DYSFUNCTIONAL DRAFTING[1]

CHAOS FOR PARTIES!! MALPRACTICE FOR ATTORNEYS??

"A cautionary note - we spend too much time trying to make sense out of arbitration agreements precisely because litigants spend too little time in drafting them. Increasingly, we have been presented with incoherent hybrids and bizarre mutations of supposed agreements for judicial or contractual arbitration. Oftentimes the 'remedy' is worse than the disease. We can only warn: Read the label before applying." National Union v Nationwide Insurance, 69 Cal. App. 4th 709,717 (1999).

Fit the Form to the Fuss[2]

1. **Checklist**. The following checklist and the online drafting guides referenced below may prove beneficial, but drafting a customized clause often leads to dysfunctional drafting and unintended consequences. See the discussion below pointing out some of the potential problems and additional topics that may be considered..

   a. Basic clause
      i. Broad or narrow.
         (a) Tort claims
         (b) Statutory claims
      ii. Conditions precedent
         (a) Mediation
         (b) Negotiation
         (c) Other
      iii. Nonsignatories
         (a) Obligations
         (b) Fail-safe
         (c) Theories
      iv. Limit on motions.
      v. Administration
         (a) Provider
         (b) Ad hoc
      vi. International
         (a) Language to be used
         (b) Provider
         (c) Number of Arbitrators
         (d) Venue
   b. Arbitrators
      i. Number
      ii. Qualifications
      iii. Party Arbitrators
      iv. Authority
         (a) Arbitrability
   c. Venue

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To paraphrase Clarence Darrow, arbitration provisions "should be like clothes. They should be made to fit the people they are meant to serve."

d. Governing law
    i. State
    ii. FAA
e. Time limits
    i. Initiation
    ii. Award
f. Discovery
    i. Oral
    ii. Written
    iii. Site visits
    iv. Third party
    v. Out-of-jurisdiction
g. Provisional relief
    i. Preserve status quo
h. Evidentiary hearing
    i. Documents only
    ii. In-person
    iii. Time limits
i. Remedies
    i. Broad
    ii. Limited
    iii. Injunctive
j. Expenses
    i. Attorney fees
    ii. Administrative
    iii. Arbitrator
    iv. Non-payment
        (a) Default
k. Award
    i. Basic
    ii. Reasoned
    iii. Findings of fact and conclusions of law
        (a) Time
        (b) Expense
l. Appeal
    i. Limit
    ii. No limit
        (a) Provider panel
        (b) Courts

2. **Simple Clause.** Arbitration is a very flexible, relatively economical, expeditious, user-driven, and contract-based alternative to litigation. "A well-drafted clause can avoid procedural skirmishes,"[3] but a "poorly drafted arbitration clause almost always has a negative impact on the process."[4] Such clauses create unexpected problems that can lead parties to the very courts they were trying to avoid. Proper drafting is not for the faint of heart and attorneys drafting dysfunctional provisions that lead clients to the courthouse and unintended consequences may want to consider malpractice ramifications.

In most instances it is preferable to keep arbitration clauses thoughtfully brief, incorporate recognized and time-tested

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[3] Hon. Curtis E. von Kann (ret). JAMS Global Construction Solutions (Fall 2013).

[4] Roy S. Mitchell, Esq., JAMS Global Construction Solutions (Fall 2013).

rules of an established and stable provider, and select a good arbitrator to hear the dispute. The rest will usually take care of itself. According to one writer,[5] there are seven broad areas that can lead to dysfunctional drafting:

Sin 1:	*Equivocation*	if the parties want to arbitrate disputes, say so unequivocally.
Sin 2:	*Inattention*	the pros and cons of the process must be understood with attention paid to proper drafting.
Sin 3:	*Omission*	too much brevity can lead to the courthouse.
Sin 4:	*Over-Specificity*	too much specificity can lead to the courthouse.
Sin 5:	*Unrealistic Expectations*	the risk of designating time deadlines; lack of fail safe provisions.
Sin 6:	*Litigation Envy*	court rules; expanded review; statutory discovery.
Sin 7:	*Overreaching*	unconscionability

Another writer recommends that writers use plain English rather than legalese (e.g. avoid "hereunder," "hereafter," "inasmuch," "aforementioned"), use simple words instead of clunky phrases (e.g. "about" instead of "with respect to" and "after" instead of "subsequent to"), and avoid duplication of numbers (i.e. "three" instead of "three (3)").[6]

When the urge strikes to deviate from an unambiguous and relatively brief provision to something more creative, extreme care is recommended.

3. **Significant Delays & Expense Caused by Poor Drafting**. Regardless of what parties want in their arbitration provision, it's important that it be made as clear and unambiguous as possible - and then run by a few English teachers.

An escrow document considered in *Villacreses v. Molinari*, 132 Cal. App. 4th 1223 (2005) (buyers and sellers of a residence), included a notice advising parties that they were agreeing to arbitration "of all disputes to which it applies." A court order to arbitrate was reversed with the appellate court saying there was no agreement to arbitrate:

> "This is a cautionary tale. If the first rule of medicine is 'Do no harm,' the first rule of contracting should be 'Read the documents.' . . . Consequently, to paraphrase the immortal words of a former President of the United States, the applicability of this purported arbitration agreement to the instant dispute 'depends upon what the meaning of the word "it" is.' Without knowing what 'it' is, or what 'it' applies to, we have no information about the scope of disputes the parties might have intended to arbitrate. Unfortunately, 'it' is not defined anywhere. There is simply no referent for this pronoun."

⊛ Three and one-half years after the Complaint was filed the *Villacreses* parties, due to poor drafting, were back where they started.

03/27/02	Complaint filed
09/26/05	Appellate opinion (arbitration award vacated).

Parties should not have to guess whether they do or do not have an agreement to arbitrate, but the issue arose again in *M.D. Imad John Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, Docket No. 11-4371-cv, 2013 WL 238708 (U.S.C.A. 2d Cir., 01/23/2013). A Certificate of Insurance provided for payment of benefits if the insured became totally disabled. If parties disagreed, each had the right to have the insured examined by a physician of its choice. If they disagreed, those two were to "name a third Physician to make a decision on the matter which shall be final and binding." The District Court in 2011 said this was an arbitration agreement even though the word was never used. The Court of Appeal, after first deciding that the meaning of "arbitration" under the Federal Arbitration Act (FAA) is governed by federal law, not state law, affirmed.

In *Ex Parte Industrial Technologies*, 707 S. 2d 234 (Ala. 1997), the parties stipulated to refer their dispute to "mediation or arbitration" with a neutral described as a "mediator/arbitrator." After the neutral supervised settlement negotiations, the parties announced their "stipulation of agreement." When Counter-claimants sought to enforce what

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5 John M. Townsend, *Drafting Arbitration Clauses. Avoiding the 7 Deadly Sins.* AAA, Disp. Res. J. (Feb.-April 2003).

6 Martin Buchanan, *On Writing. Keep It Simple. Less Really Is More.* San Diego Lawyer (Jan./Feb. 2013).

they called a "binding arbitration order," Claimant said it was merely a non-binding mediation. The Alabama Supreme Court found the process fatally flawed since, among other things, it was impossible to determine the precise process the parties had agreed upon.

The parties in *Lindsay v Lewandowski*, 139 Cal. App. 4th 1618 (2006), agreed on "binding mediation." On appeal, the court said, "we cannot tell what the parties meant." A concurring justice went farther in saying:

> ". . . the term 'binding mediation' is relatively new in the legal lexicon and because of that it is a deceptive and misleading term. . . . lawyers may easily think that the term 'binding mediation" simply means they are compelled to attend and participate; that's all. They may not realize the term might be interpreted to mean that if a settlement is not reached, then, puff, the mediation becomes an arbitration.
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> I also write separately to more clearly register the oxymoronic character of the concept of 'binding mediation.' As lawyers we should use precise language - that is our tradition. A fuzz PR phrase like 'binding mediation' is not worthy of us.
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> . . . . I can think of nothing more self-contradictory than 'binding mediation.' . . .mediation is distinctive from 'arbitration' in its very voluntariness. . . . You go to mediation, you like it, you don't, you settle, you don't, no big deal. . . . Now granted, persons can voluntarily agree to a process which yields a result out of their control - the roulette table comes to mind. . . . "

What's needed, he said, "is clarity of language and informed consent. We have neither here."

⊛ Almost five and one-half years after reaching a stipulation, the parties were back at the beginning.

12/00/00 The parties signed a stipulation for binding settlement following mediation.
05/31/06 Appellate opinion (stipulation unenforceable).

The "binding mediation" concept was considered again in *Bowers et al v. Raymond J. Lucia Companies Inc.*, 206 Cal. App. 4th 724 (2012). Parties agreed they would

> "proceed to a mediation/binding baseball arbitration with a mutually agreed-upon neutral within sixty days of the execution of this agreement. To wit, the Parties shall participate in a full day mediation. If, at the end of that mediation, the Parties have failed to reach an agreement, the mediator shall be empowered to set the amount of the judgment in favor of Plaintiffs against Raymond J. Lucia Companies, Inc., at some amount between $100,000 and $5,000,000 such binding mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of either party."

Additional written terms and a transcript, during which counsel discussed what was intended (e.g. "mediation with a binding arbitration component"), helped to clarify the process parties agreed upon including each submitting its final number to the "mediator" who was empowered, through a day-baseball process, to select one number or the other. Defendant was less than pleased when the "mediator" selected $5,000,000. Unlike *Lindsay* where the court said, "we cannot tell what the parties meant," the *Bowers* court felt the parties' intent was made clear through the explanatory clause and the transcript.

☛ Even though *Bowers* upheld the result, more precise drafting could have clarified the parties' intent and kept clients away from appellate courts and the attendant cost and delay.

In *Sy First Family v. Cheung*, 70 Cal. App. 4th 1334 (1999), parties were already in litigation when they entered into a stipulation and order providing the claims "shall be referred pursuant to Code of Civil Procedure Section 638 [relating to a judicial reference] . . . to the American Arbitration Association, before a panel of three arbitrators, for Trial pursuant to the Association's Commercial Rules of Arbitration." With multiple concepts in a single sentence, an arbitration panel asked counsel to clarify whether they wanted - a reference (with the panel making recommendations to the court) or an arbitration (with the panel giving a binding award). Counsels' second attempt included AAA's arbitration rules and a judicial reference, but with Arbitrators having the immunity of a "judicial officer." With the consent of those involved, the case was arbitrated, but Respondent then argued the result should have been a recommendation to the court, not an award. The trial court agreed. The arbitrators complied and issued a 30-page "statement of decision" and a mollified trial court entered judgment. Respondent appealed. In ordering the trial court to enter a judgment confirming to the award

of the arbitrators, the appellate court said:

"This is another in a series of recent cases where parties agreed to a form of alternative dispute resolution without carefully considering the consequences of the agreement's terms. They were unclear whether they intended to engage in a reference or a contractual arbitration. The scope of judicial review applicable to a reference is very different from that applicable to contractual arbitration."

⊛ Almost five years and ten months after the Complaint was filed, the matter was still not final.

06/08/93 Complaint filed
03/29/99 Appellate opinion (trial court to proceed as indicated in unpublished portion of opinion and thereafter enter judgment confirming the award).

A similar issue was considered in *Wilson County Board of Education v. Wilson County Education Association,* #M2005-02719-COA-R3-CV (Ct. of App. Nashville, 2007), with the court finding there was no agreement to arbitrate.

"The inconsistency between 'binding arbitration' and a 'recommendation,' instead of an award by the arbitrator is obvious. They are more than inconsistent; they are mutually exclusive. They cannot both be given effect as defining the result of the final step in the grievance step."

⊛ Fifteen months after the trial court opinion (and an unknown period of time from when the Complaint was filed), the appellate court agreed an employee's grievance did not have to be submitted to arbitration.

11/01/05 Trial court opinion (filing date of Complaint not given)
02/06/07 Appellate opinion (no agreement to arbitrate since no meeting of the minds)

Considering a clause that had attributes of both private contractual arbitration and judicial arbitration, a court in *Pratt v. Gursey, Schneider & Co.*, 80 Cal. App. 4th 1105, 1110-1111 (2000) (accounting services) said:

"California appellate courts have on occasion had to struggle in an effort to interpret arbitration agreements entered into by parties which share the ambiguity in the present case where the parties referred to rules of law generic to both judicial and contractual arbitration. . . . [D]rafting arbitration agreements requires care so that it is clear what the parties intend - to have their dispute resolved under the judicial or contractual arbitration provisions of law. By drafting arbitration agreements clearly, then disputes over the alternative dispute resolution process, such as occurred here, will be less likely to occur."

⊛ More than three years after the Complaint was filed, confirmation of an arbitration award was upheld.

04/22/97 Complaint filed
05/12/00 Appellate opinion (defendants had waived their right to appellate review of a binding arbitration award; appeal dismissed).

While the *Pratt* court commented on sloppy drafting of the agreement, it failed to mention that a trial court had approved it and a retired judge had arbitrated the dispute, but apparently neither recognized the inherent ambiguity.

Elliott & Ten Eyck Partnership v. City of Long Beach, 57 Cal. App. 4th 495 (1997) (oil and gas lease), involved an agreement - proposed by the "supervising judge of the district" - that the parties "agree to have a sitting judge in the judicial district, of their choice, hear and decide the case as an arbitrator, rendering a decision not subject to appeal." The selected judge/arbitrator issued a decision "on court-captioned paper" that he called a "'Decision of Arbitrator.' It favored the plaintiffs. The other side, then losing, asked for a 'supplemental award,' because many of the issues had not been decided. The judge issued such an award, a supplement, that modified the award. As modified, the award favored the cross-complainant. The plaintiffs then sought to vacate the award."

By blurring the Judge/Arbitrator relationship an issue arose as to whether "the judge was exercising judicial powers or whether he was an arbitrator acting under contract arbitration, and subject to the strictures of the California Arbitration Act. . . . The distinction is critical. If the judge was acting as a judge, he had power to issue both the initial and the supplemental decision, and together they comprised a final decision enforceable as a judgment. But if the judge was acting as a contract administrator, subject to the restrictions of the Act, the supplemental award and, probably, the initial

award, were both invalid." Even though the parties called him an arbitrator, counsel called him an arbitrator, the supervising judge called him an arbitrator, and the sitting judge viewed himself as an arbitrator, there was no contract and he was not party-paid so the court decided he was really acting as a judge.

- ⊛ Almost six and one half years after suit was filed, the parties were back at the trial court level where the prevailing party could presumably seek enforcement of the decision in its favor.
  - 03/00/91 Complaint filed
  - 08/29/97 Appellate opinion ("whether viewed as an appeal from a judgment or from an order denying a motion to vacate an arbitration award," the decision of the Judge/Arbitrator was upheld).

A construction contract involved in an unreported matter provided for arbitration and said any party could apply to a court for provisional relief "that may not be available in arbitration." If provisional relief was "available in arbitration," could parties still apply for such relief in court? If an application were submitted to a court, would the court refer the application to the Arbitrator? How much expense would parties incur, regardless of the result, in having to argue the issue?

4. **Clause for discussion.** When a University of California law student wanted to know what area of the law was changing most rapidly, California Supreme Court Justice Carlos Moreno identified arbitration. "There's a lot going on right now," agreed Pepperdine University's Tom Stipanowich. "It definitely is in a rapid-mode."[7] In recent years there has been a "rapid expansion" of private or contractual arbitration as a mechanism for dispute resolution. *Aguilar v. Lerner,* 32 Cal.4th 974, 985 (2004).

Most major providers of domestic arbitration services have spent many long hours working with some of the best arbitrators in the country to develop effective rules and procedures. They monitor and respond to the changes alluded to by Justice Moreno and make necessary revisions when needed. Some of these revisions in recent years have related to discovery in commercial arbitrations, to one-sided clauses in many consumer and employment contracts, and to the still evolving body of law relating to class actions, class action waivers, and "ediscovery."

That said, there are many vastly different provisions in thousands of contracts and many drafters, confident they can improve on the English language, will continue to create customized arbitration provisions. For that reason and solely for educational and discussion purposes in connection with the subject program, the following includes a variety of provisions that are worth discussing, but they are not necessarily recommended.

> *Any controversy, claim or dispute between the parties, whether in contract, tort, statutory or otherwise, relating to or arising out of this contract, or the breach thereof, including issues relating to arbitrability and jurisdiction shall be resolved by binding arbitration administered by the ____ under its _____ Rules in effect when the demand for arbitration is filed, which Rules are incorporated herein by this reference and may be viewed on its website at _____.*
>
> *Judgment on the award rendered by the Arbitrator(s) shall, on application, be entered in any court having jurisdiction thereof.*
>
> *Any such arbitration shall be at _____.*
>
> *The law of the state of ____, procedural and substantive, shall apply to the arbitration.*
>
> *This agreement may be unilaterally modified at any time by ___ without notice.*

claim

While a simple five-letter word may seem innocuous, see *Fru-Con Const. v. Southwestern Redev*, 908 S.W.2d 741 (1995), for the problems it can cause. Wanting to arbitrate small claims and litigate large ones, the parties amended a standard form contract by providing for arbitration "if the total amount of damages arising from the claim or dispute, as estimated by the Architect, are [sic] less than $200,000." However, "any claim, dispute or other matter in question for which the amount of damages is estimated by the Architect to be greater than $200,000, is not subject to arbitration unless the parties mutually agree otherwise."

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[7] Laura Ernde, *Judicial Review of Arbitration Raises Questions About the Process*. L.A. Daily J. (01/04/10).

The Contractor filed suit, but two years later the Architect "found that it was comprised of multiple events giving rise to a series of different claims, only one of which exceeded $200,000." The courts took it from there with the appellate decision finally coming three years after the suit was filed. That was followed by a denial of a rehearing and a denial of an application to transfer and the parties had still not reached the merits of their dispute. *Fru-Con* is discussed in a different context below.

parties

An employment agreement considered in *Wisdom v. Accentcare*, 202 Cal. App. 4th 591 (2012), was viewed by employees who signed it as being one-sided since it said "I hereby agree" to arbitrate. The parties settled while the case was pending at the California Supreme Court, but a similar argument was made in *Baltazar v. Forever 21, Inc.*, 212 Cal. App. 4th 221 (2012) since the provision saying disputes to which it applied included but were "not limited to" specified disputes, disputes the employees said related to those they might bring and it was, in essence, a unilateral provision.

Also similar was *Serpa v. California Sur. Investigations, Inc.*, 215 Cal. App. 4th 695 (2013) in which employees signed an agreement saying "I will submit" disputes to binding arbitration. The appellate court construed all the documents as a whole and felt it was a bilateral agreement to arbitrate, but the poor wording caused both parties a lot of unnecessary time and expense.

contract, tort, statutory or otherwise,

Although tort claims are usually not considered to be automatically excluded from a contractual arbitration if the clause only mentions contract disputes (see *Gregory v. Electro-Mechanical Corporation*, 83 F.3d 382 (11th Cir. 1996)) (sale of stock), some courts have ruled that tort and statutory claims are not arbitrable. If drafters want to make sure tort and statutory claims are to be arbitrated, or not, the best way to assure what they want is to say so.

In an unreported matter, it was alleged that construction defects caused leaks in a second story bathroom, water infiltrated ceilings and walls, mold developed, and residents with asthma problems claimed personal injuries. Parties thought their contract only applied to construction disputes, but the tort claim was deemed arbitrable under the terms of a broad clause that was not limited to contract disputes.

A clause that was limited to contract disputes was considered in *Flores v. Axxis Network,* 173 Cal. App. 4th 802 (2009), an employment case, with the court saying a contract may require arbitration of statutory claims, but that intent must be clear. The subject contract referred to statutory requirements, but the arbitration provision only mentioned contract disputes. It failed to provide for an "explicit incorporation of statutory antidiscrimination requirements" and there was no express provision making compliance with statutes a contractual commitment subject to the arbitration clause.

In *RN Solution, Inc., v. Catholic Healthcare West*, 165 Cal. App. 4th 1511 (2008) (contract to recruit nurses) a clause providing for arbitration of "any dispute . . . aris[ing] out of the services contracted for" was deemed too narrow to apply to claims of gender-based violence, assault, battery, false imprisonment, intentional infliction of emotional distress and declaratory relief regarding arbitrability

A provision providing for arbitration of contract disputes was considered in *Elijahjuan v. Superior Court*, 210 Cal. App. 4th 15 (2012), with the court saying a claim seeking enforcement of statutory Labor Code provisions did not have to be arbitrated due to the limited scope of the clause.

relating to or arising out of

When parties want a broad clause, it never hurts to use the magic words found in so many court opinions. When a clause calls for arbitration of "any dispute 'relating to or arising out of' the agreement" the parties "intend the clause to reach all aspects of the relationship." *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 n. 2 (5th Cir.1993) (joint venture to produce resins). Other opinions are similar.

The "relating to or arising out of" language is generally considered to be broad language that will incorporate a wide range of disputes. In *Prima Paint v. Flood & Conklin Mfg.*, 388 U.S. 305 (1967) (purchase of paint business), "arising out of or relating to this agreement" was held broad enough to cover claims of fraud in the inducement. In *Webb v Eldorado Colleges, Inc.*, 61 Cal. App. 4th 1450 (1998)(vocational school enrollments), a provision applicable to "any controversy or claim arising out of or relating to" the agreements was deemed to cover claims of a statutory violation,

intentional and negligent misrepresentations, and unfair business practices related to alleged misrepresentations made by a college to get students to sign the agreements. In *Ferrer v. Preston*, 552 U.S. 346 (2008) (entertainment services contract), the court said disputes subject to the Federal Arbitration Act may include otherwise state-mandated administrative proceedings.

In *Gregory v. Electro-Mechanical Corporation*, above, a clause requiring arbitration of disputes "which may arise hereunder or under any agreement referred to as an exhibit" was deemed broad enough to cover claims of breach of contract, fraud, fraudulent inducement, deceit, misrepresentation, conversion, breach of good faith and fair dealing, and outrage and not merely breach of contract claims, although broader language (e.g. "or related to") may have prevented the appeal.

David Co. v. Jim W. Miller Constr., Inc., 444 N.W.2d 836 (1989) (construction), considered a clause that authorized arbitrators to decide "[a]ll claims, disputes and other matters in question . . . relating to, the Contract . . . or the breach thereof . . . ." This, said the court, was "extremely broad" and was "a grant of authority to structure an award which is commensurate with the extent, the pervasiveness, and nature of the poor workmanship resulting in construction deficiencies of such patent magnitude which existed." While the result may be appropriate, the clause was not broad since it was limited to contract claims.

Bono v. David, 147 Cal. App. 4th 1055 (2007) (real estate development; defamation), did consider a more narrow clause with the court saying a provision for arbitration of disputes "involving the construction or application of any provision of this Agreement" did not apply to a defamation claim. The court said the "the arbitration clause before us here contains no language similar to the fairly standard 'related to' or 'arising from' terminology. Its terminology is much narrower than that, and far too narrow to permit us to reverse the ruling of the trial court."

Neosho Construction Co. v Weaver-Bailey Contractors, 69 Ark. App. 137, 10 S.W.3d 463 (2000) (concrete paving), also had a narrow clause. A construction contract said a prime contractor could "by a written order . . . make changes. . . . Changes for extra, additional or different work . . . without previous written order by Contractor will not be allowed except under emergency conditions." Arbitration was not compelled. The court felt the parties had only agreed to arbitrate disputes that arose out of "written" change orders or changes in response to an "emergency."

In *Cape Flattery Limited v. Titan Maritime, LLC.*, 647 F.3d 914 (9th Cir. 2011) (maritime salvage), a question posed to the court was, "when parties agree to arbitrate 'any disputes arising under this Agreement,' does that restrict arbitration to only those disputes about the "interpretation and performance" of a contract, or can it also include disputes that would not have arisen but for their contract?" Here, since the provision only mentioned disputes "arising under" the agreement, it was deemed too narrow to encompass a claim based on a federal statute relating to coral reefs that was separate from duties under the contract. Similarly see *Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292 (9th Cir. 1994) (licensing agreement trade secrets) ("arising out of" was interpreted to cover only contract disputes and not tort claims) and *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983) (engineering for modular housing) ("arising under" did not require arbitration of disputes "relating to" an agreement).

In *Mendez v. Mid-Wilshire Health Care Center*, No. B243144; 2013 WL 870983 (Cal. App. 4th, 09/23/2013) (employment), the court said the applicable collective bargaining agreement did not have a "clear and unmistakable," "particularly clear," or "explicitly stated" agreement to arbitrate statutory discrimination claims.

including issues relating to arbitrability and jurisdiction

Too often appellate courts have been asked to rule on whether a clause does or does or does not give the Arbitrator authority to decide issues of arbitrability, something that is an issue for the courts unless the parties' agreement "clearly and unmistakably" provides otherwise.[8]

What could be more clear and more unmistakable than saying so? Addressing the issue in the arbitration clause would seemingly save parties considerable time and expense. This is especially true in domestic arbitrations where the

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Arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate the particular grievance - is undeniably an issue for judicial determination." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986). Also see *First Options v Kaplan*, 115 S.Ct. 1920 (1995); 12 Ohio State J. on Disp. Resol. #3 (1997); *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 130 S.Ct. 2847 (2010); *Rent-A-Center West v. Jackson*, 130 S.Ct. 2772 (2010).

meaning seems to be less precise than in the international arena,[9] but it also arises in international matters. In *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II LP*, No. 12-593 (U.S.C.A. 2d Cir., June 3, 2013) (stock purchase agreement), a dispute was referred to arbitration under ICC rules in December 2007 and resulted in an award, judicial challenges in Brazil and the United States, and an appellate remand so the District Court could decide whether parties had agreed to a clause that "clearly and unmistakably assigns to an arbitral panel any questions about the scope of their arbitration agreement." Six and one-half years after commencement of the arbitration, they still had no finality.

Reviewing numerous cases, one author concluded, "Parties wishing to give an arbitrator the power to resolve the threshold question of arbitrability should include unambiguous language to that end within the arbitration provision, which may include referring to the rules of an arbitration provider (like the AAA) that grants its arbitrators with such power."[10]

> "At the time a contract is being negotiated, the arbitration step should be tailored to meet the company's objectives with respect to the likely future disputes that they anticipate could arise as a result of the transaction. Is it likely that future disputes will be large or small, complex or small? Will they involve multiple parties? Will they involve precedent-setting issues? Anticipating the nature, size and complexity of future disputes can help determine whether all or just some disputes should be arbitrated (i.e. the scope of arbitrability)."[11]

The AAA's rules correctly distinguish between "jurisdiction" and "arbitrability" (Construction Rule R-9(c); Commercial Rule R-7(c)). Construction Rule R-9(a), effective October 1, 2009, gives express authority to arbitrators to decide issues of "jurisdiction." Despite having distinguished between jurisdiction and arbitrability and expressly saying arbitrators may decide jurisdiction, it does not mention arbitrability although most courts interpret this to let arbitrators decide arbitrability issues. Commercial Rule R-7(a) effective October 1, 2013, expressly provides "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections . . . to the arbitrability of any claim or counterclaim." For JAMS, see Construction Rule 11 and Comprehensive Rule 11.

To avoid any doubt regardless of the rules specified, why not just write it into the contract?

binding

Most attorneys and arbitrators would say there is no need to say "binding." We all know private contractual commercial arbitration is binding. We may. Others may not. Their only prior experience, if any, with arbitration may have been in non-binding judicial arbitration or non-binding arbitration pursuant to California's Mandatory Fee Arbitration Act or under regulations of the Contractors State License Board. They may not realize commercial arbitration pursuant to private contracts is usually binding.

Absent clarification, some courts have viewed this "ambiguity" as a factor to be considered when deciding whether to enforce an arbitration provision and a Texas case made it to the state's supreme court before the issue was decided. One word can change that and save parties significant unnecessary expense.

administered by

Some parties may prefer a process administered by a third party provider organization such as the AAA, JAMS or another provider. Others may prefer an *ad hoc* process administered by the arbitrator.

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9 Laurence Shore, *Defining 'Arbitrability.' The United States vs .the rest of the world.* New York L. J. (06/15/2009).

10 Brian T. Hafter, *ADR Claim Jumpers*. Los Angeles Daily Journal (01/24/07).

11 Kent B. Scott and Adam T. Mow, *Creating an Economical and Efficient Arbitration Process Is Everyone's Business*. AAA, Disp. Resol, J. (Aug./Oct., 2012). The authors are construction attorneys in Salt Lake City, Utah.

Experienced providers who administer arbitrations, both domestic and international, can add value and efficiency to the process. Drafters unfamiliar with proposed providers should carefully check the administrative practices and procedures of those providers, especially in the international arena where there are so many different providers and in domestic localities where there may be providers who have not been used by drafters (see *International* discussion below).

Some organizations provide a limited variety of services without charge, but most major domestic providers do charge. They all have expenses (e.g. salaries of personnel, rent and other costs associated with their office space, newspaper advertising, travel costs, etc.). One way or another, those expenses must be recouped and providers do this in a variety of ways:

1. Some charge an initial filing fee based on the amount of the claim to help offset overhead and as a means of deterring frivolous claims (i.e. unlike litigation where one filing fee lets a Plaintiff claim virtually anything, a fee based on the amount of the claim requires a Claimant to pay-to-play and discourages frivolity).
2. Some charge no initial fee, but arbitrator compensation for their neutrals may be higher.
3. Most arbitrations, like most lawsuits, are settled and providers may have different policies for neutrals' billing of fees if a hearing is cancelled or continued.
4. Some also have provisions for a refund of all or a part of the administrative fees.

For these reasons, it's wise for drafters to check likely fees in advance, review provider policies, consider the nature of disputes that may arise and whether it seems likely that they'll be resolved prior to an evidentiary hearing, and request a copy of the provider's billing guidelines

Providers can be very helpful to parties and counsel in scheduling hearings, arranging for conference calls, selecting the arbitrators, transmitting documents, administering payments, and handling communications that might be seen as an appearance of bias if handled *ex parte* with an *ad hoc* arbitrator. Some arbitrators serving in an *ad hoc* capacity, charge fees for their time, or staff time, spent on these matters, fees that a provider will absorb as part of its administrative fees. Other *ad hoc* arbitrators do not charge for administrative time.

Drafters should also verify the existence and availability of the provider and review its rules. As basic as that may seem, at least one public agency's form contracts for construction disputes specified a provider that had gone out of business many years previously. One party to a dispute argued it therefore did not have to arbitrate since specification of that provider was integral to the parties' agreement. The other argued the commitment to arbitrate was clear and the only issue was what provider, if any, would be used, and what rules would apply.

The same issue was considered in *Riley v. Extendicare Health Care Facilities, Inc.* #2012AP311 (Wisc. Ct. App. 2012) (wrongful death), when the court said designation of the National Arbitration Forum as the provider for arbitration was integral to, and not merely ancillary to, the agreement to arbitrate. Since NAF no longer administered consumer disputes, no arbitration was required. Similarly, see *Miller v. GGNSC Atlanta, LLC,* 2013 Ga. App. LEXIS 655, 2013 WL 3658836 (07/16/13) (nursing home agreement) and *Nishimura v. Gentry Homes, Ltd.*, No. CAAP-13-0000137 (Hawai'i Inter. Ct. of App., 02/28/14) (home warranty agreement designated a provider "or such other reputable arbitration service" that a designated third party might select).

With better drafting these issues would not have existed. For this reason, since a provider may go out of business or be unwilling or unable to administer a specific matter, online suggestions have included the following. Which is more explicit?

> *If _____ is unable or unwilling to administer the proceeding, this shall not relieve the parties of their obligation to arbitrate provided, however, that, if they cannot agree on an arbitrator, either may petition the court to appoint a neutral arbitrator.*

> "*It is understood and agreed by Facility and Resident that any and all claims, disputes and controversies (hereinafter collectively referred to as a 'claim' or 'claims') arising out of, in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration and not by lawsuit or court process. No other provision shall be considered integral to this agreement to arbitrate and the failure of any other provision shall not invalidate this agreement to arbitrate.*"

Some would also provide that a specified state arbitration statute or rules of a designated alternate provider would apply. In essence, "if Provider #1 won't do it, we'll use Provider #2."

Where a provider is desired, merely providing for use of a provider's rules does not automatically mean the arbitration will be administered by that provider. *But see* AAA Commercial Arbitration Rule R-2 effective October 1, 2013 ("When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration"). While such a rule is likely to be enforced, it's still advisable to say the proceeding is to be "pursuant to the rules of" and "administered by" a specified the provider if that is the parties' intent. Remember - clarity in the contract is a primary goal of drafting. Appeals, regardless of the outcome, are to be avoided. When an important provision is in the document signed (and hopefully read) by the parties, there is a greater chance of the provision being enforced than when signatories have to go to a secondary source (e.g., rules specified in the agreement, an attached exhibit, or another incorporated document) to determine the drafter's intent.

In *Maggio v. Windward Capital Management Co.*, 80 Cal. App. 4th 1210 (2000) (management of securities portfolio), an appellate court ruled that a provision for arbitration "in accordance with" rules of the AAA meant, as provided in those rules, that the proceeding "must take place before that body." Other courts have reached a different conclusion. See *Nachmani v. By Design, LLC*, 901 N.Y.S. 2d 838 (1st Dept. 2010) (employment) ("Petitioner correctly interpreted the provision requiring that the decision be in accordance with the AAA Commercial Arbitration Rules as a choice of law rather than a forum selection clause. . . the AAA's view on the issue notwithstanding"). For drafters, the issue can be avoided merely by saying the proceeding is to be "administered by" a named provider rather than leaving it to guesswork.

in effect when the demand for arbitration is filed

Most clauses merely say the arbitration will be conducted pursuant to "rules" of a specified provider. It's preferable to specify which rules, but the rules should be reviewed and care taken to specify the appropriate rules (e.g. commercial, construction, employment) since providers may have rules tailored for specific disputes. If rules aren't specified, the provider or arbitrator will usually designate the applicable rules.

Some clauses say the arbitration will be pursuant to the rules "then prevailing," but what does that mean - prevailing when the contract is signed or when the demand for arbitration is filed?

If drafters are satisfied with rules in effect when the contract is signed, they may prefer to say that since they know what they're getting. However, since rules are occasionally changed in response to new judicial opinions, or due to changes in industry form documents that prior rules did not address, or to eliminate ambiguities or otherwise improve on wording, drafters might prefer to trust the provider to have appropriate rules in effect when the demand for arbitration is filed.

In *Evans v. Centerstone Development Co.*, 134 Cal. App. 4th 151 (2005) (settlement agreement), Claimants argued JAMS' rules in effect when the agreement was signed should apply, but the rules said they could be amended without notice and those in effect on the date of the commencement of an arbitration would apply unless the parties specified another version of the rules and this agreement didn't.

In *Harper v. Ultimo*, 113 Cal. App. 4th 1402 (2003) (construction), an agreement between a contractor and homeowner provided for arbitration "in accordance with the Uniform Rules for Better Business Bureau Arbitration." Those rules had limitations on remedies and, said the court, "the inability to receive full relief is artfully hidden by merely referencing the Better Business Bureau arbitration rules, and not attaching those rules to the contract for the customer to review." As written, it was unclear whether rules in effect when the contracts were signed or rules in effect when the dispute arose would be controlling.

which Rules are incorporated herein by this reference and may be viewed . . .

Some courts have indicated, especially in consumer and employment cases, that the failure to include the rules in a contract is a factor to be considered when deciding whether the clause is unconscionable.[12] Other cases have held that

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"Although the agreement stated that arbitration would be conducted under the rules of the American Arbitration Association, the rules were not attached. In *Harper v. Ultimo, supra*, at page 1406, the court held it was oppressive to reference the Better Business Bureau arbitration rules, but not attach the rules to the agreement. "The customer is forced to go to another source to find out the full import of what he or she is about to sign - and must go to that effort prior to signing." (Ibid.) "Numerous cases have held that the failure to provide a copy of the arbitration rules to which the employee would be bound supported a finding of procedural unconscionability." *Wisdom v. Accentcare,*

a finding of procedural unconscionability can be lessened if the arbitration rules are incorporated into the contract by reference, such incorporation is clear, and the rules are readily available. *Hodsdon v. DirecTV, LLC*, No. C 12-02827 (U.S.D.C., N.D. Calif., 11/08/12) (safeguarding customer information). While the court acknowledged *Harper* and *Trivedi*:

> "more recent cases have held that procedural unconscionabilty can be avoided if the arbitration rules are incorporated into the contract by reference, such incorporation is clear, and the rules are readily available. Ulbrich *v. Overstock.Com, Inc.*, 2012 WL 3631498 at *6 (N.D. Cal. Aug. 15, 2012); *see also Medlin Ins. Agency v. QBE Ins. Corp.*, 2012 WL 2499952, at *5 (E.D. Cal. June 27, 2012) (holding that failure to provide arbitration rules is not, itself, enough to establish procedural unconscionability)."

While these issues are less likely in commercial matters, and since it's impractical to recite actual rules, it may help to at least incorporate the rules by reference and let parties and counsel know where they can find them.

Besides, there's no good reason for not letting parties know where they can read the specified rules.

shall . . . be entered in any court having jurisdiction

Numerous courts have ruled it is not necessary for an arbitration clause to expressly state "a judgment of the court shall . . . be entered upon the award," language from FAA §9[13] for an award to be enforceable under the FAA. See *Swissmex-Rapid S.A. de C.V. v. SP Systems*, LLC, 212 Cal. App. 4th 539 (12/28/12) (distribution of agricultural sprayers) and *Qorvis Communications, LLC v. Wilson*, 549 F.3d 303 (4th Cir. 2008) (employment; noting comments in *Hall Street Associates LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (03/25/08), to the effect that §9 did not have to be satisfied by any magic language. Rather, courts must enforce arbitration awards "so long as the parties expected judicial enforcement of their agreement."

"To confirm an award under Section 9 of the FAA, the parties must have consented in advance to judicial confirmation." *Tube City IMS, LLC. v. Anza Capital Partners, LLC.*, No. 1:14-cv-01783-PAE (U.S.D.C., So. Dist. N.Y., 06/11/14) (contract for sale of scrap metal goods). The parties in Tube City had not included the FAA language, but the court found they had consented to entry of a judgment by virtue of their participation in the arbitration and by language in their agreement that said the award was to be "final and binding."

It is still preferable to include the language even if parties think the FAA is not applicable since (1) other courts may rule differently, (2) the language makes it less likely a party would try to argue it didn't know arbitration awards could become enforceable judgments, and (3) it eliminates an issue that could, as in *Tube City*, unnecessarily lead to an expensive and time-consuming appeal.

arbitration shall be held at

Agreeing on a venue in advance can save time and money - or cost time and money. Parties may agree to let the provider or arbitrator select the most appropriate venue after the nature of the dispute has been determined or they may want to designate a venue in advance. That may be where one or more of the parties is based, where a project is located, where likely witnesses are located, or elsewhere. If agreement is reached, parties should verify that adequate facilities are available.

One boilerplate construction agreement said the arbitration would be at the site of the project. The parties didn't

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Inc., 202 Cal. App. 4th 591 (2012) (settled while pending at California Supreme Court), referencing *Trivedi v. Curexo Technology Corp.*, 189 Cal.App.4th 387, 393 (2010).

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"If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made."

consider that their project was in the middle of a desert, none of the parties or counsel were located there, adequate facilities were not available and workmanship, that might have made a site visit beneficial, was not an issue. They then argued about an alternate venue, an argument not easily resolved since each preferred its own locality and their respective offices were separated by more than one thousand miles.

Bradley v Harris Research, 275 F. 3d 884 (9th Cir., 2001) (franchise), involved a Utah franchisor. Utah was specified as the venue for arbitration, but a California statute said any provision in a franchise agreement that restricts venue "to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state." The District Court said the provision was enforceable only if the arbitration were conducted in California, but this was reversed. State law was preempted by the FAA. The court recognized the general principle that "the FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration," but state law is preempted to the extent it conflicts with federal law.

Similarly, numerous states have statutes that purport to prohibit certain forum selection clauses in other contexts as a matter of public policy. *M. C. Construction Corp. v. Gray Co.*, 17 F. Supp. 2d 541 (W.D. Va. 1998) (construction), involved a Virginia statute that said Virginia was the required forum for any arbitration pursuant to a construction contract for work being performed in Virginia. A North Carolina contractor and a Kentucky subcontractor were involved in a Virginia project. Despite a contractual forum selection clause naming Kentucky, the contractor sought arbitration in Virginia pursuant to the statute. With interstate commerce involved, the court looked to the FAA and said it preempted the Virginia statute.

On the other hand, in *Keystone, Inc. v. Triad Systems Corporation*, 971 P. 2d 1240, 1244 (Mont., 1998), cert. denied,123 S.Ct. 1633 (2003) (sale of computer system), a state statute was held not to be pre-empted.

Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas., No. 12-929, 571 U.S. ___ (12/03/2013), unanimously held that federal courts must enforce forum selection clauses, except when extraordinary circumstances unrelated to convenience of the parties might dictate a different result. The Court considered a Texas construction project with a subcontract that required litigation to be venued in the state or federal courts of Virginia and said "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses."

According to one author "many states have laws that limit forum-selection clauses in construction contracts."[14] Drafters must, therefore, consider whether those or similarly restrictive laws limit their ability to craft an enforceable forum selection clause.

Consideration might also be given to whether a provision giving the Arbitrator the authority to also hold hearings at other than the venued location might be beneficial (e.g. for examination of third parties). For many years I have included the following in arbitration provisions:

> *Any such mediation or arbitration shall be at _____, provided, however, that the Arbitrator, in the Arbitrator's sole discretion, may conduct hearings for discovery purposes, taking of testimony or otherwise at other locations if reasonably necessary and beneficial to the process.*

This is intended to facilitate third-party document discovery and other issues. While this process has been used, the actual clause has not, to my knowledge, been tested in the courts although the AAA in its Commercial Arbitration Rules effective October 1, 2013, has now provided that "the arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process." *See* Rule R-11.

With the law constantly in flux, some circuits do not authorize such discovery while others do authorize it. In *Amgen, Inc. v Kidney Center of Del. County, Ltd.*, 879 F. Supp. 878 (1995) a court enforced a subpoena issued by a party's attorney in the district where the third party was located, a location other than where the arbitration was being held. Other courts, applying state or federal law, are more resistant to third party discovery. See, for example, *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004) (non-solicitation clause) The issue is two-fold: one relating to third parties and the other to the location of proceedings. While a clause such as that suggested above may not negate applicable law, it might lessen the ability of parties, having initially agreed to the provision, to later object to out-of-

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14 *Construction Law Update.* Hendrick Phillips Salzman & Flatt, P.C. (February 2014).

jurisdiction discovery.[15]

In *CNA Reinsurance Co. LTD v. Trustmark Insurance Co.*, 2001 U.S. Dist. LEXIS 7523 (N. D. Ill. 2001) (insurance), venue was not agreed upon so the parties decided to argue about it. CNA filed a motion to compel arbitration in Illinois. Trustmark filed a cross-petition to compel arbitration in London and a separate petition in London to compel arbitration in London. The District Court analyzed the dispute on a *forum non conveniens* basis and decided they should duke it out in London since "a London forum would obviously reduce the expense and inconvenience in procuring further testimony at an arbitration proceeding." If parties agreed to arbitrate but did not specify the mechanics or a location, the court "may fill the gaps" under the FAA.

Similarly, parties in *Trustmark Insurance Company v. Fire & Casualty Company*, No. 02-C-934, 202 WL 832567 (N.D. Ill. 2002) (insurance), recognized that disputes happen and had the foresight to include an arbitration provision in their contract, but said the proceeding would be "at a location mutually agreed upon by the parties." Not unexpectedly, when they became embroiled in a dispute, the parties couldn't agree on a location. In the process of resolving the issue, the court observed that "it seems to the court not the best example of contract drafting to assume that the parties will, whenever a dispute arises under the contract calling for arbitration, agree on the location when the time for choosing such location, as now, was upon them."

Polimaster Ltd. v. RAE Systems, Inc., 623 F. 3d 832 (9th Cir. 2010) (radiation detection devices), involved one company based in Belarus (Polimaster), another in Cyprus (Na&Se), and another in California (RAE). The applicable dispute resolution clause said disputes should be settled by arbitration at the "defendant's" site. When Polimaster sued RAE in California, they agreed to arbitrate in California with Polimaster reserving its right to argue no counterclaims could be filed against it in California. When RAE filed affirmative defenses and a counterclaim, Polimaster asked that the counterclaim be dismissed. The Arbitrator said everything should be heard in one forum and an award favoring RAE on its counterclaim was confirmed. This was reversed. The contract said "disputes" had to be heard at "defendant's" site. While recognizing that the arbitration clause was "an unusual one" and the result was "inefficient," Polimaster was the "defendant" in the counterclaim and it was located in Belarus.

the law . . . procedural and substantive

Especially in multi-state and international arbitrations, it may be advisable to specify what law is to be applied. If state law is specified, drafters should be familiar with both the statutory and case law of that state with respect to both the arbitration and any issues that might arise post-award regarding grounds for vacatur, confirmation, and enforcement. See *Applicable Law* discussion below. If parties prefer that the FAA is to apply, they should expressly state their intent rather than assume it will be applied merely because interstate commerce is involved.

unilaterally modified

Provisions providing for unilateral modification by one of the parties are often found in employment agreements, but may be found in commercial agreements where one party had significantly stronger bargaining power. In *Avery v. Integrated Healthcare Holdings, Inc.*, 218 Cal. App. 4th 50 (2013), an employer unilaterally modified its employee handbook several months after employees had filed a class action. Unilateral provisions may be acceptable, said the court, but this revision was not in good faith and was, therefore, unenforceable.

In *Peng v. First Republic Bank*, No. A135503 (Cal. App. 4th, August 29, 2013) a provision that said an employer could unilaterally modify, or even terminate, the provision was not, by itself, sufficient to make the agreement unconscionable since an implied covenant of good faith was viewed as preventing a modification after a claim accrued. Similarly see *Leos v. Darden Restaurants,* No. B473673 (Cal. App. 4th, June 4, 2013) considering a provision that said the agreement could be "updated from time to time as required by law."[16]

While other courts may differ, these courts make a distinction between pre-dispute and post-dispute modifications.

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15 For a general discussion of third-party discovery, see Albert Bates, Jr., *Non-Party Discovery in Commercial Arbitration: Legal Hurdles and Practical Suggestions.* (Civil Litigation Update, Pennsylvania Bar Association, Fall 2005).

16 Review granted 09/11/13; briefing deferred pending a decision in *Baltazer v. Forever 21, Inc.*, #S208345.

5. **International.** The time to start thinking about an arbitration provision is when the parties' transaction is being formulated. Dispute resolution should not be a last minute consideration and international transactions can be especially complex.

A San Diego attorney who handles international matters says he first diagrams the transaction to show the multiple parties that might be involved in a dispute, their relationships, in what countries they're located, and other factors. Parts for a product might be manufactured in multiple countries, assembled in another country, marketed by a firm in a different country, and purchased by companies in numerous countries. Only after he has analyzed what disputes may occur and what parties are likely to be involved in disputes and with whom does he work with someone else to structure an appropriate dispute resolution process considering, among other things the numerous domestic and international providers, their rules, the venue for an arbitration, the languages to be used, and choices of applicable law.

"Arbitration allows parties involved in contractual disputes to resolve conflicts outside of local legal systems that are often slow, unsophisticated and corrupt. Equally important is avoiding being hometowned by the other side's local legal system." "International companies do not feel comfortable appearing before the court of a counterparty where they have little influence over the adjudicator or legal procedure, perhaps less credibility, and fewer personal connections," said Stephen Jagusch, global chair of Quinn Emmanuel Urquhart & Sullivan LLP's international arbitration practice. The practice area does carry risks, according to Robert O'Brien of Arent Fox LLP, and that "can weigh on clients' minds when drafting agreements." Though it can be faster than a local court system, international arbitration centers "may dissolve or divide in the time between an arbitration agreement being drafted and the matter being resolved, causing strife between parties over what venue should hear the ongoing dispute," said Brent Jaslin, a partner at Jenner & Block LLP.[17]

Some providers, such as the China International Economic and Trade Arbitration Commission in 2012, may be going through significant changes, perhaps beneficial, perhaps not, that would affect wording of the provisions. Some may have rules more useful to one type of transaction than to another. Some may be in the process of amending their rules, amendments still unknown when the contract is signed. The law in some jurisdictions may be well-established but, in others, it may be in a state of flux or have no relevant statutes or opinions.

6. **Confidentiality.** In most, if not all, jurisdictions, commercial arbitrations, while "private," are not necessarily "confidential." For this reason, some drafters like to include a confidentiality clause in their contracts. One commentator suggested the following might work:

> *The parties, the arbitrator(s) and the provider shall treat the proceedings, any related discovery and the decisions of the arbitrator(s) as confidential, except in connection with judicial proceedings ancillary to the arbitration (e.g. motions to vacate, confirm or correct an award), where disclosure is required by law, or where necessary to protect a legal right of a party. To the extent possible, any specific confidentiality issues should be raised with and resolved by the arbitrator(s).*

Others suggested the following:

> *The parties shall maintain the confidential nature of the arbitration proceeding and the award, including the hearing, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision.*[18]

Note that one refers to parties, the arbitrator and the provider, the other refers to the parties, and neither refers to the attorneys. Were drafters attorneys who purposely took themselves off the hook regarding confidentiality? Realistically,

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17 Kylie Reynolds & Alexandra Schwappach, *Quinn Emanuel Explores The Next Legal Frontier: International Arbitration.* Los Angeles Daily Journal (09/13/13).

18 Scott D. Marrs & Joseph W. Hance III, *Arbitration Confidentiality.* Texas Bar Journal (02/2014).

could two parties sign a contract obligating nonsignatories (e.g. the arbitrator and provider) to maintain confidentiality? If not, is it still beneficial for them to express what they expect from the nonsignatories?

Providing for confidentiality, however, does not assure confidentiality since, like anything else, a party may breach or threaten to breach the agreement leading to efforts by the other party to enjoin the breach or seek damages arising from disclosure. Some have drafted liquidated damage provisions for breach or provided for attorney fees to a party prevailing in an action to prevent a breach or to recover damages for a breach.

The "by law" caveat was considered necessary since, for example, California's conflict disclosure requirements, in some instances, mandate that prospective arbitrators disclose whether they have arbitrated previously for any of the parties or attorneys. In some instances the Ethics Standards require disclosure of the number of pending cases in which the arbitrator is then serving, the number of prior cases in which the arbitrator previously served, the number of prior cases arbitrated to conclusion, and the number of such prior cases in which a party to the current arbitration, a party represented by the lawyer for a party in the current arbitration or the party represented by a party-arbitrator in the current arbitration was the prevailing party.

For comprehensive discussion of the issue see "*Confidentiality in U.S. Arbitration*," an article by Laura A. Kaster, a Fellow of the College of Commercial Arbitrators, in NYSBA, New York Dispute Resolution Lawyer, Vol. 5, No. 1 (Spring 2012), available on-line at www.AppropriateDisputeSolutions.Com. Also see the discussion in *Porkorny v. Quixtar, Inc.*, 601 F.3d 987 (2010), in which the wording of one-sided confidentiality agreements was viewed as an indicator of substantive unconscionability.

Even if effective between parties, a confidentiality clause is unlikely to bind non-parties. The parties in interest in *Universal City Studios, Inc. v. Superior Court (Unity Pictures Corp),* 110 Cal. App. 4th 1273 (2003), had a settlement agreement providing for strict confidentiality of its terms. Four years later, one of the parties filed a petition asking the court to seal various documents pertinent to an arbitration. The request was denied. A similar request was denied in *First State Insurance Co. v. National Casualty Co.*, No. 1:13-cv-00704 (USDC S.D.N.Y. Feb 19, 2013), despite an arbitrator's order prohibiting disclosure of confidential arbitration information.

7. **Social Media & Professional Associations**. With the widespread use of Listservs and sites such as Facebook and LinkedIn, it could be argued in vacatur proceedings that there was an appearance of bias because the arbitrator and one of the involved parties or counsel had been involved, with others, in a Listserv discussion, or were Facebook "friends" (or had declined to be a "friend"), or that they were serving on the same committee or board of a professional association.

In *Luce, Forward, Hamilton & Scripps v Koch*, 162 Cal. App. 4th 720 (2008), it was argued that an award should be vacated because the arbitrator, a retired judge, had served on boards of professional organizations with the lawyer for one of parties and with one of the expert witnesses. He had not checked witness lists until the weekend before the Monday arbitration. When the hearing started, he made a verbal disclosure (instead of the written disclosure required by statute), Respondent objected to him continuing as arbitrator, and he overruled the objection.

In *Federal Deposit Insurance Corporation, as Receiver for Republic Federal Bank N.A. v. IIG Capital LLC,* No. 12-10686 (11th Cir., 08/07/13) (not published), an award was attacked under the FAA for "evident partiality." The court, however, said the contacts between the sole Arbitrator and counsel for FDIC were "nothing beyond the kind of professional interactions that one would expect of successful lawyers active in the specialized area."

While these awards were upheld, it has been suggested that the appeals may have been avoided if the contracts had provided:

No arbitrator shall be disqualified, and no award shall be challenged or vacated, based solely on an arbitrator's membership or participation in professional associations, listservs or social media including but not limited to LinkedIn, Twitter and Facebook.

Bear in mind that having an award sustained on appeal is preferable to the alternative, but it's even better to have it sustained without the delay and expense incident to an appeal.

8. **Motions**. Experienced arbitrators will usually address their desired procedure for motions during a preliminary hearing, but some drafters prefer to include a provision in their contracts. Some provide that any motion that can be filed in

litigation can be filed in arbitration with the same procedures and time limits being applicable. Others limit the type of motion that can be filed (e.g. dispositive motions) and those that can't (e.g. discovery motions), at least without the arbitrator's consent.

"In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen, S.A. v. Animalfeeds International Corp.,* 130 S.Ct. 1758 (2010).

Good arbitrators are experienced in knowing what motions will benefit the process and which won't. Contract clauses that deprive the process of its flexibility, one of arbitration's primary benefits, may lead to unnecessary expense and delay.

9. **Discovery**. "Discovery is far and away the greatest driver of cost and delay in litigation and in arbitration."[19]

Many attorneys have long contended that litigation discovery, especially Interrogatories and Requests for Admissions, is often excessive, of little value, and overly expensive. Unfortunately, litigation-style discovery with its attendant motions to compel discovery has been invading arbitration and depriving the parties of some of the key benefits of arbitration - an expeditious, relatively inexpensive, resolution of their disputes. Incorporating full discovery into an arbitration clause can, therefore, be counter-productive.

Most well-trained, experienced, arbitrators handling a commercial arbitration would prefer a clause that neither permits full litigation-oriented discovery nor restricts allowable discovery. Good arbitrators can handle discovery issues.

In most commercial cases, an exchange of documents is common but, unlike litigation where a formal Request for Production of Documents with attendant time limits may be the norm, document exchanges in arbitration can usually be handled through a conference call with the arbitrator. If disputes arise, they can often be similarly handled without formal motions, responses, replies, time deadlines, and in-person hearings at remote venues.

Written discovery is generally discouraged, but arbitrators recognize a well-structured deposition may sometimes benefit the process. In such instances (e.g. where a witness might be required to travel long distances and incur expenses of travel and lodging for relatively brief testimony), it may be possible to arrange a video conference or telephonic deposition with the transcript introduced in lieu of an appearance. Agreed time limits can limit the duration of depositions. Usually these issues can be resolved and stipulations reached by conference call.

While reported opinions dealing with discovery in arbitration are rare, *Bain Cotton Company v. Chestnutt Cotton Company*, #12-11138 (U.S.C.A. 5th Cir. 06/24/13) (not published), upheld an award over a claim that the arbitrators had not allowed adequate discovery. "Regardless of whether the district court or this court - or both - might disagree with the arbitrators' handling of Bain's discovery requests," said the court, "that handling does not rise to the level required for vacating under any of the FAA's narrow and exclusive grounds."

Drafters sometimes include discovery provisions (e.g. full document discovery, one deposition per side, further discovery upon order of the Arbitrator for good cause found, no requests for admission) while others do not mention discovery. For a discussion of these issues see:

a. The College of Commercial Arbitrators'
   i. *Protocols for Expeditious, Cost- Effective Commercial Arbitration* (2010) available for no-cost download at www.CCA.Net, §IV Business Users and In-House Counsel #2, Arbitration Providers #3, Advocates #5, and Arbitrators #6.
   ii. *Guide to Best Practices in Commercial Arbitration* 3rd Edition (JurisNet LLC, 2014), Chapters 8 (Discovery) and 9 (eDiscovery).
b. *JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases,*.
c. AAA's *ICDR Guidelines for Arbitrators Concerning Exchanges of Information.*

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19 College of Commercial Arbitrators, *Protocols for Expeditious, Cost-Effective Commercial Arbitration* (2010), Protocol for Outside Counsel (No. 5). Similarly see Protocol for Arbitration Providers (No.3) and Protocol for Arbitrators (No. 6). The *Protocols* are available for download at no charge at www.TheCCA.Net.

10. **Stepped Clause.**[20] Many contracts provide for negotiation, mediation or other action as a condition precedent to arbitration or to the recovery of attorney fees in arbitration. Preceding the arbitration clause, such a provision might provide:

> *If any controversy, claim or dispute, whether in contract, tort, statutory or otherwise, relates to or arises out of this contract, or the breach thereof, the parties shall first try in good faith to resolve the dispute by mediation under the _____ Rules of _____ before resorting to arbitration.*
>
> *Thereafter, ...*

Some would argue there is no need to mention "good faith" in a mediation clause, but others feel it has a beneficial effect on the parties who can be reminded, if necessary, that they contractually agreed to mediate in good faith.

If such a clause is included, it's important that parallel wording of equal breadth be used in the arbitration provision that follows if that's the intent. If the mediation clause, for example, says tort and statutory claims are included, but the arbitration clause neglects to mention them, a court may interpret that to mean the parties were willing to mediate such claims but did not want them arbitrated. One poorly worded stepped clause provided:

> *In the event of any dispute arising under this agreement, the parties agree that they will attempt to find an amicable solution to such dispute and that they will negotiate in good faith. If it appears that a dispute cannot be resolved by such negotiation, then either of the parties shall have the right to initiate arbitration proceedings for resolution of the dispute, except as the dispute may relate to the validity of any of the licensed patents or the scope of their claims.*
>
> *Any such unresolved dispute shall be finally settled definitively pursuant to the appointment of one or more independent arbitrator(s) mutually selected by the Licensor and Licensee.*
>
> *The arbitration procedure shall be carried out in Pennsylvania. The arbitrator(s) shall have the powers of friendly referee(s) and shall apply Pennsylvania law to the arbitration proceedings.*

i. A "right to initiate arbitration." How? What rules?
ii. Arbitration except as to "the scope of their claims." If parties in a pending arbitration disagree regarding scope issues, does this mean they'd have to stay the arbitration, commence litigation, get a ruling on the scope issue, and then resume the arbitration?
iii. The "arbitrator(s)" will have powers. Does this mean one arbitrator? Three? Who decides?
iv. The powers will be those of a "friendly referee." Eh? According to one counsel, this meant the arbitrator, or arbitrators, would have the authority to render a decision representing a fair resolution of the matter without regard to otherwise applicable substantive law.
v. One or more arbitrators "mutually selected" by the parties. What if they don't agree?

In *Yonkers v. Port*, 640 N.Y.S. 866 (N.Y. C.A. 1996), a provision in a public contract requiring submission of a claim to the Chief Engineer as a condition precedent to suit was enforced.

Drafters should know that, unless subsequently waived, if they include a condition precedent in the contract, it's likely to be viewed as binding by the courts and results could be less than satisfying if it's not followed.

a. *Leamon v Krajkiewcz,* 107 Cal. App. 4th 424 (2003), had a mediation condition precedent, but the seller of real property said the contract was invalid, canceled the sale and refused a request to mediate. The parties then sued each other and both requested attorney fees. A jury agreed with seller that there was no valid contract, but seller's request for $27,612 attorney fees was denied. The condition precedent meant what it said. The safer course for seller, as suggested by the court, would have been to agree to mediation, but clearly state Seller's position that the contract was "voidable" and invalid and that mediation was being sought to preserve the attorney fee claim.

b. *Lange v. Schilling,*, 163 Cal. App. 4th 1412 (2008), involved a contract providing that, if any party commenced an

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[20] Generally see, The College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration* (JurisNet LLC, 2014), Chapter 14, "Hybrid Arbitration Processes" (authored by Thomas J. Brewer, Richard R. Mainland, Gerald F. Phillips, and Edna R. Sussman).

action without first attempting to resolve the matter through mediation, or refused to mediate after a request was made, then that party would not be entitled to recover attorney fees, even if they would otherwise be available.

When the buyer of a residence discovered problems, he had no address for sellers and filed suit. Unable to serve the complaint, he hired an investigator who found sellers and served them. After sellers retained counsel, buyer's counsel pointed out the mediation provision, said he and buyer had tried to locate sellers before filing suit but had been unable to do so, offered to stay the suit so the parties could mediate, and asked counsel to let him know if buyer wanted to mediate. The case went to trial without a mediation and buyer was awarded $13,475 plus $80,710.26 attorney fees. On appeal, the fee award was vacated. The court felt the contract meant what it said. If buyer could locate sellers by hiring an investigator after filing suit, he could have done so before filing suit.[21]

The AAA's Commercial Arbitration Rules (revised and effective October 1, 2013) now provide in Rule R-9 that:

> *"In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings*" (emphasis added).

Parties who have already mediated or do not want to mediate, or who do not want to incur (or may be unable to afford) the expense of paying a Mediator and an Arbitrator at the same time, have a right to "opt out" of the AAA mediation by giving proper notice. However, since parties may not be aware of the "opt out" provision, one person has suggested a contractual provision that incorporates the AAA's Commercial Arbitration Rules but expressly excludes Rule 9 (e.g., "provided, however, that Rule R-9 shall not be applicable to this proceeding"). Parties can always "opt in" later if they've reached a stage where mediation would be beneficial.

Guided Choice. An alternative to the standard mediation/arbitration stepped process is the *Guided Choice Dispute Resolution System* (www.GCDisputeResolution.Wordpress.Com), a process developed by Chicago attorney, arbitrator, mediator and CCA Fellow, Paul Lurie. As with any stepped provision, it's designed to be used as a precursor to, if necessary, arbitration or litigation. Recognizing that many cases are not resolved in an early mediation (e.g. due to a lack of sufficient information) and that the next step may involve very expensive, and sometimes marginally beneficial, discovery, motions, and other legal processes, Guided Choice involves the Mediator as an "Arbitration Process Designer" who assists parties and counsel in customizing a subsequent process that will best serve the parties. In addition to information already online, articles by Mr. Lurie include *Guided Choice: New Ways for a Mediator to Achieve Early Settlements* (Journal of the American College of Construction Lawyers, Summer 2013) that includes a sample clause and *Using The Guided Choice Process to Reduce The Cost Of Resolving Disputes* (Construction Law International, Volume 9, Issue 1, March 2014).

11. **Time Limits**. Beware of setting time limits pre-dispute. Many drafters like to specify time deadlines for arbitration, but pre-dispute time limits should be carefully considered lest they cause unanticipated problems.
    a. Early Limit. Many construction projects end with a contractor seeking damages based on a lengthy list of allegedly extra work. Wanting to avoid this, a contract on a large public project provided:
        i. If the Contractor had a claim, it had 10 days to present it to the Architect or it was deemed waived.
        ii. When presented, the Architect had 10 days to rule on the legitimacy of the claim.[22]

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21 How would you advise your client of the court's decision?

"Dear Client, I'm very pleased to inform you that you prevailed in the arbitration and were awarded the full $13,475.00 you requested. You may, however, recall the $80,701.26 you paid me and, unfortunately . . . .

We'll look forward to working with you again in the future. Sincerely yours."

22 A potential problem since the nonsignatory architect was not bound by the contract between the Owner and Contractor and could have

iii. If the Contractor were unhappy with the Architect's ruling, the Contractor had 10 days from receipt of the ruling to file a demand for arbitration or the claim was deemed waived.

iv. The Arbitrator was required to render an award no more than 30 days after the demand for arbitration was filed.

On large projects, extra work claims can arise with some frequency. Contractor had Claim #1 and presented it to the Architect who denied it. Contractor filed a demand for arbitration on Claim #1 and, another claim having arisen, presented Claim #2 to the Architect. An Arbitrator was appointed for the Claim #1 arbitration. Contractor had Claim #3 and presented it to the Architect. And so it went, every few weeks another claim, another ruling by the Architect, another demand for arbitration; one arbitration after another after another, all due to drafting that did not take into account either the realities of the process or California law.

i. Due to the 10-day time limits, the Contractor had to keep filing new demands for arbitration and pay filing fees for each or the claims would be deemed waived. At one point there were six different arbitrations pending, all with different Arbitrators, all proceeding on different fast-track schedules, and the project was far from complete so more claims and more arbitrations were probable. Absent a stipulation from all parties involved in all matters, consolidation of the arbitrations was impossible since each was on its own very tight (30-days-to- award) schedule.

ii. The provider's rules gave the Owner 15 days to respond to each demand for arbitration. Recognizing the time problem that might create, the Case Manager expedited appointment of the Arbitrators, but it still took time and each Arbitrator, by statute, had 10 days to make written disclosures of potential conflicts. After service of the disclosures, the parties had 15 days, also by statute, to object to confirmation of the Arbitrator's appointment by which time the 30-day deadline for issuance of the awards was looming and, in one instance, expired. To meet the contractually mandated deadline, arbitrators were forced to schedule evidentiary hearings on very short notice and counsel, parties and witnesses had to adjust their schedules as necessary. For recalcitrant witnesses, there was no time to serve subpoenas.

iii. In one matter, a preliminary hearing was held on a Thursday, a party was unwilling to waive the 30-day deadline, and the evidentiary hearing had to be set for the following Tuesday despite one counsel saying he was scheduled to be in trial that day. The parties drafted the contract and the Arbitrator was bound by their deadlines. The hearing lasted two days and the award was rendered on Friday, the 30th day after filing of the demand. Unfortunately, the statutory 15 days to object to confirmation of the Arbitrator had not yet expired. Fortunately, there was no objection.

While this may be an extreme example, it's not a hypothetical and it illustrates the problems that can arise from such clauses when care is not taken in drafting.

b. Late Limit. Parties in another construction case had the opposite idea. Instead of resolving claims as the project proceeded, they decided to resolve all claims in a single proceeding and signed contracts and subcontracts providing that "no hearings" could be held until "final completion" of the entire project.

i. Those familiar with construction know that the phrase "final completion" is, itself, often a subject of debate and, with no arbitrator able to hold "hearings," of any kind, who was to decide when the project reached "final completion?"

ii. To complicate matters even more, this was a large project that was still underway eleven years after ground was broken. Those with claims arising early in the process were required to demand arbitration or risk facing a statute of limitations defense, but were then told they had to wait for many years before they could have a "hearing."

12. **Incorporation by Reference and Flow-Down Clauses**. Many contracts incorporate other documents by reference (e.g. a subcontract might provide that the "prime contract is incorporated by reference into this contract") or that certain obligations in one document will flow to another document (e.g. a subcontract might provide that all obligations of the prime contractor to the owner will "flow down" to the subcontractor). The well-meaning intent, to have all parties similarly obligated, can lead to unintended consequences when provisions of the two documents are in conflict. It's complicated even more on many commercial contracts where manufacturers, assemblers, marketers, and others may be involved in the product stream and in construction where a typical large project includes designers, owners, one or more prime contractors, specialty subcontractors, material suppliers, construction managers, insurance companies and sureties. Some participants may have written contracts that provide for arbitration, some may have written contracts that don't

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refused to review the claims. Including a proper "fail-safe" clause could cover that possibility.

mention arbitration, and others may have only verbal contracts.

a. In an unreported matter, an Owner defined "goods" and "services" separately. A Purchase Order for "goods" included a broad arbitration clause, but also incorporated by reference terms relating to "services" that did not provide for arbitration. With many millions of dollars involved, one party argued that incorporating "services" into the Purchase Order for "goods" made disputes regarding "services" arbitrable. The other argued disputes regarding "goods" are arbitrable but those regarding "services" were not. That dispute regarding arbitrability made its way to a trial court, then an appellate court, and then to the arbitrators after the appellate court said the arbitrators should decide the issue. All of this could have been avoided by clear drafting that said whether disputes regarding "services" were or were not to be arbitrated.
b. *Wolschlager v. Fidelity National*, 111 Cal. App. 4th 784 (2003), involved a real estate transaction. During escrow, buyer requested a policy of title insurance from a carrier. A Preliminary Title Report (PR) was issued. It didn't mention arbitration but identified the policy, incorporated it, and said copies were available on request. After close, buyer received the policy and it included the arbitration provision. Buyer later made a claim and sued. Carrier's request for arbitration was granted. For policy terms to be incorporated in a PR, the reference must be clear and unequivocal and the terms must be known or easily available. The PR referred to the policy several times, said it was incorporated, and said it was available.

Too often drafters do not adequately review the contracts, the incorporated documents, and the obligations that may flow from one to another. Where written arbitration provisions exist in multiple documents, they may not be consistent with each other.

a. For example, a threshold issue in deciding whether arbitration clauses are enforceable is who, the court or the arbitrator, decides the issue. It's usually considered axiomatic that this is an issue for the court unless the clause clearly and unmistakably reserves the issue for the arbitrator (see discussion above). In *Ruth S. Hartley v. Superior Court (Monex Deposit Company)*, 196 Cal. App. 4th 1249 (2011), multiple contract provisions were in conflict with one reserving the issue for the arbitrator and the other reserving it for the court.
b. In another matter, when homeowners sued a developer for alleged construction defects, the developer sought arbitration pursuant to a provision in a Warranty Booklet. *Adajar v. RWR Homes, Inc.*, 160 Cal. App. 4th 563 (2008). The court said that, while agreements don't have to expressly provide for arbitration if they incorporate a document providing for arbitration, that wasn't the case here. The applications signed by these homeowners didn't incorporate anything. They merely said the Homeowners had read the booklet.
c. *Slaught v Bencomo Roofing Co.*, 25 Cal. App. 4th 744 (1994), was another construction case. The Owner/Prime contract provided for AAA arbitration. The Prime/Subcontractor subcontracts incorporated the prime contract by reference, but also had their own customized arbitration provisions providing for three arbitrators (two party-appointed and a neutral third). Apparently the drafters never considered the inconsistent provisions or the effect they might have on the parties:
    i. The Prime filed a demand with the AAA seeking $52,889.51 from Owner.
        (a) This would normally be a single-Arbitrator case administered under the AAA's fast track rules.
    ii. Alleging defects caused by the Subcontractors, Owner filed a counterclaim against the Prime for $150,000.
        (a) This would normally be a single-Arbitrator regular track case.
    iii. The Prime asked the Subs to join the AAA proceeding, but they refused since they weren't signatory to the contract providing for AAA arbitration but were signatory to subcontracts providing for a panel of three with two party-appointed.
    iv. Prime filed a petition to compel, the trial court denied the petition, and this was reversed. The court said, in a footnote, that "several federal and state courts have found that a construction contract and its arbitration clause can easily be incorporated by reference into subcontracts thus forcing subcontractors to arbitrate their disputes." Since these subcontracts incorporated the prime contract by reference, the court felt the Subs were bound - to something. Faced with different arbitration provisions, the court, rightly or wrongly, decided disputes solely between the Prime and the Subs should be governed by the subcontract but those, as here, that involved the prime contract should be governed by it.
d. Parties in *BP Exploration Libya Ltd. v. Exxon-Mobil Libya, Ltd.*, 689 F.3d 481 (5th Cir. 2012), had apparently not analyzed the nature of disputes that might arise under their transaction. Exxon had a contract with Noble that it

assigned to BP.

i. Disputes between Exxon and BP were to be arbitrated under AAA's International Rules with three arbitrators two of whom were to be party-appointed.
ii. Disputes involving Noble were to be arbitrated under rules of the Arbitration and Conciliation Act (ACA), also with three arbitrators two of whom were to be party-appointed.

When a dispute arose involving Noble:

i. Noble served an arbitration demand on BP and Exxon and designated its party arbitrator under the ACA procedures.
ii BP appointed a party arbitrator as did Exxon.
iii. If the three designated party arbitrators selected a neutral, that would result in an even number of arbitrators.
iv. BP filed suit.
v. The District Court ordered that five arbitrators, including two neutrals, hear the dispute.
vi. Solomon may have liked it, but the appellate court didn't. Nobel argued the court could not order more arbitrators than the parties agreed upon. The appellate court said they had reached a "lapse" (see FAA §5[23]) which could indefinitely delay arbitration. The agreements provided for three arbitrators. The District Court had disregarded that and imposed a result no one had agreed upon.

e. In *Matter of Saturn Constr. Co., Inc. v Landis & Gyr Powers, Inc.*, 656 N. Y. Supp. 2d (NY App. Div., 2d Dept., 1997), a contract between a Prime contractor and Owner provided for arbitration. A subcontract between the Prime and a Sub included a flow-down clause providing the Sub "agrees to be bound to the contractor by the terms of the . . . principal contract . . . and to assume to the [contractor] all the obligations and responsibilities that the [contractor] by [the principal contract] assumes to the [Owner] . . . ."

i. The nonsignatory Sub demanded arbitration.
ii. The signatory Prime preferred litigation.
iii. The Court agreed with the Prime and stayed the arbitration.
iv. This was affirmed. Prime did not waive its right to litigation since, despite the flow-down clause, there was no express agreement to arbitrate with its Sub.

13. **Fail-Safe Clause**. A fail safe clause is intended to cover the possibility that things may not go as planned.[24]

Just 'cause I said it, it doesn't mean that I meant it,
People say crazy things.
Just 'cause I said it, don't mean that I meant it,
Just 'cause you heard it.[25]

Parties realize contracts may be breached so they have the foresight to include a dispute resolution clause, but they seem to then assume that parties already embroiled in a dispute will miraculously set their differences aside and agree on how to proceed under the dispute resolution clause.

a. An arbitration clause may require a party to select a party-arbitrator for a tripartite panel, but what if it doesn't? Rules may require a party to make deposits for arbitrator compensation, but what if it doesn't? A contract between two parties may require action by a nonsignatory third, but what if the third party does nothing?
b. Saying something will happen, doesn't make it happen. Abraham Lincoln was allegedly approached by constituents lobbying on behalf of a bill he said was unfeasible. It sounded good, but it wouldn't work. Seeing that they were unconvinced, he asked, "if we call a cow's tail a leg, how many legs will it have?" Collectively they answered,

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"If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."

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See Arthur Bloch, *Murphy's Law and Other Reasons Why Things Go Wrong!* (Price/Stern/Sloan Publishers, Inc., 1977), and Arthur Bloch, *Murphy's Law Book Two* (Price/Stern/Sloan Publishers, Inc., 1980).

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Adele Laurie Blue Adkins (aka "Adele"), *Rumor Has It.*

"five." "No," he said, "calling a tail a leg doesn't make it a leg." They got the message.

c. Providing, for example, that each party will designate a party-arbitrator and those two will select the third, does not make it happen. The seemingly benign clause in *Engalla v Permanente Medical Group*, 15 Cal. 4th 951 (1997), provided for arbitration administered by Kaiser and said:

> *Within 30 days after initial service on a Respondent, Claimant and Respondent each shall designate an arbitrator and give written notice of such designation to the other . . . . Within 30 days after these notices have been given and payments made, the two arbitrators so selected shall select a neutral arbitrator and give notice of the selection to Claimant and all Respondents served, and the three arbitrators shall hold a hearing within a reasonable time thereafter. . . ."*

i. On May 31, 1991, a terminally ill Claimant served his demand.
ii. 47 days later Respondent designated a Party Arbitrator it knew was busy until late November (after Claimant's expected date of death).
iii. On August 15 ,1991, Claimant learned of the scheduling problem and demanded another Arbitrator, but Respondent refused.
iv. Claimant then requested a single Arbitrator, but Respondent refused.
v. Letters weren't answered. Calls weren't returned.
vi. On October 22nd, Respondent finally agreed to a neutral, 144 days after the claim was served.
vii. Claimant died the next day and, under applicable law, Claimant's non-economic damage claim was reduced by $250,000.

A trial court found fraud in the inducement. An appellate court didn't. The state Supreme Court thought it was possible and remanded so the facts could be examined. That was more than six years after Mr. Engalla demanded arbitration. Discovery showed that, on average, Claimants had to wait 674 days for the neutral's appointment and 863 days for the actual hearing.[26] Delays like this occurred in 99% of all Kaiser medical malpractice claims. In only 1% was the neutral picked within 90 days as required. Only 3% saw a neutral within 180 days.

Kaiser has subsequently adopted a more efficient system.

d. The nonsignatory cases in which two signatory parties say a nonsignatory third (e.g. an architect) will review a claim or make a determination have a similar inherent problem. What if the architect doesn't do it? While there are almost twenty theories, or subsets of theories, upon which nonsignatory issues may be decided, the most common are agency, assumption, estoppel, alter ego and incorporation. Common themes are that (1) arbitration is a creature of contract, (2) the manner in which contracts are written and claims pled whether initially in litigation or arbitration can have a profound impact on the result, and (3) these issues are almost always for courts, rather than the Arbitrators to decide (but see *Contec Corporation v. Remote Solution Co., Inc.*, 398 F.3d 205 (2d Cir. 2005)).

e. On one project, parties devised an intricate resolution ladder designed to resolve problems at the lowest level possible. If folks in the field couldn't resolve it in 10 days the dispute went to the foremen, if they couldn't work it out in 10 days it went to the supervisors, if they didn't resolve it in 10 days it went to the company presidents and, if they didn't get it settled within 10 days, either party could file a demand for arbitration. Basically 40 days from dispute to arbitration if necessary. Pursuant to Murphy's Law, it was eight months after a dispute arose, before claimant was finally able to demand arbitration.

f. Where a contract for a Missouri cogeneration project contained deadlines for various resolution steps from the time a dispute arose until commencement of arbitration, an 85 day process exceeded 240 days when parties delayed. People didn't do what the contract said they were to do. People were out of town. People procrastinated. People were busy. There was no fail safe provision; nothing to keep the process moving; nothing to say if parties didn't do what they were supposed to do in the stated time limits, it would then automatically go to the next step.

g. The Railway Labor Act, 44 Stat. 577 (1926), originally included a scheme for voluntary arbitration of disputes relating to existing collective bargaining agreements, but it had no provision for sanctions for failure to create a board to arbitrate the dispute. As a result, many railroads "refused to participate on such boards or so limited their participation that the boards were ineffectual." The problem was magnified by a requirement that the boards have equal numbers of labor and management representatives. As a result, there were many deadlocks. There were no

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[26] Many of the details are more fully set forth in the lower court opinion. Engalla v Permanente, 41 Cal. App.4th 1698 (1995).

fail-safe procedures that covered either eventuality.[27]

h. Then there's *Fru-Con v Southwestern Redevelopment Corporation II,* 908 S.W.2d 741 (1995) (also discussed above regarding "claim"), a case that made Murphy look like an optimist. According to an attorney involved in the matter, there's much that doesn't appear in the reported decision.

In essence, the contract between the Owner and Contractor provided that, if the total amount of claimed damages "as estimated by the Architect" was "under" $200,000, the claim would be arbitrated while those where damages were "greater" than $200,000 would, absent a stipulation by the parties, be litigated.

Contractor claimed damages well in excess of $200,000 and presented the claim to the Architect. The nonsignatory Architect, declined to review it, he wasn't obligated to review it, and there was no "fail-safe" provision.

Knowing its claim exceeded the arbitration threshold, the Contractor filed suit but, after extensive hearings, the suit was dismissed when the court learned the condition precedent (i.e. the Architect's estimate) had not been satisfied.

Finally an Architect cooperated, but said there wasn't one "claim," there were multiple claims, one over $200,000 and others under $200,000, thus requiring one law suit and multiple arbitrations.

"The Architect can't do that," said the Contractor. "Yes the Architect can," said the appellate court. After three years of wrangling and now faced with multiple proceedings, parties stipulated to one all-encompassing arbitration so they could address the merits – all because there was no fail-safe provision to keep the process moving if the Architect failed to act.

i. The court in *Harris v. Bingham McCutcheon, LLP,* 214 Cal. App. 4th 1399, 2013 WL 1278361 (03/29/13), also discussed below regarding a choice-of-law provision, involved a letter agreement between an Associate and a Law firm that said "legal disputes which may occur between you and the Firm and which arise out of, or are related in any way to our employment," will be arbitrated before an arbitrator "mutually selected" by the parties. It then included a fail-safe provision:

> *"If you and the Firm are unable to agree upon an arbitrator within twenty-one (21) days after either your or the Firm has made a demand for arbitration, the matter will be submitted for arbitration to the Santa Monica office of the Judicial Arbitration & Mediation Services ('JAMS'), and shall be administered by [Judicial Arbitration & Mediation Services] pursuant to its rules governing employment arbitration in effect as of the date of this letter agreement."*[28]

14. **Court Fees.** If a Plaintiff files suit despite having a contract that mandates arbitration and Defendant's motion to compel arbitration is granted over Plaintiff's objection, or Plaintiff's motion to enjoin arbitration is denied, who should bear the attorney fees incident to such a motion and who, the court or the arbitrator, should make the determination?

a. In *Acosta v. Kerrigan*, 150 Cal. App. 4th 1124 (2007), the court considered an arbitration clause that said:

> *"Should any party to this Agreement hereafter institute any legal action or administrative proceeding against the other by any method other than said arbitration, the responding party shall be entitled to recover from the initiating party all damages, costs, expenses, and attorneys' fees incurred as a result of such action."*

i. Acosta sued. Kerrigan petitioned for arbitration. The trial court agreed with Acosta.
ii. The appellate court agreed with Kerrigan.
iii. On remand, a compliant trial court ordered arbitration, Kerrigan asked for an award of its attorney fees incurred to date, and the court awarded $60,000.
iv. Acosta appealed and argued (1) an "interim" award of fees was impermissible and (2) any attorney fee claim was an issue for the Arbitrator.
v. The court said the fee award was appropriate, no valid reason was given why Defendant should have to wait to recover fees he was entitled to, and the fees weren't related to the merits of the dispute. The court also said it was appropriate for the trial court to make the decision since "having an arbitrator decide this claim for fees is impractical and inefficient."

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27 *United Transportation Union v. BNSF Railway Company*, 2013 DAR 3181 (USCA 9th Cir. 03/13/13) referencing *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 610 (1959).

28 This is provided merely as an example of a fail-safe provision. It wasn't involved in the issues considered by the court which ruled the dispute in question did not have to be arbitrated.

Kerrigan wasn't seeking fees as a prevailing party on the merits, but was merely asking enforcement of an independent provision in the contract. Entitlement to fees was an issue covered by the contract. Who, the Arbitrator or the court, was to decide the issue was not covered.

This court made the decision, but the next may punt to the Arbitrator. If parties have a preference, they could try to cover that issue when drafting their contract (e.g. ". . . incurred as a result of such action, such amounts to be determined by the court or administrative officer").

b. In *Frog Creek Partners LLC v. Vance Brown* Inc., 206 Cal. App. 4th 515 (2012), parties had signed different versions of their contract although both versions had identical arbitration provisions.
   i. Owner sued Contractor based on the version Owner signed, Contractor moved to compel arbitration based on the version Contractor signed, the trial court denied arbitration and the appellate court affirmed because the motion was based on a contract the Owner had not signed.
   ii. Contractor filed a renewed petition to compel based on the version Owner did sign, the appellate court reversed direction, the parties arbitrated, and Contractor was awarded compensatory damages together with fees and costs incurred in arbitration. The arbitrators declined to rule on whether either party was entitled to fees in the prior court proceedings.
   iii. Contractor then filed a court motion to recover pre-arbitration and post-arbitration fees and was awarded fees of $788,293. Contractor was not awarded $128,000 it said it incurred in the first proceeding when it was unsuccessful in its attempt to compel arbitration.
   iv. Owner, although having ultimately lost, claimed $229,510 related to the first proceeding in which it successfully opposed arbitration. Owner was awarded $125,000.
   v. Contractor appealed. It was held, pursuant to a California statute, that there may be only one "prevailing party" entitled to fees on a given contract in a given lawsuit. The party prevailing on the contract is the one recovering greater relief in the action on the contract. That was the Contractor. Fees should not have been awarded to both parties. On remand, the trial court was to award the Contractor its reasonable fees on its first, albeit unsuccessful, petition to compel and reasonable fees related to this appeal.

   While this might be applauded by Contractor, Owner may have preferred a clause similar to the *Acosta* provision so it could have requested a fee award when it was successful in its first attempt to prevent arbitration.

For those wanting a provision specifying that a court ruling on a motion to compel or prevent arbitration will be empowered to make an immediate fee award relative to that motion, would the following work?

> *If a court grants a motion to compel arbitration over the objection of a party or denies a motion to enjoin arbitration, that court is authorized to and shall make an interim award of attorney fees relating to the motion. Thereafter, any fees relating to the arbitration proceeding shall be an issue for decision by the Arbitrator.*

15. **Heightened, or Limited, Review**. Attempts to avoid finality - a main benefit of arbitration - by providing a method for review of awards is inimical to the process, but are occasionally found, especially where stakes are likely to be high.

Heightened Review: *Old Republic v. St. Paul*, 45 Cal. App. 4th 631 (1996), provided for "arbitration before a . . . Special Master" (in this case a retired appellate court justice) and a right "to seek review . . . as if this matter had been tried to the Court." Can't do it!

> *"Such an attempt is inconsistent with some of the primary purposes of arbitration, quicker results and early finality. . . . The parties cannot by their stipulation confer jurisdiction upon this court, where none exists. . . . Like the mythical chimera, out of incongruous parts, the parties have created something which does not exist. Whatever the parties' intention, the creature they conceived and delivered cannot get them to the appellate court. This court has no jurisdiction to hear the present appeal since subject matter jurisdiction can never be created by consent, waiver or estoppel."*

The agreement in *Johnson v. Wells Fargo Home Mortgages, Inc.*, 635 F.3d 401 (9th Cir. 02/15/11), resulted from a litigation settlement in which a District Court ordered arbitration in accordance with a stipulation between the parties that said:

a. the "parties shall participate in a binding arbitration with appeal rights,"
b. within 30 days after the award, either party could apply to the Court for an order confirming the award, and
c. a party could take the award directly to the 9th Circuit Court of Appeal.

To the District Court, this meant it would enter judgment ("in essence, rubber stamp the arbitrator's decision") and

either could then appeal directly to the U.S.C.A. without first raising vacatur issues in the District Court. Can't do it! Parties cannot confer on the U.S.C.A. jurisdiction that otherwise does not exist. Issues had to be raised, in the first instance, at the District Court level.

In *Hall Street Associates LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), the Supreme Court considered "whether statutory grounds for prompt vacatur and modification may be supplemented by contract" and ruled "the statutory grounds are exclusive" under the FAA. It did not prevent review on other grounds such as state statutes or common law. It also did not address "manifest disregard of the law" as an additional basis for vacatur and subsequent lower court decisions, both state and federal, are divided. *Hall Street* has also been cited as saying, unlike *Mactec*, that parties cannot contractually limit the grounds for appellate review. See *Wal-Mart Wage and Hours Employment Practices Litigation*, below.

Subsequent to *Hall Street*, *Cable Connection v. DirecTV*, 44 Cal. 4th 1334 (2008), considered an arbitration provision that said "arbitrators shall not have the power to commit errors of law or legal reasoning," they must "apply California substantive law . . . except to the extent Federal substantive law would apply to any claim," and the arbitration would be governed by the FAA. The court noted that *Hall Street* said federal law doesn't prevent review on grounds such as state statutes or common law and a prior state case, *Moncharsh v Heily*, 3 Cal. 4th 1 (1992), said merits of an award could not be reviewed in the absence of a "limiting clause" in the contract.

a. Here, there was a "limiting clause" that said arbitrators didn't have the power "to commit errors of law or legal reasoning." If they did so, they would be acting in excess of their powers, a statutory basis for vacatur. As a result, "the California rule is that the parties may obtain judicial review of the merits by express agreement."

Cable Connection may, or may not, be followed in other jurisdictions, but drafters should consider that arbitration is provided as an alternative to litigation and, when properly designed and conducted, is less expensive, more expeditious and more flexible than litigation - and it is intended to give parties a final, non-appealable, resolution. A clause designed to permit appeals could emasculate the very benefits the parties bargained for (he said over and over in this paper).

Limited Review. Efforts to achieve heightened review of awards are more common than those seeking to limit review but:

A limitation was considered and approved in *MACTEC, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir., 2005), in which the contract said any award would be "final and non-appealable." To maintain a relatively inexpensive process with finality, the parties agreed they would have two bites at the proverbial apple (arbitration and trial court review), but not three (appeal from the trial court ruling).

Losing parties and counsel may not like this since, surely, they would ultimately prevail if they could only get to three jurists instead of the arbitrator(s) and judge they'd had so far, but, if arbitration is to retain the characteristics for which it is favored, drafters may want to consider such a similar provision.

MACTEC was distinguished in *In Re: Wal-Mart Wage and Hour Employment Litigation*, No. 11-17778 (U.S.C.A. 9th Cir. 2013), in which the court interpreted a similar clause as prohibiting any review, even by a trial court.

This it said, violates the intent of Congress and the FAA as courts in several other federal circuits had already ruled. Similarly see *Goodall-Sanford, Inc., v. United Textile Workers*, 233 F.2d 104, 107 (1st Cir. 1956); *Hoeft v. MVL Group Inc.* 343 F.3d 57, 66 (2nd Cir. 2003); *Southco Inc. v. Reell Precision Mfg. Corp.*, 331 F. App'x 925 (3d Cir. 2009); and *Rollins Inc. v. Black*, 167 F. App'x 798 (11th Cir. 2006).

Also see *Allstate Ins. Co. v. Superior Court (Jessel)*, 142 Cal. App. 4th 356 (2006) ("The decision of the arbitrator shall be final and not subject to review, reconsideration or appeal . . . .").

Appellate Arbitration Review.

Some attorneys, however, especially those enamored of litigation and believing they and their clients are likely to lose more cases than they win and will, therefore, benefit from an appeals process more often than will their opponents, may provide for review by a three-member arbitration panel. They know their clients better than we do, and AAA, JAMS and CPR all have rules and procedures that will, for a fee, accommodate them.

16. **Arbitration Fees.**[29] Failure to pay a provider's administrative fees and failure to deposit amounts requested to cover anticipated arbitrator compensation have derailed more than one arbitration since, unlike litigation, rules of most providers do not permit a litigation-style default. The issue has been discussed numerous times in appellate cases and on Internet service lists with no totally satisfactory result.
    a. In *Lifescan v Premier,* 363 F.3d 1010 (9th Cir. 2004), Premier said it could not pay its share of the fees, Lifescan refused to pay Premier's share, and the proceeding was suspended. At Lifescan's request, the district court ordered Premier to pay its share since failure to pay was, in essence, a "failure, neglect, or refusal" to arbitrate under FAA §4, but this was reversed.
        i. Federal courts have limited review power of arbitration proceedings. The contract had incorporated the AAA's rules into the contract and the rules say expenses are to be borne equally unless otherwise agreed or the Arbitrator assesses fees against a specified party. The rules also give arbitrators discretion to apply the rules in a flexible manner.
        ii. "There is, of course, no totally satisfactory solution in such circumstances, which is doubtless why the AAA rules give arbitrators the flexibility to make the best of a bad situation," said the court. "Unlike the more inflexible Federal Rules of Civil Procedure, the AAA rules allow the arbitrators to adjust the payment of costs in light of circumstances."
    b. Also see *MKJA, Inc., 123 Fit Franchising LLC*, 191 Cal. App. 4th 643 (2011), *Cinel v. Christopher*, 203 Cal. App. 4th 759 (2012) and the related *Cinel v. Barna*, 206 Cal. App. 4th 1383 (2012), for problems that arise when one or more parties is unable or unwilling to pay its share of fees. In *Cinel*, a Complaint was filed on November 13, 2008, litigation was stayed, and, four years and multiple appeals later, parties had still not been able to address the merits of their dispute.

The AAA's current rules are slightly different for construction (Construction Rule R-56, "Remedies for Nonpayment") and commercial (Commercial Rule R-57, "Suspension for Nonpayment"), with the more recently revised commercial rules being more comprehensive. Also see JAMS Construction Rule 31 and Comprehensive Rule 31, but neither AAA nor JAMS currently provide for a litigation-style default.

In essence, this is another "what if" situation and drafters may want to consider a fail-safe provision to address the issue. Some have drafted default provisions into their contracts. Two examples:

a. *If any party fails or refuses to timely deposit its share of administrative or arbitrator fees, the non-refusing party or parties may advance those fees and the non-paying party will be deemed to have waived its right to participate, and shall be precluded from participating, in the arbitration unless and until the non-paying party has reimbursed the paying party or parties which reimbursement shall be at least fourteen days before the evidentiary hearing.*
b. *If any party fails or refuses to timely deposit its share of administrative or arbitrator fees, the non-refusing party or parties may request the Arbitrator to enter the default of the non-paying party. If such a request is granted, the defaulted party may, with the arbitrator's prior consent, file a motion to set the default aside, but shall otherwise have no right to prosecute a claim, defend claims being made against it or otherwise participate in the arbitration unless and until any such default is set aside.*

Other options:
a. Some have provided that a party advancing fees on behalf of another party would be entitled to recoup that amount with a stated percentage of interest as part of its award if it prevails or as an offset deducted from any award rendered against it.
b. Another alternative may be to draft a provision deeming non-payment a refusal to arbitrate that would permit a paying party to proceed in litigation and, in litigation, recoup any fees it paid in arbitration.
    i. One disadvantage to this is that it permits a non-paying party who preferred litigation to get, by breaching its contract, the forum it was seeking.

17. **Attorney Fees.** The right to recover attorney fees in arbitration is basically no different than in litigation with contract provisions and statutes being the two primary sources of an arbitrator's authority to award fees. Drafters should be aware, however, of a unique provision in some of the rules of the AAA. Since arbitration is a "creature of contract," some rules permit parties to jointly request a fee award after the dispute has arisen.

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[29] Generally see, The College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration* (JurisNet LLC, 2014), Chapter 4, "Arbitrator Fees and Expenses" (chapter authored by John T. Blankenship, Louis Coffey, Philip E. Cutler, and Curtis E. von Kann).

The AAA's Construction Rules, R-45(d)(ii) and Commercial Rules, R-47(d)(ii), provide that arbitrators may award attorneys' fees "if all parties have requested such an award or it is authorized by law or their arbitration agreement." As a result, if a Demand for Arbitration in a two-party arbitration requests fees and an Answering Statement denies all claims and requests fees, the Arbitrator may award fees to the prevailing party even in the absence of a contract providing for them.

In a party-arbitrator case, the parties' contract had a broad arbitration clause providing "each party shall bear the expense of its own arbitrator . . . and related outside attorneys' fees, and shall jointly and equally bear with the other party the expenses of the third arbitrator." A court said this did not, however, deprive the Arbitrators of the authority to award such expenses "as a sanction against a party whom the panel determines failed to arbitrate in good faith." *Reliastar Life Insurance Company of New York v. EMC National Life Company*, 564 F.3d 81 (2d Cir. 2009).

18. **Arbitrator Selection**. Many drafters like to include a contractual provision describing minimum qualifications for the Arbitrator, naming the desired arbitrator, designating the number of arbitrators, or providing for party arbitrators. While there is nothing wrong with these concepts per se, drafters must understand them, consider the expense clients may incur, and evaluate the potential problems.

a. Qualifications. Drafters may want to require that the Arbitrator be, for example, an attorney with a specified number of years of experience in construction or intellectual property or patent matters. They may want to require that the arbitrator be a retired judge, or not a retired judge. Sometimes an industry arbitrator, such as an architect, may be beneficial.

i. Parties in a Tennessee case had a clause requiring three Arbitrators, none of whom could be attorneys or from Tennessee.
ii. Another contract said the Arbitrators "shall be a knowledgeable, independent businessperson or professional." *Myer v. Americo Life, Inc.*, 371 S.W.3d 537 (2012).
iii. Another providing for two party-arbitrators and a third selected by those two said each of the arbitrators "shall be a professional mining engineer, or firm of professional mining engineers" and the neutral third must not be "an officer, employee or shareholder of, attorney or auditory to, or otherwise interested in" either party or the matter to be arbitrated. *Delta Mine v. AFC Coal*, 280 F.3d 815 (8th Cir. 2001).
iv. In another party-Arbitrator case, the neutral was required (1) to be a current or former executive officer of an insurance or reinsurance company, or an insurance brokerage, or a risk manager with a company in the real estate development or construction industry, (2) to have at least seven years' experience as an Arbitrator, Neutral or Retired Judge, (3) to have had no other full time occupation during that seven years, and (4) to have "substantial experience" in resolving insurance disputes.

When doing this, drafters should be careful not to be too specific. In one AAA case, the clause designated California venue and mandated an experienced construction arbitrator who could conduct the proceeding in Farsi. In a San Francisco case, the clause required an arbitrator experienced with oil shale operations. Both were available, at the parties' cost, but one had to be flown in from the east coast and the other from Colorado.

If required qualifications are too specific, no arbitrator may be found who can meet them. When detailed provisions are included, drafters may want to consider adding a fail-safe provision providing for an alternative method of appointment if no arbitrator can be found with the specified qualities.

Parties may also interview potential arbitrators in person or by conference call (e.g. regarding the arbitrator's subject matter experience, attitude toward discovery, etc.). While some would permit ex parte interviews, the better practice is that they be joint to avoid any appearance of bias. The Chartered Institute of Arbitrators has issued suggested guidelines for such interviews.[30]

b. Number of Arbitrators. It may be comforting to have awards based on the combined wisdom of three Arbitrators, but drafters should consider the expense parties will incur in paying three Arbitrators. With more calendars to be considered, scheduling conference calls and hearings may also become more difficult and lead to unfortunate delays.

Some parties are unable to meet the compensation requirements of three Arbitrators or feel the amount in dispute does not justify proceeding (e.g. in a San Diego case, three Arbitrators were required for a dispute in which the total

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30 *Practice Guideline 16: The Interviewing of Prospective Arbitrators* may be viewed online at www.CIArb.Org/Resources/Practice-Guidelines-and-Protocols. The Guidelines incorporate some suggestions by Gerald Aksen, a CCA Fellow.

claim was $130,000). Such requirements have deterred some potential claimants with meritorious claims from even demanding arbitration. Drafters have tried to address the issue by providing for one Arbitrator for small disputes and three for large disputes, but this is harder than it seems:

i. Consider a well-heeled Claimant who purposely files a demand for arbitration seeking an amount that will necessitate three Arbitrators and possibly force Respondent to beg for a settlement when, in fact, the actual amount Claimant hopes to prove is less than indicated. Bad faith? Prove it!
ii. Consider a demand with a dollar amount that would qualify for a single Arbitrator, but that also includes a demand for declaratory or other non-monetary relief.
iii. Consider a contract that says any "claim" in excess of $1,000,000 will implicate three Arbitrators and a dispute in which Claimant files a demand seeking $400,000 on Claim #1 regarding electrical work, $500,000 on Claim #2 regarding plumbing work and $600,000on Claim #3 regarding mechanical work. Nothing wrong with that said Claimant. It's just like litigation: a single Complaint with multiple causes of action. Here we have a single demand with multiple claims none of which exceeds the limiting amount in the contract.
   (a) Parties enamored of such a provision might consider saying there will be three Arbitrators "where the total compensation demanded on all claims exceeds" or "demanded in the arbitration exceeds" a stated amount. Others may find drafting concerns even with this.

For large AAA cases see Commercial Rule L-2 and Construction Rule L-3. For JAMS matters, see Construction Rule 7 and Comprehensive Rule 7.

For a party that definitely wants three Arbitrators for disputes over a specific amount - and is willing to pay for it - it may be a good idea to expressly say so rather than rely on provider rules. Rules change and some Claimants try to "game the system" by filing a demand for an amount (e.g. $750,000) that would be a one-Arbitrator case under provider rules. Then after that Arbitrator has conducted numerous preliminary hearings, become intimately familiar with the case, issued orders and set a date for the evidentiary hearing, the Claimant increases the amount, but not the nature, of the claim (e.g. to $3,000,000). Under those circumstances, the Respondent may be unable to get the three Arbitrators it prefers for such a large claim.

c. Party-Appointed Arbitrators.[31] This one also sounds good to many drafters, but it's a process that may cause difficulties. In addition to the problems involved in *Engalla* (above), it's important to consider whether the party-arbitrators are to be neutral or, in effect, may serve as advocates for the parties appointing them. In most instances, party arbitrators are presumed to be neutral, but courts may differ.
   i. According to one court, bias in a party-appointed arbitrator is to be expected and provides no ground for vacating an award unless it amounts to corruption. *Tate v. Saratoga Savings,* 216 Cal. App. 3rd 843 (1989).
   ii. Another court said, "as far as we can see, this is the first time since the Federal Arbitration Act was enacted in 1925 that a federal court has set aside an award because a party-appointed arbitrator on a tripartite panel, as opposed to a neutral, displayed 'evident partiality.' The lack of precedent is unsurprising, because in the main party-appointed arbitrators are supposed to be advocates. . . . Parties are free to choose for themselves to what lengths they will go in quest of impartiality." *Sphere Drake v All American Life*, 307 F.3d 617 (7th Cir. 2002).
   iii. *Trustmark v. John Hancock Life Insurance Co.,* 631 F. 3d 869 (7th Cir. 2011), said a party-appointed arbitrator may be considered "disinterested" despite the arbitrator's prior service on behalf of the same party, even if in the same or similar matter. Parties choose the method they want and can ask no more impartiality than inheres in method they chose. *Merit Insurance Company v Leatherby Insurance Company,* 714 F.2d 673, 679 (1984).

Regardless of whether these cases do or do not represent the current state of the law in any particular jurisdiction, and regardless of the provider, and regardless of the specified rules, it seems best to specify, in the contract, whether the party-appointed arbitrators are or are not to be neutral. At that point the parties are in agreement and there is no reason to leave the issue in doubt.

It's also important to know if incorporated provider rules address the issue of non-neutrality. See rules of the AAA (Construction Rules R-15 and R-21; Commercial Rules R-13(b), R-18(b), R-19(b); Canons of Ethics, Canons

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31 Generally see, The College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration* (JurisNet LLC, 2014), Chapter 3, "Nonneutral Arbitrators" (chapter authored by Richard Chernick, James M. Gaitis, and Robert A. Holtzman).

IX and X) and JAMS (Construction Rule 7; Comprehensive Rule 7).

Drafters may also want to consider who will be responsible for paying the party arbitrators.

i. In one matter, Claimant's party-arbitrator charged $650.00 per hour and billed additional amounts for the assistance of associates and paralegals. Respondent's arbitrator changed $350.00 per hour. When an award was rendered against the Respondent it included an order that Respondent pay the full amount charged by Claimant's party-arbitrator, the associates and the paralegals, an amount that exceeded the amount in dispute.

ii. Due to this concern, some contracts provide that each party will pay its own party-arbitrator. See *Reliastar Life Insurance Company of New York v. EMC National Life Company*, 564 F.3d 81 (2d Cir. 2009), for one such clause. Some go further and say each will also bear the expense of its own experts.

d. Naming the Arbitrator. Naming a specific arbitrator in a contract may cause problems. If the arbitrator is unwilling or unable to serve one party may argue there is no longer an obligation to arbitrate while the other may say arbitration was still required but with a different arbitrator. One may argue the arbitrator's disclosures revealed a conflict, while the other may say potential conflicts are irrelevant since they contractually agreed on the arbitrator and could have checked conflicts in advance.

i. Parties in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 342 v. Bechtel Construction Company*, 128 F.3d 1318 (9th Cir. 1997), were signatory to a project agreement intended to resolve any jurisdictional disputes among different union locals that said:

"In the event that the respective International Unions of the disputing Locals and the Contractor are unable to resolve the dispute within fifteen (15) days from the date of referral, the dispute may be referred by any of the interested parties to _____, who will act as Arbitrator under this Article . . . ."

When a dispute arose, the Ironworkers said they didn't have to arbitrate because the blank in the contract made it illusory, nothing more than an agreement to agree. The court said the main issue was whether the court could hold the parties to the agreement and fill in a name. Agreeing with the 3rd and 5th Circuits, it said "preservation and labor peace requires that district courts have some flexibility in fashioning decrees."

ii. Parties in *Diagnostic Radiology Assoc., P.C. v. Jeffrey M. Brown, Inc.*, 193 F.R.D. 193 (S.D.N.Y. 2000), provided for an *ad hoc* arbitration by a specified sitting federal court judge. If he were unable to serve, the clause authorized him to designate a substitute.

(a) What the drafters failed to realize is that the Code of Ethics for U.S. Judges prohibited sitting federal judges from acting as arbitrators and the designated judge could not hear the dispute. The FAA provides that, where parties have agreed to a method of naming an arbitrator, that method is to be enforced where possible. Where it's not possible, as here, and one party seeks to arbitrate under the agreement, the court is to designate an arbitrator. The difficulty in applying that section was that the judge named in the agreement was not a member of the court hearing the dispute. What to do? Federal rules permit a judge before whom a case is pending to appoint a substitute arbitrator, but the clause specified the judge who could designate a substitute, the court couldn't violate the parties' contract, and the case was not pending before the designated judge. To resolve the problem, the court transferred the case, as it decided it was allowed to do under the facts of the case, to the federal court where the designated judge was sitting so he could appoint a successor. Problem solved, but consider the expense the drafters had imposed on the parties.

iii. The clause in *HM DG, Inc. v. Amini*, #B242540, 2013 Los Angeles Daily Journal DAR 12805 (Cal. App. 4th, 09/20/13) was atrocious in many respects. The trial court, among other things, said the clause was uncertain since it didn't specify how the arbitrator would be selected. The appellate court was kind enough to direct everyone's attention to a statute that specifically addressed that possibility (California Code of Civil Procedure §1281.6). Why parties, lawyers and a trial judge didn't bump into the statute wasn't explained.

19. **Amendment / Termination.** When contracts containing arbitration provisions are amended or terminated, consideration should be given to whether the arbitration provision is intended to survive.

a. *Schneider v. Forest Park Partners Investments, LLC*, 2013 Ohio 380 (Ct. App., 1st Distr., 02/08/13), said the arbitration clause in an earlier contract applied to a subsequent agreement that, fifteen years later, had amended the initial contract. The first contract contained an arbitration clause. The subsequent contract added a forum selection clause calling for disputes to be resolved in "State Court or Federal Court sitting in Hamilton County, OH" and did

not reference the original arbitration clause. They now had one agreement to arbitrate and another to litigate. Or so it seemed. The court held that the second contract was ambiguous in multiple respects, the original contract contained a broad arbitration clause, the second contract related to the earlier contract, and there was no specific reference to or disavowal of the arbitration clause in the second contract. Following the state's strong policy of enforcing arbitration agreements, the arbitration clause of the first contract governed and the entire dispute had to be arbitrated.

b. *NEC America, Inc. v. Northeastern Office Equipment, Inc.*, 274 A.D.2d 339, 711 N.Y.S.2d 397 (App. Div., Sup. Ct. of New York, 1st Dept, 07/20/2000), is lacking in detail, but the parties had a 1990 agreement with a broad arbitration clause. A 1998 agreement was apparently a new agreement and not an amendment of the first. The only reference to arbitration in the 1998 agreement was a heading. As a result, it was held that the litigation clause contained in the 1998 agreement did not supercede the 1990 agreement to arbitrate, but it did govern disputes arising under the 1998 agreement.

c. *Hodsdon v. DirecTV, LLC*, 3:12-cv-02827 (U.S.D.C., N.D. Calif., 11/08/12), involved a putative class action by customers who claimed a company had improperly maintained their personally identifiable information after their service contracts had expired. The contracts provided that "the term of this Agreement is indefinite." It has been "well settled that courts must hold 'arbitration agreements to a life and validity separate and apart from the agreement in which they are embedded.'" Accordingly, if the parties have a contrary intent, they should so provide.

d. *Huffman v. The Hilltop Companies, LLC.*, U.S. Court of Appeals (6th Cir., 03/27/14) involved employee claims against their employer. A survival clause in their employment contracts provided that specified numbered paragraphs "shall survive the expiration or earlier termination of this Agreement." The arbitration clause was not one of the specified clauses, but the employer argued the "strong presumption in favor of arbitration" required that employment disputes be arbitrated. Employees contended that omission of the arbitration clause from those specified was a "clear implication" that the clause was to expire with the agreement.

20. **Unconscionability**. In the employment and consumer contexts, courts, on a finding of unconscionability, have routinely refused to compel arbitration. In doing so, both procedural and substantive unconscionability must usually be found with most courts indicating, that the more of one that exists, the less of the other is needed. In the commercial context, where parties are often viewed as more sophisticated and having more equal bargaining power, unconscionability is rarely a consideration, but lines are blurring so drafters should not ignore the issue.

a. *Porkorny v. Quixtar, Inc.*, 601 F. 3d 987 (9th Cir., 2010), involved agreements between businesses, one a marketer of products and the others independent business owners who distributed the products. Dispute resolution provisions in their agreements provided for a three-step process: informal conciliation, followed by formal conciliation, followed by arbitration. The District Court found both the non-binding and binding components of the process unconscionable. The appellate court agreed and refused to compel arbitration.

b. The same issue has arisen in disputes between franchisors and franchisees. The court in *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp*, 2010 WL 3584060 (9th Cir., 2010), found unconscionability under California law despite a Texas choice-of-law provision.

c. Similarly see *Ticknor v Choice Hotels*, 265 F3d 931 (9th Cir., 2001) (cert. denied) decided under Montana law and *Nagrampa v. Mailcoups, Inc.*, 469 F.3rd (9th Cir. 2006).

d. Franchise agreements for Subway franchises in Washington State had forum selection clauses saying disputes were to be arbitrated in Connecticut, but the trial judge refused to enforce the clause. This was upheld on appeal based, in part, on a state interpretive guideline finding "it is not in good faith, reasonable or a fair act and practice for a franchisor to require an arbitration clause in a franchise agreement that unfairly and non-negotiably sets the site of arbitration in a state other than the state of Washington." *Saleemi v. Doctor's Associates, Inc.*, 176 Wn. 2d 368, 292 P.3d 108 (Wash. Sup. Ct. 2013).

Drafters should keep these concepts, and factors affecting both procedural and substantive unconscionability, in mind when drafting commercial contracts.[32]

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[32] On February 19, 2014, the California Supreme Court, in *Sanchez v. Valencia Holding Co., LLC*, #S199119 (201 Cal. App. 4th 74), ordered supplemental briefing and invited the parties and interested others to address (1) which, if any, of the current formulations (e.g. shock the conscience, overly harsh, unduly oppressive, etc.) that appellate courts have used when considering unconscionability should be used, (3) whether there is a different formulation that should be used, (3) whether there is some terminology to be avoided, and (4) what differences, if any, exist among these formulations. The court's ultimate ruling will hopefully give beneficial guidance to parties, attorneys and courts

21. **Applicable Law.**

a. State law. Recent cases illustrate the importance of considering - properly considering - applicable law. They arose in an employment context, but the principle is equally important for commercial matters in both domestic and international matters.

i. A broad arbitration provision in *Peleg v. Neiman Marcus Group, Inc.,* 204 Cal. App. 4th 1425 (2012), included a list of disputes to which it would apply. It also said the employer could amend, modify or even revoke the provision on thirty days' written notice after which the change would apply to any claim that had not yet been filed. The employee worked in a California store, but the contract said it was "governed by Texas law and the FAA." The court ruled that, under Texas law, a modification provision such as the one in this contract, required a "savings clause" that would preclude application of any amendments to disputes which arose before the amendment. There was none and the agreement was, therefore, unenforceable.

ii. *Harris v. Bingham McCutchen, LLP,* 214 Cal. App. 4th 1399, 2013 WL 1278361 (03/29/13), involved a letter agreement between an associate and a law firm, a Massachusetts limited liability company. The associate filed suit claiming she was wrongfully terminated. Six of her nine causes of action alleged violations of California's Fair Employment and Housing Act. The agreement included a Massachusetts choice-of-law provision and Massachusetts law required that agreements clearly state whether the employee was waiving or limiting any statutory antidiscrimination claims. This one did not. Arbitration was not compelled.

iii. An employee and employer signed an agreement that said disputes "shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures published by the American Arbitration Association (AAA)." Instead, the employee sued his employer and a nonsignatory third party and then invoked CCP §1281.2(c) in an attempt to prevent arbitration.[33] Arbitration was compelled since they had stipulated that the applicable law was the FAA and it has no provision comparable to §1281.2(c). *Gloster v. Sonic Automotive, Inc.*, 2014 Los Angeles Daily Journal DAR 6362 (05/21/14).

b. Preemption. Drafters should also be aware that, despite a state choice-of-law provision, that state's law may be preempted by the Federal Arbitration Act, U.S.C. Title 9.

i. For example, in *A.T. & T. Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the Court said California contract law that deemed class waivers in arbitration agreements unenforceable under certain circumstances was preempted by the FAA since state law would be an obstacle to accomplishment of the objectives of Congress.

ii. Those wrestling with preemption arguments can take solace in knowing these are difficult issues even for the courts. In *Kilgore v. KeyBank National Association,* No. 09-16703, ___ F.3d ___ (9th Cir. 04/11/2013), a federal court recognized what it said was the "sometimes delicate and precarious dance between state law and federal law."

iii. Similarly, in *Mastick v. TD Ameritrade, Inc.*, 209 Cal. App. 4th 1258 (2012), a state court said, "When federal and state laws involve the same subject matter, their provisions may conflict. When they do, the doctrine of federal preemption often resolves the issue which law applies. We answer the question when it does with judges' and lawyers' habitual, exasperating response: it all depends."

c. An arbitration clause said, "*this agreement shall be governed in all respects by the laws of the United States of America and by the laws of the State of California.*"

i. Statutory law and case law? What controls where state and federal laws are in conflict?

22. **Nature of Transaction.** Consideration should be given to the nature of disputes that may occur in both international (as discussed above) and domestic matters.

Some contracts are very long term and disputes may not arise for decades after they're signed. Consider a supply contract with goods or services to be provided over a twenty or thirty year term, or an oil and gas supply contract, or a construction project that is estimated to take fifteen years followed by a ten-year statute of limitations for raising defect claims. If a contract includes a very detailed arbitration provision, it may cause unanticipated problems by the time a demand is filed. A specified provider may no longer exist as happened with a public agency construction project. A named arbitrator may no longer be living. Rules specified in the contract, may have been amended several times. Statutes may have been repealed or amended. New cases may have overruled those in effect when the contract was drafted.

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in the future.

[33] A petition to compel arbitration can be denied if a party to the arbitration agreement is also party to pending litigation with a third party arising out of the same transaction, or series of related transactions, and there is a possibility of conflicting rulings.

It has been suggested by one who typically handles such disputes that a relatively "bare bones" provision could best serve such parties.

23. **Permissive or Mandatory**? Too often drafters seem to prefer kindler, gentler, permissive language to more harsh mandatory language when writing arbitration clauses. Most would assume that "may" is permissive and "shall" is mandatory, but courts don't always see it that way.
    a. *TM Delmarva Power, LLC v NCP of Virginia, LLC*, 263 Va. 116 (2002), involved a contract that provided first for resolution by "Conciliators" and then, if that were unsuccessful, "either Party may commence arbitration hereunder by delivering to the other Party a notice of arbitration." When conciliation didn't resolve their disputes, NCP filed suit while TM filed a motion to compel arbitration which was denied since the arbitration provision was viewed as permissive. Since neither had demanded arbitration, NCP said it had a right to pursue litigation.

       The appellate court disagreed. The court interpreted the wording to mean that either party could require arbitration at any time, before or after litigation was commenced.
    b. The clause in *Angelakis v. Hennigan*, an unpublished California appellate case decided on March 13, 2013, said disputes "shall" be submitted to mediation. The mandatory language was clear, but it then said "the terms and procedures for mediation shall be arranged by the parties." In essence, parties already embroiled in a dispute were expected to have an epiphany and be able to agree on procedures for the mediation.

       The clause continued downhill by providing that, if mediation were unsuccessful, "the dispute may be submitted to arbitration" with the AAA and "if all parties to the dispute agree to arbitration, arbitration shall be commenced as soon as possible." The trial court said it couldn't compel arbitration since there was no agreement to arbitrate and it couldn't compel mediation since it was aware of no law giving it "jurisdiction or authority" to do so. The appellate court agreed.
    c. In *Service Employees Internat. Union, Local 18 v. American Building Maintenance Co.*, 29 Cal. App. 3rd 356 (1972), the clause said "the issue in dispute may be submitted to an impartial arbitrator." Despite the permissive language, arbitration was ordered on the theory that, if arbitration were merely consensual, there would have been no reason to mention it at all.
    d. In *Pacific Gas & Electric Co. v. Superior Court*, 15 Cal. App. 4th 576 (1993), the contract said any dispute "may be submitted by either party to arbitration." This, the court said, mandated arbitration.
    e. In *Titan Group, Inc. v Sonoma Valley County Sanitation Dist.*, 164 Cal. App. 3d 1122 (1985), the parties used broad language by referring to disputes "arising out of or relating to this agreement or the breach thereof," but then said the disputes "will" be decided by arbitration "if" the parties mutually agreed. Arbitration was not compelled.
    f. In *Mendez v. Mid-Wilshire Health Care Center*, No. B243144 (Cal. App. 4th, 09/23/2013), the trial court "emphasized, 'It doesn't say "shall." 'It says "may." 'As far as I'm concerned that doesn't impose a contractual mandate to pursue arbitration." Arbitration was denied on the ground that the agreement "is vague as to whether arbitration is mandatory." The appellate court agreed.
    g. *Volpei v. County of* Ventura, #B243954 (Cal. App. 4th 11/07/13), concerned a union member who was covered by a Memorandum of Agreement that said grievances "may be" subjected to arbitration. Employee sued Employer for harassment, retaliation, and discrimination under the state Fair Employment and Housing Act.. The trial court denied Employer's motion to compel and this was affirmed. An agreement to arbitrate statutory claims must be "particularly clear" and "clearly and unmistakably" waive the employee's right to sue. The language here was permissive and did not refer to the FEHA or any statutory claims.

Also, see *McCready v. White*, 417 F.3d 700, 702 (7th Cir. 2005), that had nothing to do with arbitration, but in which the court considered a statute that said certain personal information "shall be disclosed for use in connection with matters of motor vehicle or driver safety" etc. etc. etc. and referenced various statutes. The trial judge read this as requiring disclosure, but only to the extent required by one of the statutes, and this appellate opinion by Judge Frank Easterbrook suggests that:

> "Another possibility is that the word 'shall' in subsection (b) is permissive rather than compulsory. 'Shall' is a notoriously slippery word that careful drafters should avoid."

Bryan Garner, who was referenced in Judge Easterbrook's opinion, agreed and said, "Courts have held that *shall* can mean *has a duty to, should, is, will*, and even *may*. The word is like a chameleon: It changes its hue sentence to sentence.

Abjure it. Forswear it."[34]

24. **Form of Award.**

Bare Bones. Absent a contrary requirement in the parties' contract or provider rules,[35] arbitrators are usually only required to render a "bare bones" award and this usually accomplishes what the parties want and need. Their attorneys, however, often want more. They want to see the Arbitrator's reasoning, or findings of fact, or conclusions of law, but, in a cost/benefit analysis, are these of value to clients?

Parties in *Allstate v Superior Court,* 142 Cal. App. 4th 356 (2006), went out of their way to assure an award that gave them what they needed and no more. Their contract said (1) the award "shall be final and not subject to review, reconsideration or appeal," (2) the parties "waive any right to appeal or otherwise challenge the Arbitrator's decision," (3) the award is to be "without a written opinion other than to indicate which party prevailed" and "how much, if anything, Allstate shall pay," and (4) vacatur could be sought only on limited grounds.

Unfortunately, the Arbitrator, a retired judge, apparently neglected to read the contract and, "contrary to the parties' agreement," included a five-page ruling spelling out his reasoning in detail and awarding $400,000 to Homeowners less unspecified credits. Not only had the judge not followed the form required by the contract, but that award also failed to indicate "how much" Allstate was to pay.

When the Homeowner asked for that amount and reconsideration of one of the Arbitrator's findings (a finding that wasn't supposed to exist), the Arbitrator admitted "neither judges nor arbitrators are infallible" and "it now appears to the arbitrator that his last ruling may well not have been a correct one," but the ruling was "a final award" not subject to reconsideration. "It boggles the arbitrator's mind," he said "that neither [Homeowners] nor Allstate pointed out to the arbitrator that the arbitration contract executed by the parties specifically provides that the decision of the arbitrator 'shall be issued without a written opinion.'"[36]

Reasoning. A reasoned award, said *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836 (11th Cir. 2011), is one that, "strictly speaking. . . is an award that is provided with or marked by the detailed listing or mention of expressions or statements offered as a justification of an act - the 'act' here being, of course, the decision of the Panel." While the benefit, if any, of reasoned awards has been questioned, the increased time and cost to the parties will, at least, be significantly less than when findings and conclusions are required. This is because good Arbitrators will have done their "reasoning" in reaching their decision, and putting it into the body of an award, while taking some additional time, will not rise to the level of the cost of preparing "findings and conclusions."

Findings & Conclusions. When required to prepare findings and conclusions many, if not most, Arbitrators will ask parties to submit their "proposed" findings and conclusions. This takes attorney time and increases fees billed to clients. Arbitrators must then compare, contrast and analyze the submittals, review the authorities cited, and draft their own findings and conclusions - more delay and increased billings for Arbitrator compensation. The cost goes up when counsel insist on a right to brief all the egregious errors that are sure to appear in anything submitted by opposing counsel. Since awards are very rarely subject to vacatur for errors of either fact or law, some suggest counsel are doing a disservice to their clients by requiring such awards.

Parties who really, really, really want a "reasoned" award or "findings of fact and conclusions of law" should so provide when they draft their contracts and the 7th Circuit's Judge Posner would probably agree with this approach. In affirming an award, he wrote "that arbitrators probably would not write opinions - they are not required to - if their opinions were reviewable for legal errors, which would be concealed if the award consisted simply of a dollar amount.

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34 Bryan A. Garner, *Learn Them and Ax Them.* ABA Journal (April 2014).

35 See AAA Construction Rule 44(b). "In all cases, unless waived by agreement of the parties, the Arbitrator shall provide a concise written financial breakdown of any monetary awards and, if there are non-monetary components of the claims or Counterclaims, the Arbitrator shall include a line item disposition of each non-monetary claim or Counterclaim."

36 "Boggles" the Arbitrator's mind? It's axiomatic that one of the first things any Arbitrator must do is read the contract since, as has been said hundreds of times, arbitration is a creature of _____." Need I fill in the blank?

The quality of arbitration would be less, if, as seems plausible, having to articulate one's view in writing is a good discipline - something we judges certainly believe." *BEM 1, LLC v. Anthropologies, Inc.*, No. 98 C 358, 2000 WL 1849574 (7th Cir. 2002). While Judge Posner may well be correct, judicial opinions, unlike most arbitration awards, are subject to appellate review and, together with concurring and dissenting opinions, help the development of the law. Judges are also salaried while Arbitrators are not and any added expense in preparing anything other than a bare bones award will likely be passed on to the parties.

25. **Nonsignatories.**[37]

a. Nonsignatory issues were involved in some of the matters discussed above and can be a complex topic in their own right, too complex to discuss here (e.g. agency, estoppel, third party beneficiary, subsidiary, alter ego, incorporation by reference, derivative actions - "an' a' that, an' a' that"[38]), but *Murphy v. DirecTV, Inc.*, No. 11-57163 (USCA 9th Cir. 07/30/13), exposed a related drafting issue.

An agreement between a Manufacturer (DirecTV) and its Customers (Murphy et al) provided for arbitration on an individual basis. There was no similar agreement between the Manufacturer (DirecTV) and its Retailers (BestBuy et al) who sold the product to the Customers.

Customers filed a class action alleging that DirecTV and BestBuy were deceiving them.

As to DirecTV, arbitration was compelled.

As to Best Buy, arbitration was not compelled since Best Buy was not signatory to the arbitration agreement and its claims of equitable estoppel, agency and third-party beneficiary were unavailing.

So far, that's straightforward, but Robert Herrington & Jeff Scott, attorneys with Greenberg Traurig, LLP, pointed out (*Arbitration Loophole Exposed,* Los Angeles Daily Journal, 08/22/13) that a potentially significant drafting issue could be a concern. If manufacturers are obligated to defend or indemnify their retailers regarding claims relating to the products manufactured, they may find themselves paying to defend the class actions they sought, by their arbitration provisions, to avoid. The authors suggest that an arbitration clause could be drafted to make retailers and others "express third party beneficiaries" of the clause so arbitration could be compelled even as to them.

b. A Subcontractor sued a Direct Contractor for non-payment and an Owner to foreclose a mechanic's lien. Arbitration between the Subcontractor and Prime was compelled based on a provision in the subcontract. The request of the nonsignatory Owner to participate in the arbitration was granted based on a provision in the subcontract that allowed "joinder [of] persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in an arbitration" so long as the nonsignatory consents to joinder as this Owner had done. *Cape Romain Contractors v. Wando E., LLC*, 747 S.E. 2d 461 (S.C. 2013).

26. **Statutes of Limitation.** An online commentator offered the opinion that state laws are inconsistent as to whether a statute of limitations is tolled by commencement of an arbitration.

Some state courts, he said, say that statutory limitations to commence an "action" are not applicable to claims in an arbitration "proceeding" and a lawsuit must, therefore, be filed to toll the limitation period. Other courts are different and the lack of uniformity causes added legal expense in resolving the issue. He suggested that the following could be considered for a rule or contract provision:

> *The arbitrator(s) will give effect to statutes of limitation in determining any Claim and shall dismiss the arbitration if the Claim is barred under the applicable statutes of limitation.*
>
> *For purposes of the application of any statutes of limitation, the service on [the designated provider] under applicable [provider] rules of a Notice of Claim is the equivalent of the filing of a lawsuit.*
>
> *Any dispute concerning this arbitration provision or whether a Claim is arbitrable shall be determined by the arbitrator(s), except as set forth at subparagraph (j) of this Dispute Resolution Provision.*
>
> *The arbitrator(s) shall have the power to award legal fees pursuant to the terms of this agreement.*

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37 For nonsignatory issues relating to arbitration in general, see Carl F. Ingwalson et al, *Arbitration and Nonsignatories: Bound or Not Bound?* J. of the Am. College of Comm. Arb. (Winter 2012).

38 Robert Burns, *A Man's a Man for A' That* (1795).

27. **Poison Pill Clause**. Drafters sometimes consider certain provisions of their arbitration clauses to be so critical that they would not want a court to sever those provisions while enforcing the balance of the clause. To prevent this, they may include a "poison pill" clause (also called a "jettison" or "blow-up" clause).

a. In *Sanchez v. Valencia Holding Co., LLC,* 201 Cal. App. 4th 74 (2011),[39] such a clause was included in sales contracts between a car dealer and customers. The contracts provided for arbitration, included a class action waiver, and said:

> "*If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable.*
> *If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable.*"

b. A poison pill clause was also included in the contract at issue in *Coneff v. A.T. & T. Corp.*, 673 F.3d 1155 (9th Cir., 2012).

28. **Delegation Clause**. A delegation clause is used by parties to indicate who, the arbitrator or the court, is to decide certain issues. In *Tiri v. Lucky Chances Inc.,* 2014 DAR 6103 (Cal. App. 4th 05/15/14), an employment contract said:

> "*The Arbitrator, and not any federal, state, or local court or agency shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable.*"

When the Employee sued for wrongful termination, Employer's petition to compel arbitration was denied by the trial court. This was reversed. The parties had clearly delegated the authority to rule on the enforceability of their agreement to an Arbitrator and the result, the court said, would be the same under both the federal and state arbitration statutes.

Generally, a challenge to the validity of a contract as a whole is an issue for the Arbitrator while a challenge to an arbitration provision within a contract is an issue for the Court. *Rent-a-Center* expanded on that by saying where, as here, the contract itself is an arbitration agreement the issue of its validity is for the Arbitrator. There are two requisites for a delegation clause to be effective: (1) the language "*must be clear and unmistakable*" and (2) the delegation must not be revocable under state contract defenses such as fraud, unconscionable. In making its ruling, the court:

- distinguished *Zullo v. Superior Court*, 197 Cal. App. 4th 477 (2011) and *Fitz v. NCR Corp.* 118 Cal. App. 4th 702 (2004) on which the trial court had relied.
- found that two of its own prior decisions *Ontiveros v. DHL Express (USA) Inc.,* 164 Cal. App. 4th 494 (2008) *and Murphy v. Check 'N Go of California Inc.*, 156 Cal. App. 4th 138 (2007) had been "*undermined by the more recent*" U.S. Supreme Court decisions in *Rent-A-Center* and *AT&T Mobility LLC v. Concepcion.*

Similarly see *Malone v. Superior Court*, 2014 Los Angeles Daily Journal DAR 7703 (Cal. App. 4th 06/17/14) and *In re Checking Account Overdraft Litigation*, No. 11-14282 (11th Cir. 03/21/12).

> For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

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39 As indicated above, *Sanchez* is currently on appeal to the California Supreme Court regarding an unconscionability issue.

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