UTAH STATE BAR

FALL FORUM

LITTLE AMERICA HOTEL
500 South Main Street, Salt Lake City

AVOIDING ARBITRATION CLAUSES THAT CAN DESTROY YOUR CASE

PART 2

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11:00am - 12:00pm

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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.

OTHER PROVISIONS

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

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

"Arbitration allows parties involved in contractual disputes to resolve conflicts outside of local legal systems that are often slow, unsophisticated and corrupt. Equally important is avoiding being home-towned by the other side's local legal system." "International companies do not feel comfortable appearing before the court of a counterparty where they have little influence over the adjudicator or legal procedure, perhaps less credibility, and fewer personal connections," said Stephen Jagusch, global chair of Quinn Emmanuel Urquhart & Sullivan LLP's international arbitration practice. The practice area does carry risks, according to Robert O'Brien of Arent Fox LLP, and that "can weigh on clients' minds when drafting agreements." Though it can be faster than a local court system, international arbitration centers "may dissolve or divide in the time between an arbitration agreement being drafted and the matter being resolved, causing strife between parties over what venue should hear the ongoing dispute," said Brent Jaslin, a partner at Jenner & Block LLP.[28]

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

In *Hurdsman & Ors vs. Ekactrm Solutions Pty Ltd.*, SASC 112 (08/10/18), a clause was so ambiguous it couldn't be determined if the merits were to be mediated or arbitrated. Among other things, while the final contract referred to mediation, it incorporated rules of the Singapore International Arbitration Centre which doesn't have mediation rules. The Singapore International Mediation Centre does have mediation rules, but wasn't specified.

An additional consideration relates to the extent of potential conflicts to be disclosed by Arbitrators. Since rules of international providers tend to be less inclusive, some drafters prefer to specify what the parties expect. California's stringent requirements for domestic arbitrations (especially in employment and consumer matters), have been held not applicable if the arbitration is pursuant to the state's Code of Civil Procedure §§1297.111 et seq ("Arbitration and Conciliation of International Commercial Disputes"). *Comerica Bank v. Howsam*, 208 Cal. App. 4th 790 (2012). Parties wanting the stringent requirements to be applicable could, however, so provide in their contracts.

California's recent adoption of Senate Bill 766 (effective 01/01/19) will permit a non-California lawyer who is qualified to practice in another state or country to represent parties in international arbitrations in California. Businesses in California should, therefore, be aware of the advantages of drafting clauses that specific California as the venue for international disputes.

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

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

Others suggested the following:

> *The parties shall maintain the confidential nature of the arbitration proceeding and the award, including the hearing, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or as may be necessary in connection with a*

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

court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision.[29]

Note that one refers to parties, the arbitrator and the provider, the other refers to the parties, and neither refers to the attorneys. Were drafters attorneys who purposely took themselves off the hook regarding confidentiality? Realistically, could two parties sign a contract obligating nonsignatories (e.g. the arbitrator and provider) to maintain confidentiality? If not, is it still beneficial for them to express what they expect from the nonsignatories?

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

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

For comprehensive discussion of the issue see "*Confidentiality in U.S. Arbitration*," an article by Laura A. Kaster, a Fellow of the College of Commercial Arbitrators, in NYSBA, New York Dispute Resolution Lawyer, Vol. 5, No. 1 (Spring 2012), available on-line at www.AppropriateDisputeSolutions.Com.

Also see *Porkorny v. Quixtar, Inc.*, 601 F.3d 987 (2010), in which the wording of one-sided confidentiality agreements was viewed as an indicator of substantive unconscionability and *Grynberg v. BP P.L.C.*, 205 F. Supp. 3d 1 (2016), in which a motion to seal exhibits was denied in view of a "strong presumption in favor of public access to disputed exhibits." The exhibits included two complaints filed in the arbitration, the arbitrator's 2013 award, the transcript of an arbitration meeting and certain written correspondence. The court analyzed the motion by reviewing six factors that might act to overcome the presumption of public access.

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

In Larsen v. Citibank FSB, 871 F.3d 1295 (11th Cir., 09/26/17), the court said a confidentiality agreement in an arbitration clause in a bank's account holder agreement was substantively unconscionable. Parties to an arbitration were to keep any arbitration awards concealed, but the court agreed with an account holder that this would disproportionately favor the bank as a repeat party in arbitration. The court severed the confidentiality clause.

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

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

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

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

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

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

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

4. **Motions**. Experienced arbitrators will usually address their desired procedure for motions during a preliminary hearing, but some drafters prefer to include a provision in their contracts. Some provide that any motion that can be filed in litigation can be filed in arbitration with the same procedures and time limits being applicable. Others limit the type of motion that can be filed (e.g. dispositive motions) and those that can't (e.g. discovery motions), at least without the arbitrator's consent.

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

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

5. **Discovery**. "Discovery is far and away the greatest driver of cost and delay in litigation and in arbitration."[30]

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

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

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

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

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

Drafters sometimes include discovery provisions (e.g. full document discovery, one deposition per side, further discovery upon order of the Arbitrator for good cause found, no requests for admission) while others do not mention discovery. For a discussion of these issues see the College of Commercial Arbitrators' *Protocols for Expeditious, Cost- Effective Commercial Arbitration* (2010) available for no-cost download at www.CCA.Net and its *Guide to Best Practices in Commercial Arbitration* listed in the References at the end of this paper.

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

6. **Stepped Clause.**[31] Many contracts provide for negotiation, mediation or other action as a condition precedent to arbitration or to the recovery of attorney fees in arbitration. Such a provision might provide:

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

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

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

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

☞ i. A "right to initiate arbitration." How? What rules?

ii. Arbitration except as to "the scope of their claims." If parties in a pending arbitration disagree regarding scope issues, does this mean they'd have to stay the arbitration, commence litigation, get a ruling on the scope issue, and then resume the arbitration? What a waste of time and the clients' money!

iii. The "arbitrator(s)" will have powers. Does this mean one arbitrator? Three? Who decides?

iv. The powers will be those of a "friendly referee." Eh? According to one counsel, this meant the arbitrator, or arbitrators, would have the authority to render a decision representing a fair resolution of the matter without regard to otherwise applicable substantive law.

v. One or more arbitrators "mutually selected" by the parties. What if they don't agree?

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

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

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

b. In *Ambac Assur. Corp. v. Knox Hills LLC*, 2018 Ky. LEXIS 188 (06/15/18), the parties had failed to designate an "Advisor" as required by their agreement and, therefore, the right to compel arbitration never vested.

c. *Lange v. Schilling.*, 163 Cal. App. 4th 1412 (2008), involved a contract providing that, if any party commenced an action without first attempting to resolve the matter through mediation, or refused to mediate after a request was made, then that party would not be entitled to recover attorney fees, even if they would otherwise be available.

When the Buyer of a residence discovered problems, he had no address for Sellers and filed suit. Unable to serve the complaint, he

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31 Generally see, The College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration*, 3rd Edition (JurisNet LLC, 2014), Chapter 14, "Hybrid Arbitration Processes"; 4th Edition (JurisNet LLC, 2017), Chapter 20, "Hybrid Arbitration Processes."

hired an investigator who found Sellers and served them. After Sellers retained counsel, Buyer's counsel pointed out the mediation provision, said he and Buyer had tried to locate Sellers before filing suit but had been unable to do so, offered to stay the suit so the parties could mediate, and asked counsel to let him know if Buyer wanted to mediate. The case went to trial without a mediation and Buyer was awarded $13,475 plus $80,710.26 attorney fees. On appeal, the fee award was vacated. The court felt the contract meant what it said. If Buyer could locate Sellers by hiring an investigator after filing suit, he could have done so before filing suit.[32]

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

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

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

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

7. **Time Limits**. Beware of setting time limits pre-dispute. Many drafters like to specify time deadlines for arbitration, but pre-dispute time limits should be carefully considered lest they cause unanticipated problems.

   a. Early Limit. Many construction projects end with a contractor seeking damages based on a lengthy list of allegedly extra work. Wanting to avoid this, a contract on a large public project provided:
      i. If the Contractor had a claim, it had 10 days to present it to the Architect or it was deemed waived.
      ii. If presented, the Architect had 10 days to rule on the legitimacy of the claim.[33]
      iii. If the Contractor was unhappy with the Architect's ruling, the Contractor had 10 days from receipt of the ruling to file a demand for arbitration or the claim was deemed waived.
      iv. If a demand for arbitration was filed, the award had to be rendered no more than 30 day after the filing.

Aside from problems inherent in assigning tasks to a non-signatory, extra work claims can arise frequently during construction - and in this case did. Contractor had Claim #1 and presented it to the Architect who denied it. Contractor filed a demand for arbitration on Claim #1 and, another claim having arisen, presented Claim #2 to the Architect. An Arbitrator was appointed for the Claim #1 arbitration. Contractor had Claim #3 and presented it to the Architect. The Architect denied Claim #3. The Contractor then filed a demand for arbitration of Claim #3. The Architect exceeded the time limit on Claim #2. And so it went, every few weeks another claim, another ruling by the Architect, another demand for arbitration; one arbitration after another after another, all due to drafting that did not take into account either the realities of the process or California law.

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32 How would you advise your client of the court's decision?
"Dear Client, I'm very pleased to inform you that you prevailed in the arbitration and were awarded the full $13,475.00 you requested. You may, however, recall the $80,701.26 you paid me and, unfortunately, ... We'll look forward to working with you again in the future. Sincerely yours."

33 A potential problem since the nonsignatory architect was not bound by the contract between the Owner and Contractor and could have refused to review the claims. A proper "fail-safe" clause could address that possibility.

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

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

The writer handled one of these matters. Recognizing the short time limit, an expedited preliminary hearing was held even though the parties still had time, by statute, to object to the arbitrator's appointment. During the preliminary hearing held on a Thursday, one party refused to waive the 30-day deadline so the evidentiary hearing had to be set for the following Tuesday despite one counsel saying he was scheduled to be in trial that day. The parties drafted the contract and the arbitrator was bound by their deadlines. The hearing lasted two days and a timely award was rendered on Friday, the 30th day after filing of the demand. Unfortunately, the statutory 15 days to object to confirmation of the Arbitrator had not yet expired. Fortunately, there was no objection.

While these may be extreme examples, they're not hypotheticals.

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

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

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

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

a. In an unreported matter, an Owner defined "goods" and "services" separately. A Purchase Order for "goods" included a broad arbitration clause, but also incorporated by reference terms relating to "services" that did not provide for arbitration. With many millions of dollars involved, one party argued that incorporating "services" into the Purchase Order for "goods" made disputes regarding "services" arbitrable. The other argued disputes regarding "goods" are arbitrable but those regarding "services" were not. That dispute regarding arbitrability made its way to a trial court, then an appellate court and then to the arbitrators after the appellate court said the arbitrators should decide the issue. All of this could have been avoided by clear drafting that said whether disputes regarding "services" were or were not to be arbitrated.

b. *Wolschlager v. Fidelity National*, 111 Cal. App. 4th 784 (2003), involved a real estate transaction. During escrow, buyer requested a policy of title insurance from a carrier. A Preliminary Title Report (PR) was issued. It didn't mention arbitration but identified the policy, incorporated it, and said copies were available on request. After close, buyer received the policy and it included the arbitration provision. Buyer later made a claim and sued. Carrier's request for arbitration was granted. For policy terms to be incorporated in a PR, the reference must be clear and unequivocal and the terms must be known or easily available. The PR referred to the policy several times, said it was incorporated, and said it was available.

c. Instead of clearly incorporating another document, a written price quotation said it was "based on" terms in an enclosed document, terms that provided for arbitration. When a litigation defendant was served with process, it demanded arbitration. A District Court in Texas felt the quoted language was insufficient and refused to compel arbitration. The appellate court disagreed and, almost two years after the demand for arbitration had been made, remanded the case so the parties could start over. *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 757 F.3d 416, 2014 WL 2971701 (5th Cir., 07/02/14). They did start over and before long were back at the appellate court. *Al Rushaid v. Nat'l*

Oilwell Varco, Inc., 814 F.3d 300 (5th Cir., 02/17/16) ("though the litigation has been pending for five years, we are asked for a second time to reverse an order denying a motion to compel arbitration").

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

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

    When a dispute arose involving Noble:
    i. Noble served an arbitration demand on BP and Exxon and designated its party arbitrator under the ACA procedures.
    ii BP then appointed its party arbitrator as did Exxon.
    iii. If those three party arbitrators selected a neutral, that would result in an even number of arbitrators.
    iv. BP filed suit.
    v. The District Court ordered that five arbitrators, including two neutrals, hear the dispute.
    vi. Solomon may have liked it, but the appellate court didn't. Nobel argued the court could not order more arbitrators than the parties agreed upon. The appellate court said they had reached a "lapse" (see FAA §5[34]) which could indefinitely delay arbitration. The agreements provided for three Arbitrators, but the District Court had disregarded that and imposed a result no one had agreed upon.
e. In *Matter of Saturn Constr. Co., Inc. v Landis & Gyr Powers, Inc.*, 656 N. Y. Supp. 2d (NY App. Div., 2d Dept., 1997), a contract between a Prime contractor and Owner provided for arbitration. A subcontract between the Prime and a Sub included a flow-down clause providing the Sub "agrees to be bound to the contractor by the terms of the . . . principal contract . . . and to assume to the [contractor] all the obligations and responsibilities that the [contractor] by [the principal contract] assumes to the [Owner] . . . ."
    i. The nonsignatory Sub demanded arbitration.
    ii. The signatory Prime preferred litigation.

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

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

f. The parties in *Halliburton Company v. KBR, Inc.*, 446 S.W. 3d 551 (1st Dist. of Texas, 09/11/14), signed a Master Service Agreement (MSA) that stated their intent to set forth their agreement in the MSA "including . . . the Ancillary Agreements . . . ." One of the Ancillary Agreements was a Tax Sharing Agreement (TSA). The MSA provided for resolution of disputes by a three-person AAA panel that was given authority to resolve any arbitrability issues. The TSA provided for arbitration by a single "Accounting Referee" from a "nationally recognized independent accounting firm chosen by and mutually acceptable to the Parties," but did not mention resolution of arbitrability issues. When a $256,000,000 dispute arose, Halliburton wanted a single Accounting Referee while KBR wanted a panel of three AAA Arbitrators and filed a demand with the AAA. Halliburton moved to appoint an Accounting Referee and stay the AAA arbitration. A trial court ruling in 2012 was appealed and resolved two years later by this opinion (absent further appeals) upholding the denial of Halliburton's motion to compel.

Also see Neal J. Sweeney, *Compelling the Surety to Arbitrate - "Not So Fast, My Friend!"* The Construction Lawyer, Journal of the ABA Forum on Construction Law (Summer 2018). The author examined "whether a surety is bound to arbitrate based on the incorporation by reference into a surety bond of a subcontract that includes an arbitration agreement." While most courts answer in the affirmative, the author examined two matters in which, due to wording of the arbitration clause, the courts refused to compel sureties to arbitrate: (1) *Schneider Electric Buildings Critical Systems, Inc. v. Western Surety Co.*, 165 A. 3d 485 (Md., 2017) and (2) *Developers Surety & Indemnity Co. v. Carothers Construction, Inc.*, No. 17-2292-JWL, 2017 WL 3674975 (D. Kan., 08/24/17).

In the same vein see *Western Surety Co. v. U. S. Engineering Co.*, No. 15-cv-327 (USDC, D.D.C., 09/30/16). The court said the surety was bound by the contract between the parties, but not by its arbitration provision due to its wording.

09. **Fail-Safe Clause**. A fail safe clause is intended to cover the possibility that things may not go as planned.[35]

Just 'cause I said it, it doesn't mean that I meant it,
People say crazy things.
Just 'cause I said it, don't mean that I meant it,
Just 'cause you heard it.[36]

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

a. An arbitration clause may require a party to select a party-arbitrator for a tripartite panel, but what if it doesn't? Rules may require a party to make deposits for arbitrator compensation, but what if it doesn't? A contract between two parties may require action by a nonsignatory third, but what if the third party does nothing?
b. Saying something will happen, doesn't make it happen. Abraham Lincoln was allegedly approached by constituents lobbying on behalf of a bill he said was unfeasible. It sounded good, but it wouldn't work. Seeing that they were unconvinced, he asked, "if we call a cow's tail a leg, how many legs will it have?" Collectively they answered, "five." "No," he said, "calling a tail a leg doesn't make it a leg." They got the message.
c. Rules and regulations regarding "Short Term Vacation Rentals," currently a contentious issue in many residential areas, are notorious for having such provisions.
   i. "Off-street parking shall be provided at a rate of 1 space for each 2 boarders or lodgers."
      (a) Requiring that parking spaces be "provided" does not mean they'll be used and they frequently are not.
   ii. "The operator shall designate a local contact that shall be responsible to actively discourage and prevent any nuisance activity."
      (a) Designating such a contact person, does not mean that person will be available. In practice, phone calls often go to answering machines and cell phone contacts too often are in areas without adequate reception.
d. Providing, for example, that each party will designate a party-arbitrator and those two will select the third, does not make it happen. The seemingly benign clause in *Engalla v Permanente Medical Group*, 15 Cal. 4th 951 (1997), provided for arbitration administered by Kaiser and said:

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

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

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

served, and the three arbitrators shall hold a hearing within a reasonable time thereafter. . . ."

- 05/31/91 a terminally ill Claimant served his demand.
  - 47 days later Respondent designated a Party Arbitrator it knew was busy until late November (after Claimant's expected date of death).

  08/15/91 Claimant learned of the scheduling problem and demanded another Arbitrator.
  - Respondent refused.

  Claimant requested a single Arbitrator.
  - Respondent refused.

  Letters weren't answered.
  Calls weren't returned.

  10/22/91 Respondent finally agreed to a neutral, 144 days after the claim was served.
  10/23/91 Claimant died and, under applicable law, Claimant's non-economic damage claim was reduced by $250,000.

A trial court found fraud in the inducement. An appellate court didn't. The state Supreme Court thought it was possible and remanded so the facts could be examined. That was more than six years after Mr. Engalla demanded arbitration. Discovery showed that, on average, Claimants had to wait 674 days for the neutral's appointment and 863 days for the actual hearing.[37] Delays like this occurred in 99% of all Kaiser medical malpractice claims. In only 1% was the neutral picked within 60 days as required. Only 3% saw a neutral within 180 days. Kaiser subsequently adopted a more efficient system.

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

   ☞ See non-signatory discussion below.

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

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

g. The Railway Labor Act, 44 Stat. 577 (1926), originally included a scheme for voluntary arbitration of disputes relating to existing collective bargaining agreements, but it had no provision for sanctions for failure to create a board to arbitrate the dispute. As a result, many railroads "refused to participate on such boards or so limited their participation that the boards were ineffectual." The problem was magnified by a requirement that the boards have equal numbers of labor and management representatives. As a result, there were many deadlocks. There were no fail-safe procedures that covered either eventuality.[38]

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

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

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

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

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

   "The Architect can't do that," said the Contractor. "Yes the Architect can," said the appellate court. After three years of wrangling and

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

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

now faced with multiple proceedings, parties stipulated to one all-encompassing arbitration so they could address the merits - all because there was no fail-safe provision to keep the process moving if the Architect failed to act.

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

> *"If you and the Firm are unable to agree upon an arbitrator within twenty-one (21) days after either you or the Firm has made a demand for arbitration, the matter will be submitted for arbitration to the Santa Monica office of the Judicial Arbitration & Mediation Services ('JAMS'), and shall be administered by [Judicial Arbitration & Mediation Services] pursuant to its rules governing employment arbitration in effect as of the date of this letter agreement."*[39]

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

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

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

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

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

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

☞ "The 'experienced trial judge is the best judge of the value of professional services rendered in his court.'" Consumer Privacy Cases, 175 Cal. App. 4th 545 (2009), Serrano v. Priest, 20 Cal. 3d 25 (1977), and numerous other cases.

b. In *Frog Creek Partners LLC v. Vance Brown* Inc., 206 Cal. App. 4th 515 (2012), parties signed different versions of their contract although the arbitration provisions were the same.

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

While this might be applauded by Contractor, Owner may have preferred a clause similar to the *Acosta* provision so it could have

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

requested a fee award when it was successful in its first attempt to prevent arbitration.

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

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

11. **Heightened, or Limited, Review**. During one presentation I asked a room full of litigators if they preferred litigation because they had appellate rights, almost everyone answered in the affirmative.

I then asked for a show of hands as to whether they won most of their cases and, again, almost all hands went up.

It's understandable that attorneys who lose most of their cases, might want a right to appeal[40] but, if they win most of their cases, why would they want to give opponents a second bite of the apple by letting them appeal the majority of the cases?

Is this beneficial to the initially victorious client or merely a way for the attorney to receive more fees?

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

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

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

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

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

To the District Court, this meant it would enter judgment ("in essence, rubber stamp the arbitrator's decision") and either could then appeal directly to the U.S.C.A. without first raising vacatur issues in the District Court. Can't do it! Parties cannot confer on the U.S.C.A. jurisdiction that otherwise does not exist. Issues had to be raised, in the first instance, at the District Court level.

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

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

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

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

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40 *"Dear client, I recommend litigation rather than arbitration to resolve your dispute since I lose most of my cases and litigation will give you a chance to appeal and possibly get a new trial. My fees for handling appeals are . . . . Sincerely yours."*

Condon v. Daland Nissan, Inc., 6 Cal. App. 5th 263 (11/04/2016). The parties' contract provided for arbitration with the American Arbitration Association, the National Arbitration Forum or another mutually agreeable provider. ADR Services was selected. The contract also provided for a "new arbitration" if an award exceeded $100,000 (it did) and an "appealing party" made such a request. Respondent requested a new arbitration. Claimant refused. ADR Services said it lacked authority to resolve that disagreement absent a court order. Instead, a trial court confirmed the award on the rationale that ADR Services, unlike the American Arbitration Association, had no appellate rules and the contract didn't permit parties to select a different forum. That was reversed. Since ADR Services was willing to proceed, the court saw no need for separate appellate rules since the contract merely referred to a "new arbitration" (i.e. a "do-over").

Citizen Potawatomi Nation v. Oklahoma, 2018 WL 718606 (10th Cir. 02/06/18), considered a clause providing for federal court de novo review of any arbitration award, something prohibited by *Hall Street.* The court said the provision could not be severed since it was integral to the parties' agreement to arbitration and, as a result, it found the entire arbitration agreement unenforceable.

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

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

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

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

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

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

Appellate Arbitration Review.

Some arbitration clauses provide for review by a three-member arbitration panel. They know their clients, and their own legal competency, better than others know them and if they truly think they and their clients are likely to lose most arbitrations, AAA, JAMS and CPR all have appellate rules and procedures that will, for a fee, accommodate them.

12. **Arbitration Fees.**[41] Failure to pay a provider's administrative fees and failure to deposit amounts requested to cover anticipated arbitrator compensation have derailed more than one arbitration since, unlike litigation, rules of most providers do not permit a litigation-style default. The issue has been discussed numerous times in appellate cases and on Internet service lists.

    a. In *Lifescan v Premier,* 363 F.3d 1010 (9th Cir. 2004), Premier said it could not pay its share of the fees, Lifescan refused to pay Premier's share and the proceeding was suspended. At Lifescan's request, the district court ordered Premier to pay its share since failure to pay was, in essence, a "failure, neglect, or refusal" to arbitrate under FAA §4. This was reversed.
        i. Federal courts have limited review power of arbitration proceedings. The contract had incorporated the AAA's rules into the contract and the rules say expenses are to be borne equally unless otherwise agreed or the Arbitrator assesses fees against a specified party. The rules also give Arbitrators discretion to apply the rules in a flexible manner.
        ii. "There is, of course, no totally satisfactory solution in such circumstances, which is doubtless why the AAA rules give arbitrators the flexibility to make the best of a bad situation," said the court. "Unlike the more inflexible Federal Rules of Civil Procedure, the AAA rules allow the arbitrators to adjust the payment of costs in light of circumstances."
    b. Also see *MKJA, Inc., 123 Fit Franchising LLC*, 191 Cal. App. 4th 643 (2011), *Cinel v. Christopher*, 203 Cal. App. 4th 759 (2012) and the *Cinel v. Barna*, 206 Cal. App. 4th 1383 (2012), for problems that arise when one or more parties is unable or unwilling to pay its share of fees. In *Cinel*, a Complaint was filed on November 13, 2008, litigation was stayed and, four years and multiple appeals later, parties had still not been able to address the merits of their dispute.
    c. *Sean Tillman v. Renee Tillman and Rheingold, Valet, Rheingold, Shkolnik and McCartney*, 2016 DJDAR 5804, #13-56624 (USCA 9th Cir. 2016). Litigation was stayed pending arbitration, but Claimant was unable to pay a requested deposit. The court agreed that termination of the arbitration was appropriate, but said litigation could continue. The result, it said, would be different if a party merely refused to pay.

The AAA's current rules are slightly different for construction (Construction Rule R-56, "Remedies for Nonpayment") and commercial (Commercial Rule R-57, "Suspension for Nonpayment"), with the more recently revised commercial rules being more comprehensive. Also

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

see JAMS Construction Rule 31 and Comprehensive Rule 31, but neither AAA nor JAMS currently provide for a litigation-style default.

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

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

Other options:

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

13. **Attorney Fees**. The right to recover attorney fees in arbitration is basically no different than in litigation with contract provisions and statutes being the two primary sources of an arbitrator's authority to award fees. Drafters should be aware, however, of a unique provision in some of the rules of the AAA. Since arbitration is a "creature of contract," the AAA's Construction Rules, R-45(d)(ii) and Commercial Rules, R-47(d)(ii), for example, provide that arbitrators may award attorneys' fees "if all parties have requested such an award or it is authorized by law or their arbitration agreement." As a result, if a Demand for Arbitration in a two-party arbitration requests fees and an Answering Statement denies all claims and requests fees, the Arbitrator may award fees to the prevailing party even in the absence of a contract providing for them.

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

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

    a. Qualifications. Drafters may want to require that the Arbitrator be, for example, an attorney with a specified number of years of experience in construction or intellectual property or patent matters. They may want to require that the arbitrator be a retired judge, or not a retired judge. Sometimes an industry Arbitrator, such as an architect, may be beneficial. For example, in one matter while representing an Owner who had incurred unnecessary construction costs due to faulty plans, we selected an Architect as the arbitrator and he immediately recognized how deficient the Chicago architect's plans were. The would withstand a ten foot snowfall (a rare occurrence in San Diego), but in many respects made little sense with incorrect dimensions, plan notes that were inapplicable, etc. At one point I asked the architect who had drafted the plans if a walkway was concrete or asphalt. When he couldn't figure it out, the arbitrator almost shouted, "Can't you read your own d___ plans?" The case settled that evening.

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

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

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

Parties may also interview potential arbitrators in person or by conference call (e.g. regarding the arbitrator's subject matter experience, attitude toward discovery, etc.). While some would permit *ex parte* interviews, the better practice is that they be joint to avoid any appearance of bias. The Chartered Institute of Arbitrators has issued suggested guidelines for such interviews.[42]

b. Impartiality. Impartiality of Arbitrators is usually assumed, but that's not always the case. Disclosure laws for Arbitrators vary widely from state to state, requirements may or may not be covered by provider rules, and even where full disclosure is required Arbitrators may not always comply. For that reason, some prefer to draft "*impartiality*" into their contracts.

The clause in *Americo Life, Inc. v. Myer*, #12-0739 (S.Ct. Texas 06/20/14), provided for AAA arbitration and a three-Arbitrator panel (two party-appointed and the third selected by those two) with each Arbitrator to be "*a knowledgeable, independent businessperson or professional.*" Applicable AAA rules said Arbitrators "*shall be impartial and independent . . . and shall be subject to disqualification for . . . partiality or lack of independence.*" When a dispute arose regarding the AAA's removal of a party-Arbitrator for lack of impartiality, the court said impartiality wasn't required. In its view, the parties (in their contract) and the AAA (in its rules) had addressed the issue of Arbitrator qualifications, arbitration is a "*creature of contract*," the parties' contract trumped the AAA's rules and the contract didn't require impartiality. Definitions of "*independent*" and "*impartiality*" may overlap but, "*in the arbitration context*," the Supreme Court of Texas felt they had different meanings.

Other courts may feel the requirements should be read together, the contract didn't negate impartiality and the Arbitrators should be both "*independent*" and "*impartial*" - or, they may agree with *Americo*. If drafters want impartiality, it's therefore best to say so.

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

Some parties are unable to meet the compensation requirements of three Arbitrators or feel the amount in dispute does not justify proceeding (e.g. in a San Diego case, three Arbitrators were required for a dispute in which the total claim was $130,000). Such requirements have deterred some potential claimants with meritorious claims from even demanding arbitration. Drafters have tried to address the issue by providing for one Arbitrator for small disputes and three for large disputes, but this is harder than it seems:

i. Consider a well-heeled Claimant who purposely files a demand for arbitration seeking an amount that will necessitate three Arbitrators and possibly force Respondent to beg for a settlement when, in fact, the actual amount Claimant hopes to prove is less than indicated. Bad faith? Prove it!

ii. Consider a demand with a dollar amount that would qualify for a single Arbitrator, but that also includes a demand for declaratory or other non-monetary relief. Provider rules may or may not include a solution.

iii. Consider (1) a contract that says any "claim" in excess of $1,000,000 will require three Arbitrators and (2) a dispute in which Claimant files a demand seeking $400,000 on Claim #1 regarding electrical work, $500,000 on Claim #2 regarding plumbing work and $600,000on Claim #3 regarding mechanical work. Nothing wrong with that said Claimant. It's just like litigation: a single Complaint with multiple causes of action. Here we have a single demand with multiple claims none of which exceeds the limiting amount in the contract. Is that what drafters intended?

(a) Parties enamored of such a provision might consider saying there will be three Arbitrators where the total compensation "demanded on all claims exceeds" or "demanded in the arbitration exceeds" a stated amount. Others may find drafting concerns even with this.

Also see *BP Exploration Libya Ltd. v. Exxon-Mobil Libya, Ltd.*, 689 F.3d 481 (5th Cir. 2012), above, in which drafters apparently did not consider, or provide for, the possibility of a dispute involving more than two parties. Unlike *BP*, drafters in *AVIC Intern. USA, Inc. v. Tang Energy Group, Ltd.*, No. 3:14-CV-2815K (U.S.D.C., N.D. of Texas, 2015), affirmed No. 15-10190 (U.S.C.A. 5th Cir., 08/25/15), did consider the possibility (e.g. "in the event there are more than two Disputing Members to the Dispute"). When a dispute arose, two Plaintiffs each designated an Arbitrator, five Defendants each designated an Arbitrator, and the panel of seven selected two more, thereby creating a panel of nine. The District Court said it had no authority under the FAA to intervene and reconstitute the panel prior to issuance of an award.

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

For a party that definitely wants three Arbitrators for disputes over a specific amount - and is willing to pay for it - it may be a good idea to expressly say so rather than rely on provider rules. Rules change and some Claimants try to "game the system" by filing a demand for an amount (e.g. $75,000) that would be a one-Arbitrator case under provider rules. Then, after that Arbitrator has conducted numerous

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

preliminary hearings, become intimately familiar with the case, issued orders and set a date for the evidentiary hearing, the Claimant increases the amount, but not the nature, of the claim (e.g. to $3,000,000). Under those circumstances, the Respondent may be unable to get the three Arbitrators it prefers for such a large claim.

d. Party-Appointed Arbitrators.[43] This one also sounds good to many drafters, but it's a process that may cause difficulties. In addition to the problems involved in *Engalla* (above), it's important to consider whether the party-arbitrators are to be neutral or, in effect, may serve as advocates for the parties appointing them. In most instances, party arbitrators are presumed to be neutral, but courts may differ.
   i. According to one court, bias in a party-appointed arbitrator is to be expected and provides no ground for vacating an award unless it amounts to corruption. *Tate v. Saratoga Savings,* 216 Cal. App. 3rd 843 (1989).
   ii. Another court said, "as far as we can see, this is the first time since the Federal Arbitration Act was enacted in 1925 that a federal court has set aside an award because a party-appointed arbitrator on a tripartite panel, as opposed to a neutral, displayed 'evident partiality.' The lack of precedent is unsurprising, because in the main party-appointed arbitrators are supposed to be advocates. . . . Parties are free to choose for themselves to what lengths they will go in quest of impartiality." *Sphere Drake v All American Life*, 307 F.3d 617 (7th Cir. 2002).
   iii. *Trustmark v. John Hancock Life Insurance Co.*, 631 F. 3d 869 (7th Cir. 2011), said a party-appointed arbitrator may be considered "disinterested" despite the arbitrator's prior service on behalf of the same party, even if in the same or similar matter. Parties choose the method they want and can ask no more impartiality than inheres in method they chose. *Merit Insurance Company v Leatherby Insurance Company,* 714 F.2d 673, 679 (1984).

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

It's also important to know if incorporated provider rules address the issue of non-neutrality. See rules of the AAA (Construction Rules R-15 and R-21; Commercial Rules R-13(b), R-18(b), R-19(b); Canons of Ethics, Canons IX and X) and JAMS (Construction Rule 7; Comprehensive Rule 7).

Drafters may also want to consider who will be responsible for paying the party arbitrators.
   i. In one matter, Claimant's party-arbitrator charged $650.00 per hour and billed additional amounts for the assistance of associates and paralegals. Respondent's party- arbitrator changed $350.00 per hour. When an award was rendered against the Respondent it included an order that Respondent pay the full amount charged by Claimant's party-arbitrator, the associates and the paralegals, an amount that exceeded the amount in dispute.
   ii. Due to this concern, some contracts provide that each party will pay its own party-arbitrator. See *Reliastar Life Insurance Company of New York v. EMC National Life Company*, 564 F.3d 81 (2d Cir. 2009), for one such clause. Some go further and say each will also bear the expense of its own experts.

e. Naming the Arbitrator. Naming a specific arbitrator in a contract may cause problems. If the arbitrator is unwilling or unable to serve one party may argue there is no longer an obligation to arbitrate while the other may say arbitration was still required but with a different arbitrator. One may argue the arbitrator's disclosures revealed a conflict, while the other may say potential conflicts are irrelevant since they contractually agreed on the arbitrator and could have checked conflicts in advance.
   i. Parties in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 342 v. Bechtel Construction Company*, 128 F.3d 1318 (9th Cir. 1997), were signatory to a project agreement intended to resolve any jurisdictional disputes among different union locals that said:

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

When a dispute arose, the Ironworkers said they didn't have to arbitrate because the blank in the contract made it illusory, nothing more than an agreement to agree. The court said the main issue was whether the court could hold the parties to the agreement and fill in a name. Agreeing with the 3rd and 5th Circuits, it said "preservation and labor peace requires that district courts have some flexibility in fashioning decrees."
   ii. Parties in *Diagnostic Radiology Assoc., P.C. v. Jeffrey M. Brown, Inc.*, 193 F.R.D. 193 (S.D.N.Y. 2000), provided for an *ad hoc* arbitration by a specified sitting federal court judge. If he were unable to serve, the clause authorized him to designate a substitute.
      (a) What the drafters failed to realize is that the Code of Ethics for U.S. Judges prohibited sitting federal judges from acting as arbitrators and the designated judge could not hear the dispute. The FAA provides that, where parties have agreed to a method

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

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

iii. The clause in *HM DG, Inc. v. Amini*, 219 Cal. App. 4th 1100 (09/20/13), was atrocious. The trial court, among other things, said the clause "*is uncertain in that it does not specify before what agency o[r] person the matter will be arbitrated, [or] how the arbitrator will be selected, but merely sets for[th] the options for these terms.*" The trial court refused to compel arbitration, but this was reversed.

Apparently unlike everyone else, the appellate court decided to read a relevant statute (CCP §1281.6) that specifically addresses the situation where the clause does not provide a method for appointing an arbitrator and parties can't agree (i.e. the court will appoint one). Since the trial court never addressed whether there were other grounds for denying the petition, the case was remanded for such a consideration.

15. **Arbitrator Compensation**. In 2017, an attorney in Portugal devised an arbitration clause that specified fees paid to Arbitrators would be based on (1) the amount in dispute and (2) amount of work to be performed. See Exhibit A below.

Since the clause was intended for international arbitrations sited in Portugal (the referenced law is the Portuguese civil code regarding arbitration procedures), he was curious to know how the clause would be received outside of the jurisdiction and forwarded the clause for comments. There were few and both the clause and concept seem highly questionable, but:

a. An Arbitrator in Florida said (07/20/17): I can appreciate the intent of wanting to control what the arbitrators invoice, most people want to control costs. However not much thought is given to the effect of unintended consequences. Do practitioners invoice per hour up to a not to exceed amount? Who determines the amount of compensation within the ranges provided? I wonder if counsel is employed with the same criteria. I understand the same concept is used in other locations. I would like to hear those locations satisfaction with the concept.

b. An Arbitrator in Geneva, Switzerland, expressed (07/19/17) concerns about the clause, but not the concept:
   1. There is no incentive for the tribunal to create early settlement. (On the contrary, it is penalized if this occurs).
   2. There are no time limits. Why not use expedited proceedings with limits on evidence and deadlines for submissions as well as the hearing and final award?
   3. Why only limit the tribunal's fees? What incentives or controls are there to limit legal spend and other procedural expenses?
   4. The caps for Uhr arbitrators strike me as too low. These numbers are likely to lead to very rough justice. Is no distinction made based on the complexity of the case, whether it is domestic or international (there is an extensive Lusophone community), number of witnesses, length of pleadings? Should there be any caps on some of these items?
   5. The 1.3 x cap on the chair also seems too low.
   6. The provision regarding a secretary is confusing and also suggests that there should be one. Why?
   7. How about there being a maximum expressed as a percentage of the value of the dispute, which should include a limit on all legal spend and experts as well as the Tribunal's fees (e.g., limiting spend to each party to 10% of the value of the dispute in total), including any counterclaims?
   8. I am not concerned about the issue of the hourly rates, but the incentives for early and effective dispute resolution without compromising quality too much. Focusing only on the amounts paid to the arbitrators does not cut it for me.

Finally, I note a few typos and agree with the comment regarding unintended consequences (e.g., the disincentive on encouraging early settlement and focusing only on fees and not timelines or evidentiary submissions). Rather than try and "legislate" the arbitrators' fees in this way, I would be more comfortable with a Guided Choice provision so that the process can be designed with the help of a facilitator to work within certain cost, timing and evidentiary parameters, before seeking to fix such limits on the arbitrators.

16. **Amendment / Termination ("evergreen clause" aka "survival clause").** Consideration should be given to whether an arbitration provision is intended to survive contract amendment, repudiation or termination.

a. *Primex Int'l Corp. v. Wal-Mart Stores, Inc.*, 89 N.Y.2d 594, 657 N.Y.S.2d 385 (03/27/97), involved three contracts. Two provided for arbitration. The third had a merger clause (aka integration clause) saying it was deemed to be the entire agreement of the parties and it didn't mention arbitration. To the extent subsequent disputes dealt with conduct under the first two agreements, they were held to be arbitrable despite the merger clause whose purpose is merely to preclude oral evidence from varying the terms of the agreement.

b. *Schneider v. Forest Park Partners Investments, LLC*, 2013 Ohio 380 (Ct. App., 1st Distr., 02/08/13), said the arbitration clause in an earlier contract applied to a subsequent agreement that, fifteen years later, had amended the initial contract. The first contract contained an arbitration clause. The subsequent contract added a forum selection clause calling for disputes to be resolved in "State Court or Federal Court sitting in Hamilton County, OH" and did not reference the original arbitration clause. They now had one agreement to arbitrate and another to litigate. Or so it seemed. The court held that the second contract was ambiguous in multiple respects, the original contract contained a broad arbitration clause, the second contract related to the earlier contract, and there was no specific reference to or disavowal of the arbitration clause in the second contract. Following the state's strong policy of enforcing arbitration agreements, the arbitration clause of the first contract governed and the entire dispute had to be arbitrated.

c. *NEC America, Inc. v. Northeastern Office Equipment, Inc.*, 274 A.D.2d 339, 711 N.Y.S.2d 397 (App. Div., Sup. Ct. of New York, 1st Dept, 07/20/2000), is lacking in detail, but the parties had a 1990 agreement with a broad arbitration clause. A 1998 agreement was apparently

a new agreement and not an amendment of the first. The only reference to arbitration in the 1998 agreement was a heading. As a result, it was held that the clause in the 1998 agreement did not supercede the 1990 agreement to arbitrate, but it did govern disputes arising under the 1998 agreement.

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

e *Huffman v. The Hilltop Companies, LLC.*, #13-3989, U.S. Court of Appeals (6th Cir., 03/27/14), involved employee claims against their employer. A survival clause in their employment contracts provided that specified numbered paragraphs "shall survive the expiration or earlier termination of this Agreement." The arbitration clause was not one of the specified clauses, but the employer argued the "strong presumption in favor of arbitration" required that employment disputes be arbitrated. Employees contended that omission of the arbitration clause from those specified was a "clear implication" that the clause was to expire with the agreement.

f. *Rebolledo v. Tilly's, Inc.*, 228 Cal. App. 4th 900 (2014), involved separate employment arbitration agreements signed in 2001, 2004 and 2005. The 2001 and 2004 agreements excluded *"matters governed by"* or *"within the jurisdiction"* of the Labor Commissioner. The 2005 agreement did not, but the court viewed it as merely a "*modification*" of the earlier agreements and since it did not "expressly supersede" those agreements, arbitration of issues in dispute was denied. That may or may not have been the employer's intent.

g. *Sharpe v. AmeriPlan Corp.*, 769 F.3d 909 (5th Cir. 10/16/14), was another employment case. Contracts for three employees were slightly different but, in essence, said each employee submitted to the non-exclusive jurisdiction of state and federal courts of Texas, venue for "legal proceedings" was Texas, contracts were to be "construed under Texas laws," and the contracts could not be changed "except by written amendment duly executed by all parties." Subsequently, the employer issued a policy manual that contained an arbitration provision, but there was no change to the pre-existing employment contracts. The court said, for two employees, wording in the contract and policy manual could not be "harmonized" and arbitration was denied. Arbitration was compelled as to the third employee whose contract wording varied from the others.

g. *Andermann et al v. Sprint Spectrum L.P.*, 785 F.3d 1157 (7th Cir. 05/11/15) ("this arbitration agreement survives the termination of this service agreement.").

h. *IATSE v. InSync Show Productions*, 2015 DJDAR 10335 (U.S.C.A. 9th Cir., 09/04/15). The court considered an "evergreen clause" in a collective bargaining agreement that said the agreement would continue in full force and effect to and including December 31, 2007 "and from year to year thereafter."A petition filed in 2012 to compel arbitration under the original agreement was granted.

i. *Grey v. American Management Services*, 204 Cal. App. 4th 803 (03/28/12). When applying for employment, Employee signed an Issue Resolution Agreement containing a broadly worded arbitration clause. After being hired, he was required to sign an employment agreement containing an integration clause and saying disputes "arising out of the alleged breach" of the agreement were to be arbitrated. Employee, alleging statutory violations, filed suit. Arbitration was ordered. Employee's petition for a writ of mandate was denied. *Grey v. Superior Court*, #B217803 (08/27/09). Employer prevailed in arbitration. Now, in this opinion, the award was vacated since the employment agreement said it superceded prior agreements and its scope was limited.

   i. Subsequently, the case was litigated and Employee prevailed. *Grey v. American Management Services*, Los Angeles Superior Court #BC412760 (06/14/16).

j. *Ragab v. Howard*, 841 F.3d 1134, 2016 WL 6832870 (10th Cir. 11/21/16). The parties had six different agreements that governed their business relationship. Each agreement had an arbitration clause, but they differed as to applicable rules, the method for choosing an Arbitrator, a pre-arbitration notice period and whether attorney fees were recoverable. Mr. Ragab's claim fell within the scope of all six agreements. Using Colorado law, the district court said there was no meeting of the minds and denied a motion to compel. It noted that California, Florida and New Jersey had already dealt with "irreconcilable" differences among multiple contracts.

   i. Some courts dealing with similar issues have said the obligation to arbitrate is clear and then addressed the specific conflict (e.g. where the person named as Arbitrator wasn't available or a stated venue wasn't possible).

k. *Evans v. Building Materials Corp. of America*, 2017 U.S. App. LEXIS 9873 (Fed. Cir., 06/05/17). The arbitration provision did not apply to a patent infringement dispute that arose six years after termination because the narrowly drafted clause only applied to claims "arising under" the parties' contract. The case is also interesting because the court determined arbitrability despite the presence of a delegation clause.

17. **Unconscionability**. Especially in employment and consumer contexts, courts, on a finding of unconscionability, have routinely refused to compel arbitration. In doing so, both procedural and substantive unconscionability must usually be found with most courts indicating that the more of one that exists, the less of the other is needed.

In the commercial context, where parties are often viewed as more sophisticated and having more equal bargaining power, unconscionability is rarely a consideration, but lines are blurring so drafters should not ignore the issue. In *Pompliano v. Snap Inc.*, No. 17-cv-3664, 2018 WL 3198454 (Cent. Distr. CA) the court felt the plaintiff was sophisticated enough to evaluate what he signed.

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

b. The same issue has arisen in disputes between franchisors and franchisees. The court in *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp*, 2010 WL 3584060 (9th Cir., 2010), found unconscionability under California law despite a Texas choice-of-law provision.
   i. Similarly see *Ticknor v Choice Hotels*, 265 F3d 931 (9th Cir., 2001) (cert. denied) decided under Montana law and *Nagrampa v. Mailcoups, Inc.*, 469 F.3rd (9th Cir. 2006).

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

18. **Applicable Law.** Parties "might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia or (as relevant here) the law of California." *DirecTV, Inc. v. Imburgia* 136 S. Ct. 463, 468. Given that latitude, it's important that drafters be familiar with the law being designated.
   a. State law.
      i. A broad arbitration provision in *Peleg v. Neiman Marcus Group, Inc.*, 204 Cal. App. 4th 1425 (2012), included a list of disputes to which it would apply. It also said the employer could amend, modify or even revoke the provision on thirty days' written notice after which the change would apply to any claim that had not yet been filed. The employee worked in a California store, but the contract said it was "governed by Texas law and the FAA." The court ruled that, under Texas law, a modification provision such as the one in this contract, required a "savings clause" that would preclude application of any amendments to disputes which arose before the amendment. There was none and the agreement was, therefore, unenforceable.
      ii. *Harris v. Bingham McCutchen, LLP*, 214 Cal. App. 4th 1399, 2013 WL 1278361 (03/29/13), involved a letter agreement between an associate and a law firm, a Massachusetts limited liability company. The associate filed suit claiming she was wrongfully terminated. Six of her nine causes of action alleged violations of California's Fair Employment and Housing Act. The agreement included a Massachusetts choice-of-law provision and Massachusetts law required that agreements clearly state whether the employee was waiving or limiting any statutory antidiscrimination claims. This one did not. Arbitration was not compelled.
      iii. An employee and employer signed an agreement that said disputes "shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures published by the American Arbitration Association (AAA)." Instead, the employee sued his employer and a nonsignatory third party and then invoked California CCP §1281.2(c) in an attempt to prevent arbitration.[44] Arbitration was compelled since they had stipulated that the applicable law was the FAA and it has no provision comparable to §1281.2(c). *Gloster v. Sonic Automotive, Inc.*, 226 Cal. App. 4th 438 (04/23/14).
   b. Preemption. Drafters should also be aware that, despite a state choice-of-law provision, that state's law may be preempted by the Federal Arbitration Act, U.S.C. Title 9.
      i. For example, in *A.T. & T. Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the Court said California contract law that deemed class waivers in arbitration agreements unenforceable under certain circumstances was preempted by the FAA since state law would be an obstacle to accomplishment of the objectives of Congress.
      ii. Those wrestling with preemption arguments can take solace in knowing these are difficult issues even for the courts. In *Kilgore v. KeyBank National Association,* No. 09-16703, ___ F.3d ___ (9th Cir. 04/11/2013), a federal court recognized what it said was the "sometimes delicate and precarious dance between state law and federal law."
      iii. Similarly, in *Mastick v. TD Ameritrade, Inc.*, 209 Cal. App. 4th 1258 (2012), a state court said, "When federal and state laws involve the same subject matter, their provisions may conflict. When they do, the doctrine of federal preemption often resolves the issue which law applies. We answer the question when it does with judges' and lawyers' habitual, exasperating response: it all depends."
   c. Religious Law. While clauses specifying religious or faith-based law are relatively rare in this country, they are not unheard of. In *In re Aramco Servs*, No. 01-09-00624-CV, 2010 Tex. App. LEXIS 2069, 2010 WL 1241525, Tex. App. Houston 1st Dist. Mar. 19, 2010), a Texas court considered a contract requiring application of Saudi Arabian law and an arbitration provision specifying Sharia law. When suit was filed in Texas, the court refused to accept the case. Also see Albert D. Spalding Jr., *Faith-Based Arbitration Clauses as a Global Alternative to Dispute Resolution* (Review of Business Finance Studies, v. 5 (2) p. 1-8, 2014); the article can be downloaded from the Social Science Research Network.

☞ Consider an arbitration clause that said, "this agreement shall be governed in all respects by the laws of the United States of America and by the laws of the State of California." What controls where state and federal laws are in conflict?

19. **Nature of Transaction.** Consideration should be given to the nature of disputes that may occur.

Some contracts are very long term and disputes may not arise for decades after contracts are signed. Consider a supply contract with goods or services to be provided over a twenty or thirty year term, or an oil and gas supply contract, or a construction project that is estimated to take fifteen years followed by a ten-year statute of limitations for raising defect claims. If a contract includes a very detailed arbitration provision, it may cause unanticipated problems by the time a demand is filed. A specified provider may no longer exist as happened with a public agency

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

construction project. A named arbitrator may no longer be living. Rules specified in the contract, may have been amended several times. Statutes may have been repealed or amended. New cases may have overruled those in effect when the contract was drafted.

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

20. **Permissive or Mandatory**? Too often drafters seem to prefer kindler, gentler, permissive language to language that expressly provides for arbitration of disputes. Most would assume "may" is permissive and "shall" is mandatory. Sometimes courts agree; sometimes not.
    a. *TM Delmarva Power, LLC v NCP of Virginia, LLC*, 263 Va. 116 (2002), involved a contract that provided first for resolution by "Conciliators" and then, if that were unsuccessful, "either Party may commence arbitration hereunder by delivering to the other Party a notice of arbitration." When conciliation didn't resolve their disputes, NCP filed suit while TM filed a motion to compel arbitration which was denied since the arbitration provision was viewed as permissive. Since neither had demanded arbitration, NCP said it had a right to pursue litigation. The appellate court disagreed. The court interpreted the wording to mean that either party could require arbitration at any time, before or after litigation was commenced.
    b. The clause in *Angelakis v. Hennigan*, an unpublished California appellate case decided on March 13, 2013, said disputes "shall" be submitted to mediation. The mandatory language was clear, but it then said "the terms and procedures for mediation shall be arranged by the parties." In essence, parties already embroiled in a dispute were expected to have an epiphany and be able to agree on procedures for the mediation.

       The clause continued downhill by providing that, if mediation were unsuccessful, "the dispute may be submitted to arbitration" with the AAA and "if all parties to the dispute agree to arbitration, arbitration shall be commenced as soon as possible." The trial court said it couldn't compel arbitration since there was no agreement to arbitrate and it couldn't compel mediation since it was aware of no law giving it "jurisdiction or authority" to do so. The appellate court agreed.
    c. In *Service Employees Internat. Union, Local 18 v. American Building Maintenance Co.*, 29 Cal. App. 3rd 356 (1972), the clause said "the issue in dispute may be submitted to an impartial arbitrator." Despite the permissive language, arbitration was ordered on the theory that, if arbitration were merely consensual, there would have been no reason to mention it at all.
    d. In *Pacific Gas & Electric Co. v. Superior Court*, 15 Cal. App. 4th 576 (1993), the contract said any dispute "may be submitted by either party to arbitration." This, the court said, mandated arbitration.
    e. In *Titan Group, Inc. v Sonoma Valley County Sanitation Dist.*, 164 Cal. App. 3d 1122 (1985), the parties used broad language by referring to disputes "arising out of or relating to this agreement or the breach thereof," but then said the disputes "will" be decided by arbitration "if" the parties mutually agreed. Arbitration was not compelled.
    f. In *Mendez v. Mid-Wilshire Health Care Center*, 220 Cal. App. 4th 534, 2013 WL 870983 (Cal. App. 4th, 09/23/2013) (employment), the trial court "emphasized, 'It doesn't say "shall." 'It says "may." 'As far as I'm concerned that doesn't impose a contractual mandate to pursue arbitration." Arbitration was denied on the ground that the agreement "is vague as to whether arbitration is mandatory." The appellate court agreed.
    g. *Volpei v. County of* Ventura, 221 Cal. App. 4th 391 (2013), concerned a union member who was covered by a Memorandum of Agreement that said grievances "may be" subjected to arbitration. Employee sued Employer for harassment, retaliation, and discrimination under the state Fair Employment and Housing Act. The trial court denied Employer's motion to compel and this was affirmed. An agreement to arbitrate statutory claims must be "particularly clear" and "clearly and unmistakably" waive the employee's right to sue. The language here was permissive and did not refer to the FEHA or any statutory claims.
    h. The clause in *Quam Construction Co., Inc. v. City of Redfield*, 770 F.3d 706 (8th Cir. 10/16/14), said, if the dispute wasn't resolved through mediation, the parties "may" submit the controversy to arbitration and "if the parties agree to arbitration," certain terms would apply. The court denied a motion to compel.
    i. Also, see *McCready v. White*, 417 F.3d 700, 702 (7th Cir. 2005), that had nothing to do with arbitration, but in which the court considered a statute that said certain personal information "shall" be disclosed for use in connection with matters of motor vehicle or driver safety and then referenced various statutes. The trial judge read this as requiring disclosure, but only to the extent required by one of the statutes.

       While trying to interpret the provision, the court said "Another possibility is that the word 'shall' in subsection (b) is permissive rather than compulsory. 'Shall' is a notoriously slippery word that careful drafters should avoid."

       Bryan Garner, who was referenced in the opinion, agreed and said, "Courts have held that *shall* can mean *has a duty to, should, is, will*, and even *may*. The word is like a chameleon: It changes its hue sentence to sentence. Abjure it. Forswear it."[45]

21. **Form of Award.**

Bare Bones. Absent a contrary requirement in the parties' contract or provider rules,[46] arbitrators are usually only required to render a "bare bones" award and this usually accomplishes what the parties want and need. Their attorneys, however, often want more and are willing to have

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

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

their clients pay more attorney fees and Arbitrator fees to get it. They want to see the Arbitrator's reasoning, or findings of fact, or conclusions of law, but, in a cost/benefit analysis, these are usually of little or no value to the clients who must pay for them since arbitration awards are generally non-appealable .

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

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

When the Homeowner asked for that amount and reconsideration of one of the Arbitrator's findings (a finding that wasn't supposed to exist), the Arbitrator admitted "neither judges nor arbitrators are infallible" and "it now appears to the arbitrator that his last ruling may well not have been a correct one" but, correct or incorrect, the ruling was "a final award" not subject to reconsideration. "It boggles the arbitrator's mind," he said "that neither [Homeowners] nor Allstate pointed out to the arbitrator that the arbitration contract executed by the parties specifically provides that the decision of the arbitrator 'shall be issued without a written opinion.'"[47]

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

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

Parties who really, really, really want a "reasoned" award or "findings of fact and conclusions of law" should so provide when they draft their contracts and the 7th Circuit's Judge Posner would probably agree with this approach. In affirming an award, he wrote "that arbitrators probably would not write opinions - they are not required to - if their opinions were reviewable for legal errors, which would be concealed if the award consisted simply of a dollar amount. The quality of arbitration would be less, if, as seems plausible, having to articulate one's view in writing is a good discipline - something we judges certainly believe." *BEM I, LLC v. Anthropologies, Inc.*, No. 98 C 358, 2000 WL 1849574 (7th Cir. 2002). While Judge Posner may well be correct, judicial opinions, unlike most arbitration awards, are subject to appellate review and, together with concurring and dissenting opinions, help the development of the law. Judges are also salaried while Arbitrators are not and any added expense in preparing anything other than a bare bones award will likely be passed on to the parties.

There is also the possibility that the award will be attached to a subsequent motion to confirm and one or both parties might regret having that reasoning available for review by competitors, the media and other third parties (e.g. "The Arbitrator finds that the testimony by Claimant's president was not credible, its cost estimates were purposely under-stated and its business practices were atrocious"). As one court noted, "whether their motives are to cut costs, reduce delay, or simply to avoid making their dispute public, or some other motive altogether, the essence of how a dispute is to be resolved is a matter to be decided by the parties as between themselves." *Sagonowsky v. More*, 64 Cal. App. 122, 133 (1998).

22. **Nonsignatories.**[48]
    a. Nonsignatory issues were involved in some of the matters discussed above and can be a complex topic in their own right, too complex to discuss here (e.g. agency, estoppel, third party beneficiary, subsidiary, alter ego, incorporation by reference, derivative actions - "an' a'

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

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For nonsignatory issues in general, see Carl F. Ingwalson, Adam T. M ow & Elysian Kurnik, *Arbitration and Nonsignatories: Bound or Not Bound*? J. of the Am. College of Constr. Lawyers (Thomson Reuters, Winter 2012).

that, an' a' that"[49]), but *Murphy v. DirecTV, Inc.*, No. 11-57163 (USCA 9th Cir. 07/30/13), exposed a related drafting issue.

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

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

As to DirecTV, arbitration was compelled.

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

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

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

c. Wife signed an arbitration agreement with her Employer. When she was injured, she and her husband filed suit. Arbitration was compelled as to the wife, but not her nonsignatory husband. Employer's agency, third party beneficiary and derivative arguments were unpersuasive. *Albertson's Holdings, LLC v. Kay*, #12-16-00181-CV (Tex. App. - Tyler, 02/02/17).

d. A California manufacturer negotiated with an Australian company and a Nevada company. The California company and Nevada company signed a contract. Alleging its invoices weren't paid. the California company initiated an arbitration against the Nevada (signatory) and Australian (non-signatory) both of whom were ultimately found liable. The award was sustained on agency and estoppel theories. Key to the decision were the nonsignatories' conduct during the negotiations and subsequently, its statements that could lead one to believe the Nevada signatory had authority to bind it, the fact that it had directly benefitted from the transaction ,and the good in question had been delivered directly to it. *Trina Solar US, Inc. v. JRC-Services, LLC, and Jasmin Solar Pty. Ltd.*, No. 16-cv-2869, 2017 U.S. Dist. LEXIS 6134 (S.D.N.Y. 01/17/17).

e. Two Alabama courts resolved arbitrability issues and decided the scope of agreements relating to disputes "between them" (i.e. the signatories) did not permit joinder of nonsignatories. *Daphne Automotive, LLC v. Eastern Shore Neurology Clinic, Inc.*, 2017 WL 3446127 (Ala. 08/11/17); *Nissan N. Am. v. Scott*, 2017 WL 3446129 (Ala. 08/11/17).

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

It is also clear that statutes of limitation applicable to the bringing of claims in civil litigation may - or may not - apply to those same claims in arbitration. Since such defenses are usually viewed as procedural, they're usually - but not always - for the Arbitrator to decide. See *Village v Mayfair*, 426 N.E.2d 558 (Illinois 1981) (Arbitrator decides) and *Nielsen v Barnett*, 485 N.W. 2d 666 (Michigan 1992) (Arbitrator decides), *Wagner Construction Co. v. Pacific Mechanical Corp.*, 2007 WL 1461900 (California 2007) (Arbitrator decides), but also see *Donaldson v New York Institute*, 671 NYS2d 114 (New York 1998)(Court decides).

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

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

A reference to "applicable" statutes, doesn't seem to answer the question whether statutes applicable to litigation are or are not applicable in arbitration. It would seem to be better to merely state that all statutes of limitation applicable to litigation will, to the same extent, be applicable to arbitration. See, for example, the American Institute of Architects A201 form that provides, at §15.4.1.1, that the arbitration demand shall, in no event, be made "after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations."

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[49] Robert Burns, *A Man's a Man for A' That* (1795).

Some states (e. g. Georgia, New York, Washington) have statutes that may specify whether such statute of limitation apply, but most do not and drafters have to look to decisional law to answer the question. In *Wagner v Pacific Mechanical*, 41 Cal. 4th 19 (05/21/07), an appellate court said statutes of limitation had run and a subcontractor had, therefore, waived its right to arbitrate. The Supreme Court disagreed. Expiration of a statute of limitations is not, in and of itself, grounds to deny a petition to compel arbitration which has its own limitation period (i.e. four years after the party to be compelled has refused to arbitrate), and has nothing to do with statutes applicable to underlying claims.

Due to uncertainty and the possibility that new judicial decisions may alter prior decisions, it seems advisable to eliminate doubt, by careful drafting of the contract. Online suggestions for such a clause have included:

- "Any demand for arbitration under this Agreement must be made before the statute of limitations applicable to such a claim has run."
- "Any demand for arbitration must be made within one year of discovery, or the claim will be deemed waived."
- "The arbitrator(s) will give effect to statutes of limitation in determining any claim and shall dismiss the arbitration if the claim is barred under the applicable statutes of limitation. For purposes of the application of any statutes of limitation, the service on AAA under applicable AAA rules of a notice of claim is the equivalent of the filing of a lawsuit. Any dispute concerning this arbitration provision or whether a claim is arbitrable shall be determined by the Arbitrator(s)."
- "All statutes of limitation applicable to civil actions shall be equally applicable to arbitration proceedings and all disputes as to whether a claim is barred by such a statute shall be determined by the Arbitrator."
- "A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim would be barred by the applicable statute of limitations. Receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim."

24. **Severability Clause**. When dealing with arbitration clauses, especially in consumer and employment arbitrations, courts will often "sever" an objectionable provision, but enforce the rest. In *Serpa v. California Sur. Investigations, Inc.*, 215 Cal. App. 4th 695 (2013), the court said a provision requiring parties in an employment dispute to bear their own attorney fees (contrary to a state Supreme Court opinion) could be severed and the rest enforced.

    In *Brown v. Ralphs Grocery Co,* 197 Cal. App. 4th 489 (2011), it was argued that a U. S. Supreme Court case did not bar a Private Attorney General Act (PAGA) action under state law. The case was remanded "for a determination of whether the provision in the arbitration agreement waiving plaintiff's right to pursue a representative action under the PAGA can be severed or whether the presence of that one invalid provision in the arbitration agreement renders the entire agreement or portions thereof unenforceable." Also see *Larsen v. Citibank* (above) in which a confidentiality clause was severed.

    In *SWN Prod. Co.,LLC v. Long*, 2017 W. Va. LEXIS 892 (W.Va. 10/18/17), a severability clause provided that if any provision were held invalid or unenforceable by "any court" the other provisions would remain. A petition to compel arbitration pursuant to the arbitration clause was denied by the lower court that felt the reference to "any court" (and to "civil action" elsewhere) made the agreement ambiguous. The appellate court, applying the FAA, disagreed.

    Some drafters include a severability clause that specifically provides that, if part of an arbitration provision is found to be objectionable and is severed, the balance will be enforced.

25. **Poison Pill Clause**. A poison pill clause (sometimes called a "jettison" or "blow-up" clause) is a counterpoint to the severability clause. Drafters sometimes consider certain provisions of their arbitration clauses to be so critical that they would not want a court to sever those provisions while enforcing the balance of the clause. To prevent this, they may include a "poison pill" clause.
    a. The agreement in *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899 (2015), included a severability clause and also a poison pill clause:
        - Severability. "*If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable.*"
        - Poison Pill. "*If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable.*"
    b. A poison pill clause was also considered in *Coneff v. A.T. & T. Corp.*, 673 F.3d 1155 (9th Cir., 2012). Also see *Montano v. Wet Seal, Inc.*, 232 Cal. App. 4th 1214 (01/07/15) (contract including a waiver of Private Attorney General Act actions unenforceable)

26. **Delegation Clause**. A delegation clause is used by parties to indicate who, the Arbitrator or the court, is to decide certain issues. In *Tiri v. Lucky Chances Inc.*, 226 Cal. App. 4th 231 (05/15/14), an employment contract said:

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

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

    Generally, a challenge to the validity of a contract as a whole is an issue for the Arbitrator while a challenge to an arbitration provision within a contract is an issue for the Court. *Rent-A-Center West v. Jackson,* 130 S.Ct. 2772 (2010), expanded on that by saying where the