHAT QUESTIONS TO ASK WHEN CONSIDERING WHETHER AN ADR PROVISION IS ENFORCEABLE, AND WHETHER THE PARTIES CAN BE COMPELLED TO ARBITRATE .

- A. Is there an enforceable ADR agreement? See Code of Civil Procedure section 1281.2; *Lopez v. Charles Schwab & Co., Inc.* (2004) 118 Cal.App.4th 1224.
- B. Has the proponent of the ADR provision complied with all of the applicable specialized statutes which apply to this particular contract? See section I.A.3., above. If not, is the statute preempted by the Federal Arbitration Act?
- C. Is the claim actually arbitrable?
1. Injunctive relief claims are not arbitrable. *Cruz v. PacifCare Health Systems, Inc.* (2003) 30 Cal.4th 303..
 2. A purchaser or lessor of real property cannot be compelled to arbitrate a construction defect claim. Code of Civil Procedure section 1298.7; *Basura v. U.S. Home Corp.* (2002) 98 Cal.App.4th 1205; *Villa Milano Homeowners Assn.v. Il Davorge* (2000) 84 Cal.App.4th 819.
- D. Is the ADR provision unconscionable?
1. Statutory authority: Civil Code section 1670.5. See also Civil Code section 1671 (enforceability of penalty and liquidated damages provisions).
 2. Important cases.
 - a. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.
 - b. *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064.
 - c. *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807.
 - d. *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638.

- e. *Greenbriar Homes Community v. Superior Court* (2004) 117 Cal.App.4th 337.
 - f. *Jaramillo v. JH Real Estate Partners, Inc.* (2003) 111 Cal.App.4th 394.
 - g. *Fitz v. NCR Corp.* (2004)118 Cal.App.4th 702.
 - h. *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519.
3. Consider all facts suggesting procedural and substantive unconscionability. See summary of facts below regarding substantive unconscionability, section III.
- E. Does the ADR provision seek to deprive a party of an important statutory or common law right? For instance, does the provision prohibit class treatment of arbitrable claims, does it restrict the remedies of the prevailing party, does it impair any specific statutory remedies?

III. FOR THE TRANSACTIONAL ATTORNEY, WHAT TO LOOK FOR IN REVIEWING AND DRAFTING ADR PROVISIONS.

- A. Does the ADR clause have aspects which are one-sided (non-mutual) and which unfairly benefit one party at the expense of the other? See *Armendariz, supra*; *Jones, supra*.
- B. Does the ADR clause contain a provision which prohibits or severely limits discovery? See *Armendariz, supra*.
- C. Does the ADR clause have a venue clause which violates California's venue scheme, Code of Civil Procedure sections 392 - 97? See *Pinedo v. Premium Tobacco Stores, Inc.* (2000) 85 Cal.app.4th 774; *Alexander v. Superior Court* (2003) 114 Cal.App.4th 723 (non-ADR case).
- D. Does the ADR clause provide for the selection of a neutral or neutrals whose qualifications might raise a question about true neutrality in the context of the agreement in question? See *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807.

- E. Does the ADR clause severely limit any applicable limitations period?
- F. Does the ADR clause substantially limit important common law or statutory rights? *See Armendariz, supra; Discover Bank, supra; Szetela, supra.*
- G. Does the ADR clause violate any applicable specialized statutes which apply to this particular contract? *See Woolls, supra.*
- H. Does the ADR clause require the payment of an unreasonable fee as a precondition to the right to arbitrate? *See Armendariz, supra; Boghos, supra.*
- I. If any of the foregoing elements are present, can the Court sever the offending provisions?

IV. **OTHER CONSIDERATIONS IN DRAFTING THE (HOPEFULLY) ENFORCEABLE ADR CLAUSE.**

A. **The Use of Factual Recitals.**

- 1. See Evidence Code section 622.
- 2. *Plaza Freeway Limited Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th 616.
- 3. *Miner v. Tustin Avenue Investors* (2004) 116 Cal.App.4th 264.

B. **The Form and Placement of ADR Provisions.**

- 1. See Commercial Code section 2316 regarding “conspicuousness”: print type, headings, placement.
- 2. Language choice: Is it clear and unambiguous?
- 3. Use of initials and specially prepared language (as opposed to a form agreement or “bill stuffer”). See Justice Johnson’s dissent in *Hicks v. Superior Court* (2004) 115 Cal.App.4th 77; *rev. granted and opinion superseded by* 13 Cal.Rptr.3d 300.