UTAH STATE BAR

FALL FORUM

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AVOIDING ARBITRATION CLAUSES THAT CAN DESTROY YOUR CASE

PART I

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James R. Holbrook
Clinical Professor of Law
S. J. Quinney College of Law, University of Utah
Salt Lake City, Utah

Carl F. Ingwalson, Jr.
Attorney, Arbitrator, Mediator
San Diego, California

THE BIO

Carl Ingwalson is a San Diego attorney, arbitrator and mediator. He is one of two San Diego attorneys elected to fellowship in the College of Commercial Arbitrators (CCA) and the only San Diego attorney elected to fellowship in the American College of Construction Lawyers (ACCL). He is a diplomat of the California Academy of Distinguished Neutrals and a charter member of the National Academy of Distinguished Neutrals. When the California Mandatory Fee Arbitration Act was adopted, he served as co-chair of a committee that wrote the Guidelines for local bar programs and chaired the local committee for three years.

Carl also chaired the ADR Section of the San Diego County Bar Association for three years and was a co-founder of the Construction Law Section which he chaired for its first three years. Carl has also written and lectured on numerous dispute resolution topics in California and elsewhere including presentations to various sections of the San Diego County Bar Association, the Beverly Hills Bar Association, the North County Bar Association, the State Bar of California, the Utah State Bar, the Colorado Bar Association, the American Bar Association, the Forum on the Construction Industry and numerous private law firms. This year he is presenting his 22nd annual *ADR Update* including a review of recent cases from California, the 9th Circuit and the U.S. Supreme Court.

He was an Editor of CCA's Guide to Best Practices in Commercial Arbitration (Juris Publishing, 2014) and the author of the *Awards* chapter of the ABA Forum's volume on Construction ADR (ABA Publishing, 2014). Published articles include *Arbitration and the Unauthorized Practice of Law* (Winter, 2007) and *Pass Through Claims and Liquidation Agreements* (October, 1998) both published in The Construction Lawyer, journal of the ABA Forum on the Construction Industry. Another article, *Arbitration and Nonsignatories: Bound or Not Bound?*, was published in the Journal of the American College of Construction Lawyers (Winter, 2012). He also served as a consultant on the Attorney's Guide to California Construction Contracts and Disputes, 1st ed. (CEB, 1976) and 2d ed. (CEB, 1990), and on California Mechanic's Liens and Related Construction Remedies, 1st ed (CEB).

Other interests include European and domestic travel and the study of America's Civil War about which he has made numerous presentations and had articles published in newspapers and online.

THE DISCLAIMER

These materials include a review of common concerns and problems that can occur due to dysfunctional drafting. Included are salient features of various cases (paraphrased and greatly simplified) and references to articles dealing with drafting issues, all of which are intended for educational and discussion purposes solely in conjunction with an oral presentation.

Since the purpose of the program is to demonstrate drafting issues, other facts and issues are excluded. Readers should rely only on fully reported statutes and official published opinions when citing any referenced authorities. Some cases may have been reversed or overruled, or may not yet be final, and some statutes may no longer exist, but they're included for discussion purposes. It is the drafting issue, not who won or lost, or how courts ultimately ruled, that is of importance. Why did parties, who anticipated a relatively expeditious and inexpensive arbitration, find themselves embroiled in lengthy, very expensive, appellate litigation?

Neither the materials nor the presentation should be considered legal advice or the practice of law and neither the presenter, Professor James Holbrook the State Bar of Utah, nor any other individuals or organizations shall be re held responsible for their content.

DYSFUNCTIONAL DRAFTING
CHAOS FOR PARTIES! MALPRACTICE FOR ATTORNEYS?[1]

"[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract." *Baravati v Josephthal, Lyon Ross, Inc.*, 28 F. 3d 704, 709 (7th Cir. 1994).

however

"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).

PRINCIPLES OF DRAFTING[2]

When a college sophomore asked six law schools what courses he should take that would best prepare him for a legal career, the schools all responded with similar suggestions the first of which was the study of English, as much as possible - reading it, writing it, comprehending it, speaking it. Secondly, they suggested math and logic as a way to train minds to think analytically. Too many attorneys skipped English and math.

Too often documents are drafted with attention paid to who is to do what to whom and how much will be paid for performance of specified obligations, but with minimal attention paid to how potential disputes are to be resolved. Dispute resolution becomes an afterthought with provisions cut from one document and pasted into another. As a result, provisions for dispute resolution often cause more problems than they solve.

> *"Among the causes of ambiguity are the imperfection of language and the variant modes of expression in use among different individuals. Verbosity; unnecessary repetition and the use of obscure terms tend to create legal problems. It is not the quantity of verbiage but rather the sense of the words used which determines the true construction of a writing. . . . The use of fewer words, provided they are clear and of specific import, will simplify the Contract Documents and thereby avoid confusion. The Contract Documents are not only intended to be used but also to be understood."*[3]

The Written Word

"Condemned to the use of words, we can never expect mathematical certainty from our language." Justice Thurgood Marshall in *Grayned vs. City of Rockford*, 408 U.S.104, 110 (1972).

When people converse verbally a speaker's intent is clarified by pauses and by emphasis on specific words or syllables. Emphasis is augmented by facial expressions, gestures and body language but, when the same words are put on paper, these added clues to the author's intent are missing. Consider this sentence:

I never said he stole money.

When spoken orally there's likely to be little misunderstanding but, to the reader, the sentence could have six different meanings depending on which word is mentally emphasized.

Two men formed a partnership and went west to make their fortune during the gold rush. A year later, on the way home after each had made $10,000, one of the men was injured and, as he died, gave his money to his friend and wrote a note instructing him to:

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Drafting is the "*posh name for the process of getting it wrong the first time so you can charge for getting it right the next time.*" Martin Vernon, Bluff Your Way in the Law (Revette Publishing, 1995).

3

Robert W. Johnson, "*The Case for Streamlined Construction Document Language*" (CSI, The Construction Specifier, July 1999), referencing a 1949 article quoting Nathan Walker, then counsel for the New York AIA Chapter. Similarly see George B. Newhouse, Jr., "*Willfully, Wantonly, Knowingly a Mess*," (Los Angeles Daily Journal, December 16, 2015) discussing "imprecise laws."

Give my wife what you want.

The man returned and gave the wife $1. She filed suit, but the man was adamant; he had done exactly what the note said. The judge ordered that the man to give her another $9,999 explaining, "now I have done what her husband instructed."

Short Words

"In promulgating your esoteric cogitations or articulating your superficial sentimentalities and amicable, philosophical, or psychological observations, beware of platitudinous ponderosity," says Richard Lederer, the well-known linguist, punster and "verbivore" who then makes a case for the use of short words in his book "Word Wizard" (St. Martin's Griffin, New York, 2006). Advising that one should "never use a big word when a diminutive word will do," he demonstrates the point by starting one chapter with four paragraphs composed solely of single syllable words. "Use small, old words where you can," he says. "If a long word says just what you want it to say, do not fear to use it." But, "short words are like fast friends. They will not let you down."

In any profession there are words of art that have established meanings and convey clarity to others in the profession (e.g. "demurrer" in the legal profession). Too often, however, drafters, with dictionaries at hand, only confuse readers by using unnecessarily long words and complex run-on sentences and paragraphs.

Punctuation

Confusion and ambiguity may result from missing, misplaced, or misuse of punctuation. Compare:

Let's eat, Mom	with	Let's eat Mom.
What a game!	with	What, a game?
What is this thing called "love"?	with	What is this thing called, Love?

In ancient Greece, the well known Oracle at Delphi was consulted by a soldier as to whether he should go to war and the Oracle's written response seemed comforting:

Thou shalt go
thou shalt return
never by war
shalt thou perish.

Only after suffering a mortal wound did the soldier realize the punctuation-challenged Oracle had neglected to put commas after "go" and "never."

Discussing a documentary about Merle Haggard, a news article said "among those interviewed were his two ex-wives, Kris Kristofferson and Robert Duvall." Four persons had been interviewed, but a serial comma (also known as an Oxford or Harvard comma) after "Kristofferson" may have stopped the snickers.

Sentences may be punctuated differently by men and women.[4] Who punctuated which of the following?

Woman without her man is nothing.
Woman! Without her, man is nothing.

Several years ago an issue arose regarding a comma in Missouri's Constitution. Gertrude Block, *Language for Lawyers*. The Federal Lawyer (January/February 2013).

There's also a debate about the placement, or non-placement, of a period in the Declaration of Independence. One interpretation would place the "role of government" and the "individual" on an equal footing, while another would create an implied hierarchy.[5] The National Archives has indicated it will examine the original document.

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4 Richard Lederer, *Lederer on Language*.

5 Christina Sterbenz, *An Extra Period in the Declaration of Independence Might Change Our Understanding of Government.* Business Insider (07/03/14).

In 1984, a sentence proposed for the Republican platform read:[6]

"We therefore oppose any attempt to increase taxes which would harm the recovery and reverse the trend toward restoring control of the economy to individual Americans."

When conservatives objected to the language, a comma was inserted and the meaning of the sentence changed:

"We therefore oppose any attempt to increase taxes, which would harm the recovery and reverse the trend toward restoring control of the economy to individual Americans.

Did this indicate opposition to any attempt to increase taxes or only to those increases that would harm the recovery?

In another matter, a question arose regarding the implications of a dash appearing between phrases in an expert's report.

Punctuation also "arises as an issue in thousands of lawsuits each year in which courts ponder the meaning of statutes and contracts." Bryan A. Garner, *How Are Your Punctuation Skills?* ABA Journal (December 2014). Punctuation problems have been found in numerous regulations, court rules, statutes and contracts:

1. "*For want of a comma, we have this case*," said the court in *O'Connor v. Oakhurst Dairy*, No. 16-1901 (U.S.C.A., 1st Cir., 03/13/17). The court agreed with employees in a class action relating to overtime pay that the absence of a serial comma created an ambiguity. The District Court's grant of a partial summary judgment to Oakhurst was reversed. An online report on MSN.Com. said the decision could cost a Maine dairy company an estimated $10,000,000.

2. A California court rule said, "th*e parties shall personally appear at the first mediation session, and at any subsequent session unless excused by the mediator.*" California Rules of Court, Rule 1634 (subsequently revised). Could a Mediator excuse a party from attending the first mediation session? Judges, mediators and advocates had different opinions.

3. A statute said the penalty for certain juveniles "*shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.*" Interpreting this to create a presumption of a life sentence, courts sentenced countless juveniles to life terms - until a court said it was a wrong interpretation. *People v. Gutierrez*, 58 Cal. App. 4th 1354 (05/05/14).

4. In Illinois, a mechanic's lien statute was amended to make liens available to structural engineers. In the process, drafters changed a semicolon to a comma without any indication as to whether the punctuation change was intended to make a substantive change regarding applicability of the statute. A circuit court invalidated the engineer's lien and an appellate court affirmed. Six years after the suit was filed, the state Supreme Court reversed. *Christopher R. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois*, No. 118955 (Illinois Supreme Court, 11/19/15). The punctuation change was one of several issues considered by the court.

5. A Middleton, Ohio, ordinance listed vehicles that could not be parked on the streets for more than twenty-four hours. The list included a "*motor vehicle camper.*" When Andrea Cammelleri received a ticket for parking her "*motor vehicle*" (a pickup truck) on the street, she argued the ordinance was ambiguous. The City said it clearly was intended to have a comma so it would read "*motor vehicle, camper.*" A judge with the 12th Ohio District Court of Appeals forgave the ticket and directed the city to clarify the law if it wanted to enforce the ordinance. Business Insider (July 1, 2015).

6. In Minnesota, a rainstorm flooded a Minneapolis parking lot and an insured's business causing substantial damage. When a claim was made, the carrier pointed to a flood exclusion and denied the claim. Counsel for the claimant thought the exclusion was ambiguous due to the placement of a comma. A linguistics professor from the University of Minnesota agreed there were multiple interpretations, one favoring coverage and the other not. In litigation, the judge, only a couple of credits short of her Ph.D. in linguistics, thought the provision was susceptible of three interpretations and said the ambiguous exclusion should be construed against the carrier thereby making the exclusion inapplicable.

7. Placement of commas and permissive language in several contracts have caused ambiguities as to whether mediation was or was not a condition precedent to arbitration.

8. In *Boulger v. Woods*, #2:17-cv-00186-GCS-EPD (U.S.D.C., So. Dist. Ohio, Eastern Div.; 01/24/18), Plaintiff claimed she had been defamed by a "tweet" ("So-called #Trump 'Nazi' is a #Bernie Sanders agitator/operative?"). The suit was dismissed on the pleadings due to the use of

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6 *The Tax Plank.* New York Times (08/15/84)

the question mark instead of a period.

Terminology

Sometimes, problems arise from typographical errors or from misuse of a word. Mark Twain reportedly said, "the difference between the right word and the almost right word is the difference between lightning and the lightning bug."[7] Church announcements from online photos:

"Thursday night potluck supper. Prayer and medication to follow.

"While the Pastor is on vacation, massages can be given to the church secretary."

"Ushers will eat latecomers."

Would you be inclined to use the online dispute resolution site that extolled, as did one site, the virtue of its process for attorneys and their "co-council"?

Several years ago San Diego litigation was resolved with parties executing a settlement agreement in which they released all claims against each other and "their respective officers, directors, shareholders, attorneys, insurance agents, sureties" and others. No sooner had the agreement been signed than the Defendant named Plaintiff's attorney as one of many defendants in a new suit and no sooner had that occurred than the attorney pointed to his release in the settlement agreement he had helped draft. It took a Mediator (a retired federal court judge flown in for the occasion) and almost fourteen hours of mediation, for parties, attorneys, experts and insurance adjusters to resolve the dispute.[8]

In *Iqbal v. Ziadeh*, 10 Cal. App. 5th 1 (03/24/17), a court said the parties' general release of known and unknown claims against each other and their "affiliates" and those that might be "affiliated" with them was not broad enough to encompass one defendant's unnamed landlord

In San Diego, a trial court ruling that a Mayor did not have to sign a contract already approved by the City Council turned on the use of "*an*" instead of "*the*" in the council resolution. The resolution authorized the Mayor to "*enter into an agreement.*" It did not, said the judge, say "*the TMD agreement*" or "*the TMD agreement attached hereto*" or "*the agreement approved by the City Council.*" Additionally, the resolution "*authorized*" action but did not require the Mayor to do anything.

Similarly, use of the wrong word by Plaintiffs' attorneys caused an appellate panel to overturn a lower court's decision to halt an election in Palmdale, California. The attorneys should have used the word "*and*" instead of "*or*" when drafting a preliminary injunction the trial judge had signed.[9]

In *Penton Business Media Holdings, LLC, v. Informa PLC*, 2018 WL 3343495 (Del. Ch., 07/29/18), the court had to consider whether a provision for an "expert determination" (in this case by an accounting firm) was, in effect, an agreement to arbitrate. The opinion indicates twenty-four states recognize a difference; twenty-two do not; and in four it's uncertain.

Uniform Terminology

As young writers our teachers introduced us to Roget and his marvelous Thesaurus. Use it, we were told, to add variety to prose. In legal writing, it's preferable to use the identical word or phrase when speaking of the same subject. How often has a court, perhaps wrongly, attributed different meanings to different statutes on the assumption that, if the legislature meant the same thing, it would have used the same word?

"Sophisticated lawyers . . . must be presumed to know how to use parallel construction and identical wording to impart identical meaning when they intend to do so, and how to use different words and construction to establish distinctions in meaning." *Int'l Fidelity Ins. Co. v County of Rockland*, 98 F. Supp. 2d 400, 412 (2000).

When referring to a written subcontract between parties, stick to subcontract. Alternating between subcontract, contract and agreement for the

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Mark Twain. Wit and Wisecracks (The Peter Pauper Press 1961).

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The parties had purported to release only their own attorneys. For readers in doubt, consider two couples going to dinner and then going home with their "*respective*" spouses. Who's going home with whom?

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Omar Shamout, *Wording Error Prompts Reversal in Palmdale Election Lawsuit*. Los Angeles Daily Journal (10/18/13).

sake of variety can only cause confusion. In San Diego, specifications referencing "bathroom sinks," "bathroom basins," "sinks," and "basins" led to litigation. The designer said they meant the same thing. The involved subcontractor felt a distinction was being made and ordered its materials accordingly. On delivery, some of the materials were rejected by the owner on the designer's advice. Litigation followed.

In *Sy First Family v. Cheung*, 70 Cal. App. 4th 1334 (1999), discussed below, terminology varied from arbitration to judicial reference to trial, all in one sentence.

An employment contract considered in *Juarez v. Wash. Depot Holdings, Inc.*, 2018 Cal. App LEXIS 604 (07/03/18), provided for arbitration. It included both English language and Spanish language versions of the agreement. In an apparent effort to cover all its bases, it had employees sign two separate handbook acknowledgments, one saying the employee received an English version and agreed to its terms and the other saying the employee received a Spanish version and agreed to its terms. Employee filed suit alleging various employment-related claims (failure to pay minimum wages, failure to pay overtime, etc.). The wording in the two agreements was not uniform. They differed on one critical issue, the ambiguity was construed against the Employer, and Employer's motion to compel arbitration was denied.

ARBITRATION PROVISIONS

Fit the Form to the Fuss[10]

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. The discussion below points 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) Failsafe
      (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
d. Governing law
   i. State
   ii. FAA
e. Time limits
   i. Initiation

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

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

Checklists such as the above have formed the basis of countless articles and presentations for decades (e.g. see a similar list in Ingwalson, *Arbitration: Some Benefits and Concerns*, EGCA Magazine, Vol. 7, December 1996), a publication of the Engineering and General Contractors Association. The subject program, while not discounting the value of such lists, seeks to enlarge on those issues and make readers aware of significant problems that can arise with even the most innocuous provisions

Caveat. While class actions are referred to in some of the examples and cases below, this paper is not intended to address the entire realm of drafting issues regarding class action provisions relating to arbitration agreements. Counsel with class action concerns have a special drafting burden since case law following several U.S. Supreme Court decisions is frequently changing and there is often a split among state courts and among federal circuits (e.g. see *Lamps Plus Inc. v. Varlea*, No. 17-988, certiorari granted April 30, 2018, with the issue being "*whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.*" Oral argument October 29, 2018).

Simple Clause Usually Preferable. Arbitration is a very flexible, relatively economical, expeditious, user-driven, and contract-based alternative to litigation. "A well-drafted clause can avoid procedural skirmishes,"[11] but a "poorly drafted arbitration clause almost always has a negative impact on the process."[12] 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.

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

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

In most instances it is preferable to keep arbitration clauses thoughtfully brief, incorporate recognized and time-tested 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,[13] 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 failsafe 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)").[14]

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

Significant Delays & Expense Caused by Poor (Usually by Lawyers) 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 it by a few English teachers.

When a theater fired its director, an issue arose as to whether the director was still entitled to a bonus. Their agreement said "the parties agree to abide by the determination of the ... certified public accountants ... in case of a dispute as to the true amount of the net profits, and each party agrees to accept such determination as final." The accountants said no bonus was due. The theater said the contract provision was, in essence, an arbitration provision and the accountants' decision ended the matter. The Kentucky Supreme Court disagreed. Among other observations, it noted that the contract did not mention arbitration. *The Kentucky Shakespeare Festival, Inc. v. Dunaway*, 490 S.W.3d 691, 2016 WL 3371085 (Ky, June 16, 2016).

An escrow document considered in *Villacreses v. Molinari*, 132 Cal. App. 4th 1223 (2005), included a notice advising parties 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*, 2013 WL 238708 (U.S.C.A. 2d Cir., 01/23/13) (cert denied). 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 the physicians 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.

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

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

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 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.

Employees of a New York company were asked to and did sign compensation agreements that provided for arbitration. Subsequently, they sued for benefits they claimed were due for work performed prior to those agreements. The court denied arbitration because the agreement was ambiguous as to the "temporal effect" of the agreements and testimony convinced the court that the parties did not intend the provision to have retroactive effect. *Holick, Jr. v. Cellular Sales of New York, LLC.*, 802 F.3d 391 (U.S.C.A., 2d Cir., 09/22/15).

Parties in *Lindsay v Lewandowski*, 139 Cal. App. 4th 1618 (2006), agreed on "binding mediation." Did this mean arbitration? 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.
>
> 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.
>
> . . . . 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), 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), 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 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 arbitrator, 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).

Narayan v. The Ritz-Carlton Development Company, Inc., No. SCWC-12-0000819 (Sup. Ct. of Hawaii, June 3, 2015), involved a condominium project. Numerous documents referenced arbitration, but also said "venue for any cause of action brought by Purchaser hereunder shall be in the Second Circuit Court." A related public report said documents controlling rights and obligations of owners "are intended to be, and in most cases are, enforceable in a court of law." The court felt a reasonable buyer "would not know whether she or he maintained the right to judicial redress or whether she or he had agreed to arbitrate." A petition to compel arbitration was denied.

In another matter, 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?

During mediation regarding a commercial lease, parties disputed the appropriate next step if the mediation were unsuccessful. The contract said:

1. "the parties hereby waive their respective rights to trial by jury in any action or proceeding . . ."

   ☞ One party said litigation had not been waived since the provision only related to a "jury" trial and it expressly contemplated the possibility of an "action."

2. "Except as otherwise provided . . . any controversy . . . shall be settled by mediation or by arbitration. . . ."

   ☞ One party said this gave two options, mediation "or" arbitration. It chose mediation and, especially in light of the foregoing provision, it did not have to arbitrate.

Arbitration is a beast/critter/brute/varmint of contract:[15]

1. *Huckaba v. Ref-Chem, L. P.*, No. 17-50341 (USCA 5th Cir. 2018), considered an employment agreement that provided for arbitration and said, "[b]y signing this agreement the parties are giving up any right they may have to sue each other" and any modifications had to be in a writing signed by both parties. Employee signed the agreement but, by the time a dispute arose, Employer had not signed it. Employer argued the obligation to arbitrate was clear. The court said there was no such obligation since Employer had not signed the agreement.

2. In another matter, Plaintiff signed an agreement with Knight Enterprises S.E., LLC. A separate "Rider and Class Action Waiver" with Jeffrey Knight, Inc., dba Knight Enterprises provided for arbitration on an individual basis with a class action waiver. When Plaintiff sued Knight Enterprises S.E., LLC, Defendant's motion to compel arbitration was denied since, even though the two entities may have been related, Knight Enterprises S.E., LLC, had not signed an arbitration agreement. *Weckesser v. Knight Enterprises, S.E., LLC*, No. 17-1247 (USCA 4th Cir. 2018).

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."[16] 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, at least in the form given.

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15 "Creature of contract" has become boring.

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

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

A simple five-letter word may seem innocuous, but see *Fru-Con Const. v. Southwestern Redev*, 908 S.W.2d 741 (1995), for the problems it can cause although many of the details are omitted from the opinion. 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."

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." As a result, there were to be multiple separate arbitrations and one lawsuit. 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.

Rather than referencing the amount of damages from a "claim," it might more clearly indicate the parties' intent by tying the amount to the total monetary damages being requested in the arbitration. Since that could lead to game-playing by someone artificially inflating a demand, some have suggested that it should reference damages being requested in "good faith" or that might "realistically flow" from the alleged conduct - or not, since this language could also lead to disputes.

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.*, 62 Cal. 4th 1237 (03/28/2016), 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. The court disagreed and said they had mutually agreed to arbitrate all disputes.

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, as in *Baltazar*, the poor wording had caused both parties a lot of unnecessary time and expense.

Swearingen v. Swearingen, No. 05-15-01199-CV (Dallas Court of Appeals, 07/15/16), involved the sale of a business by Swearingen Financial Group to United Capital Investors. Swearingen was owned by two brothers who had a family tiff relating to the allocation of proceeds from the sale. After construing "we," "us," "you," "your,' and "our" in the agreement, the court decided the arbitration clause did not apply to disputes between the brothers.

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)), some courts have ruled that tort and statutory claims are not arbitrable. Others have said tort claims are arbitrable (see *STV One Nineteen Senior Living, LLC v. Boyd*, 2018 WL 914992 (Alabama, 2018). If drafters want to make sure such 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 contract 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. There was no express provision making compliance with the statutes a contractual obligation subject to the arbitration clause. Similarly see *Vasserman v. Henry Mayo Newhall Memorial Hospital*, 8 Cal. App. 5th 236,

2017 WL 491700 (02/07/17), involving a wage and hour class action. Arbitration was denied since the applicable collective bargaining agreement "did not include an explicitly stated, clear and unmistakable waiver of the right to a judicial forum for individual statutory claims."

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 arising out of or in connection with this Agreement" was deemed too narrow to apply to numerous battery-related tort claims based on a personal relationship between employees of the two companies.

In *Keyes v. Dollar General Corp.*, 2018 WL 1755266 (Miss. April 12, 2018), a clause relating to disputes "arising out of your employment" was deemed not applicable to a claims of malicious prosecution, defamation, false imprisonment and other tort claims. The court in *Henry v. Cash Biz*, 2018 WL 1022838 (Tex. Feb. 23, 2018), considered short term loan contracts and a detailed arbitration provision that said "dispute" and "disputes" were to be given their broadest possible meaning and that specifically included "all common law claims, based on contract, tort, fraud, or intentional torts."

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.

The clause in *Jessica M. Denson v. Donald J. Trump for President, Inc.*, a trial level opinion by the Supreme Court State of New York, New York County, No. 101616 / 2017 (2018), said "any dispute arising out of or relating to this agreement," at the discretion of defendant, was to be arbitrated. A campaign worker, said she was routinely overworked, subject to harassment by supervisors, etc. The court, noting that although the wording seemed broad "the agreement itself only includes a specific list of five prohibited acts on plaintiff's part," said "there is simply no way to construe this arbitration clause in this agreement to prevent plaintiff from pursuing harassment claims in court." In *Mendez v. Mid-Wilshire Health Care Center*, 220 Cal. App. 4th 534, 2013 WL 870983 (2013), 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.

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, but not all, 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 agreement 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 . . . arising out of or relating to, the contract documents 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." The arbitrators' unique award was upheld.

Bono v. David, 147 Cal. App. 4th 1055 (2007) (real estate development), considered 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 executed by Subcontractor, without a 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), certiorari denied 132 S.Ct. 1862 (2012) (maritime salvage), the involved clause said any dispute "arising under" the agreement was to be settled by arbitration. The clause 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.

In *Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292 (9th Cir. 1994) (licensing agreement), "arising out of" was interpreted to cover contract disputes but not tort claims.

In *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 *United States and Nevada ex rel. Welch v. My Left Foot Children's Therapy LLC et al*, 871 F.3d 791 (9th Cir. 09/11/17), a clause that said parties would arbitrate "all disputes that may arise out of the employment context" was found not broad enough to cover claims under the federal False Claims Act.

Jessica Denton v. Donald J. Trump for President, Inc., a trial level opinion by the Supreme Court State of New York, New York County, No. 101616 / 2017 (August 7, 2018), discussed an arbitration clause saying "any dispute arising out of or related to this agreement," at the discretion of defendant, was to be arbitrated. The self-represented plaintiff, a campaign worker, said she was routinely overworked, subject to harassment by supervisors, etc. A motion to compel was denied with the court noting that, although the wording seemed broad, "the agreement itself only includes a specific list of five prohibited acts on plaintiff's part." "There is simply no way to construe this arbitration clause in this agreement to prevent plaintiff from pursuing harassment claims in court. The arbitration clause could have been written to require any disputes arising out of plaintiff's employment to go to arbitration," but it did not.

In *Mendez v. Mid-Wilshire Health Care Center*, 220 Cal. App. 4th 534, 2013 WL 870983 (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.

In *Rice v. Downs*, 247 Cal. App. 4th 1213 (June 1,2016), similar interpretive issues arose in an attorney-drafted agreement. The court said claims "arising out of" the agreement did not include claims of legal malpractice, rescission and breach of fiduciary duty.

Another agreement caused problems for actress Pamela Anderson and her husband, Tommy Lee. A sexually explicit video of their honeymoon made its way to Internet Entertainment Group (IEG) which shared it with the rest of the world via the Internet. The Lees sued in state court and the parties signed a settlement agreement that broadly indicated the parties waived and released all claims against each other "arising out of or in any way related to the facts underlying the action." IEG then argued it still had the right to distribute the tape on DVD and VHS. The Lees countered that they never consented to future distribution in any fashion; after all, stopping distribution was the essence of the initial suit and the goal of the settlement agreement. In a March 1998 court filing an attorney was quoted as saying the agreement was "so indefinite" a trial would be needed merely to determine its validity. An unpublished memorandum decision in federal court agreed there was at least an issue as to whether the settlement was limited to Internet distribution or also extended to DVD and VHS. The ultimate resolution is unimportant (except, perhaps, for the Lees). *Lee v Internet Entertainment Group*, Los Angeles Superior Court Case #BC180801. Also see *Lee v. Internet Entertainment Group*, 33 F. App'x. 886 (9th Cir. 2002).

☞ A broad arbitration clause may not, however, be sufficient to permit class arbitration. There must be a contractual basis to conclude the parties agreed to arbitrate such claims. While such a basis may be implied, it's preferable for parties to make their intent express. See *Stolt-Nielsen S. A. v. Animal Feeds Int'l. Corp.*, 559 U.S. 662 (2010), and *Truly Nolen of America v. Superior Court*, 208 Cal. App. 4th 487 (2012).

Opinions as to who, an Arbitrator or a Court, decides the issue are split. See *Oxford Health Plans LLC v. Sutter*, 186 L.Ed. 2d 113 (06/10/13) (parties agreed to have the Arbitrator decide), *Brinkley v. Monterey Financial Services*, 242 Cal. App. 4th 314 (11/19/15) (incorporation of AAA rules mean Arbitrator decided), and *Sandquist v. Lebo Automotive*, 1 Cal. 5th 233 (07/28/16) (interpreting a broad clause, the court said it was for the Arbitrator to decide).

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.[17]

17

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).

What could be more clear and more unmistakable than saying so? Addressing the issue in the arbitration clause could save parties considerable time and expense. This is especially true in domestic arbitrations where the meaning seems to be less precise than in the international arena,[18] but it also arises in international matters. In *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II LP*, 717 F. 3d 322 (2d Cir., June 3, 2013) (stock purchase agreement), a dispute was referred to arbitration under rules of the International Chamber of Commerce (ICC) 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."[19]

> "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)."[20]

For provider rules, see 2013 AAA Commercial Rule R-7 (Arbitrator has the authority to rule on the "arbitrability of any claim or counterclaim") and 2015 Construction Rule R-9 (distinguishing between arbitrability and jurisdiction, but not, at least expressly, giving the Arbitrator the authority to rule on arbitrability issues). The reason for the different wording in the AAA's commercial and construction matters is unclear.

JAMS Comprehensive Arbitration Rules & Procedures (effective July 1, 2014) were specified in the contract between parties in *Simply Wireless Inc. v. T-Mobile US Inc.*, #16-1123, -1166 (4th Cir., 12/13/17), and the court said that was sufficient to clearly and expressly delegate arbitrability issues to the Arbitrators (at least when "sophisticated parties" - whatever that means - were involved).[21] *Simply Wireless* was a 2-1 opinion. Another court might agree with the dissent. To avoid any doubt regardless of the involved jurisdiction, the justices hearing the case or the rules specified, it's preferable to write "arbitrability" 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 non-binding arbitration under regulations of California's Contractors State License Board. They may not realize commercial arbitration pursuant to private contracts is different and 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.

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).

18

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

19

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

20

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.

21

Involved attorneys were: Cameron McEvoy, PLLC (Sean Patrick Roche, Esq.), Fairfax, Virginia. Irell & Manella LLP (Joseph Mark Lipner, Esq.; Ellisen S. Turner, Esq., Adam M. Shapiro, Esq.), Los Angeles, California. Nixon & Vanderhye, P.C. (Robert A. Rowan, Esq.; Sheryl L. De Luca, Esq.), Arlington, Virginia. Winston & Strawn, LLP (Charles B. Molster, III), Washington, D.C.

Readers are invited to speculate as to the amount of fees incurred by the parties due to the omission of "including arbitrability" in the arbitration provision.

administered by

Most parties and counsel 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.

Experienced providers who administer arbitrations, both domestic and international, can add significant value and efficiency to the process. Drafters unfamiliar with proposed providers should 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 church-related or charitable organizations provide a limited variety of services without charge, but most major domestic commercial providers do charge. They all have expenses (e.g. salaries of personnel, rent, insurance and other costs associated with their office space, newspaper advertising, travel costs and general overhead). 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,
   (a) to help offset overhead and
   (b) 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 the kind of frivolity that can significantly increase discovery costs and attorney fees).
2. Some charge no initial fee regardless of the nature of the claim, but other fees and Arbitrator compensation for their neutrals may be much higher..
3. Providers may also have different policies for neutrals' billing of fees if a hearing is cancelled or continued. Resumes of individual Arbitrators and any provider billing guidelines should be reviewed.
4. Some also have provisions for refunds of all or a part of the fees.
5. The AAA has also recently implemented new "Alternative Fee Arrangement Options' that include both a fixed fee option and a capped fee option.

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 request a copy of the provider's *Billing Guidelines* for its neutrals.

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 its agreement to arbitrate. 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.

At least one provider has indicated it will not proceed with an arbitration if one of the parties is self-represented (i.e. pro per, pro se). This raises the possibility that a Respondent (who has no interest in proceeding) could discharge its attorney shortly before the evidentiary hearing and bring the proceeding to a halt. While this has only been encountered with one provider, drafters may want to consider confirming and documenting that their chosen providers do not have similar policies.

Inetianbor v. CashCall, Inc., 768 F.3d 1346 (11th Cir. 2014), considered an agreement saying arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation." After much legal wrangling, the court denied a motion to compel since the designated forum was apparently unavailable and the forum selection clause was viewed as integral to the agreement. Similarly see *Hayes v. Delbert Serv. Corp.*, No. 15-1170 (4th Cir. 02/02/16) (involving a payday loan and an agreement designating the Cheyenne River Sioux Tribe to administer the arbitration) and *MacDonald v. Cashcall*, Inc., No. 17-2161 (3rd Cir. 02/27/18) (arbitration clause unenforceable where designated provider, Cheyenne River Sioux Tribe, does not exist).[22]

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 *Moss v. First Premier Bank*, #15-2513 (USCA 2d Cir., 08/29/16) (NAF no long accepted consumer cases and the court said it couldn't appoint a substitute). Also see *Miller v. GGNSC*

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Some have suggested there are so many cases in which the tribe was designated that it might want to consider going into the arbitration business.

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).

Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 729 S.E.2d 727, 2014 WL 2771300 (06/18/14), involved a medical malpractice claim and a nursing home agreement that specified usage of AAA rules. While it did not mention administration by the AAA, Respondent argued that following AAA rules meant administration by the AAA. Nine years previously, due to a large number of disputes relating to the competency of some patients to agree to arbitrate, the AAA had stopped administering nursing home personal injury disputes absent a post-injury agreement to arbitrate - something the drafters apparently failed to check. The Circuit Court refused to compel arbitration. The state Supreme Court reversed. Some other providers continue to arbitrate such disputes.

Moral: if parties want administration by a specific provider they should say so and they should make sure the provider will handle the dispute. A similar issue may exist when statutes are enacted that prohibit arbitration of certain disputes (e.g. California's Senate Bill 33 enacted in 2017 "prohibits financial institutions from forcing customers to give up their legal right to adjudicate claims in court when a bank commits fraud or identify theft." Brian S. Kabateck & Shant A. Karnikian, *SB33: Arbitration Agreements Covering Bank Fraud Are Out.* Los Angeles Daily Journal Supplement (01/10/18)). Whether such a statute would be preempted by the FAA is another issue.

The arbitration clause in *Flanzman v. Jenny Craig, Inc.*, at al, #A-2580-17T1, Superior Court of New Jersey, Appellate Division (10/17/18), "failed to identify any arbitration forum and any process for conducting the arbitration." The court decided there had been no "meeting of the minds" and reversed an order compelling arbitration.

With better drafting the above 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 the 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 may exist and be enforceable, 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 that was 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.

Anecdote: A well known arbitration scholar related this experience. While checking in for a surgical procedure, he was presented with numerous documents requiring his signature. Later, while medical personnel were in the process of preparing him for surgery, he was presented with a full-page arbitration agreement that (1) failed to designate a provider to administer the arbitration and (2) said there were to be three Arbitrators, two of whom were to be party-appointed. He wrote in two changes: (1) he designated the American Arbitration Association to administer the proceeding and (2) he said all three Arbitrators were to be neutral and selected from lists submitted to the parties by the AAA.

Most clauses merely say the arbitration will be conducted pursuant to "*rules*" of a specified provider. It's usually 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 actual rules in a contract is a factor to be considered when deciding whether the clause is unconscionable.[23] Other cases have held that 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 indicate where parties and counsel may review them as in the discussion clause above. 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[24]) for an award to be enforceable under the FAA. See *Swissmex-Rapid S.A. de C.V. v. SP Systems*, LLC, 212

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23 "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, 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).

The issue was also raised in *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237 (2016) and *Nguyen v. Applied Medical Resources Corp.*, 4 Cal. App. 4th 232 (2016). While failure to attach arbitration rules did not render the provisions defective in either case, a better drafted clause could have prevented, or simplified, the issue and the attendant legal expense in researching and arguing it.

24 "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

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 - 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. In *Bamberger Rosenheim, Ltd., v. OA Dev., Inc.* 862 F.3d 1284 (11th Cir., 07/1717), a federal court of appeals said disputes over interpretation of venue clauses are presumptively procedural issues to be decided by the Arbitrator.

A California contract for the sale of a business said the venue for the arbitration would be in the county "where the business is located." After the sale, the buyer moved the business to a different county and a dispute arose. The seller said "where the business is located" meant at the time of sale while the buyer said it meant at the time the dispute arose.

A boilerplate construction agreement said the arbitration would be at the site of the project. The parties didn't 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), 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), 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. A recent article said twenty-seven states have similar statutes (e.g. California Code of Civil Procedure, hereafter CCP, §410.42).

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, 2013 WL 6231157, 134 S. Ct. 568, 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 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."

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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."

According to one author "many states have laws that limit forum-selection clauses in construction contracts."[25] Drafters must, therefore, consider whether those or similarly restrictive laws limit their ability to craft an enforceable forum selection clause.

In view of CVS Health Corp. v. Vividus LLC, 878 F.3d 703 (9th Cir. 2017), saying that, under the FAA, arbitrators may not issue document-only subpoenas to non-parties, consideration might be given to whether a provision expressly giving the arbitrator the authority to also hold hearings at other than the venued location might be beneficial. For many years I have included the following in arbitration provisions:

> *Any such 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 in the opinion of the Arbitrator.*

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 authorize it while others don't. 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-jurisdiction discovery.[26]

Most recently see *CVS Health Corporation v. Vividus LlC*, No. 16-16187 (USCA 9th Cirt., 12/21/17): "Agreeing with the Second, Third, and Fourth Circuits, and disagreeing with the Eighth Circuit," the court said the Federal Arbitration Act does not grant Arbitrators the power to compel production of documents from third parties outside a hearing.

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. While 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 arbitration clause said venue would be 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.

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Construction Law Update, Hendrick Phillips Salzman & Flatt, P.C. (February 2014). Eric Travers, *Forum-Selection Clauses After Atlantic Marine*, National Academy of Distinguished Neutrals' Lexology (August 2014). Mr. Travers pointed out that twenty-four states have statutes relating to construction projects that would seemingly require resolution in the state where the project was located and contract provisions to the contrary could be invalid (the court seemed to stress that its opinion dealt with "valid" clauses).

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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).

In the same vein, consider *Goldman, Sachs & Co. v. Golden Empire Schools Financing Authority,* Nos. 13-797-cv and 13-2247-cv (U.S.D.C. 2nd Cir., August 21, 2014). The parties' contract said "all actions and proceedings arising out of this Broker-Dealer Agreement . . . shall be brought in the United States District Court." The court said this forum selection between a FINRA-regulated party (Goldman, Sachs) and one of its customers trumped the arbitration provision otherwise applicable to their dispute. Similarly see *Goldman, Sachs & Co. v. City of Reno,* 74 F.3d 733 (9th Cir. 2014), but, to the contrary, see *UBS Fin. Servs., Inc. v. Carilion Clinic,* 706 F.3d 319 (4th Cir. 2013).

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

In *Peng v. First Republic Bank*, No. A135503 (Cal. App. 4th, August 29, 2013) a provision that said an employer could unilaterally modify or 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."[27]

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.

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

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Review granted 09/11/13; briefing deferred pending a decision in *Baltazar v. Forever 21, Inc.*, #S208345. Dismissed and remanded June 29, 2016. See *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237 (2016), for its resolution.