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From the Editor

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Topical interest articles about recent cases, legislation or current trends which discuss their effect on the day-to-day practice of ADR.

The Editor is also interested in articles about your experiences with arbitration, mediation, settlement conferences and negotiation in general.

Ensuring a Neutral: Disclosure and Disqualification in the Face of Arbitrator Bias

By Rebecca S. Leeds, Esq.

In the past several years, private or contractual arbitration has surfaced as a preferred means for resolving disputes. See Azteca Construction, Inc. v. ADR Consulting, Inc. 121 Cal.App.4th 1156, 1164-65 (2004). Although the parties' agreement dictates the scope of arbitration as well as the powers of the neutral, "the process has historically been subject to extensive legislative supervision[,]" especially concerning the integrity of the proceeding, versus the merits of the individual arbitrator's decision. Id. The statutory schemes regulating private arbitration in the state of California include the California Arbitration Act ("CAA") (California Code of Civil Procedure section 1280 et seq.), the Federal Arbitration Act ("FAA") (9 U.S.C. §§1-14) and the California Ethics Standards for Neutral Arbitrators in Contractual Arbitration ("Ethics Standards"). This article will explore the origins of the disclosure and disqualification schemes of both federal and state law as they relate to arbitrator bias, as well as the differences between federal and state standards and the question of federal preemption.

Judicial Oversight and Arbitrator Bias

While arbitration agreements govern many of the substantive aspects of contractual arbitration, various federal and state statutes and standards regulate private arbitration by setting forth procedures for enforcing the agreements between the parties, establishing the rules for the conduct of the proceedings to the extent they are not contemplated by the arbitration agreement, and describe the means by which the court may enforce, vacate, clarify or otherwise interfere with an arbitration award. Id.

Further, while the Legislature sets the standard for judicial oversight of an arbitration award (moving away from common law in recent years), it severely restricts "judicial interference in the *merits* of an arbitrator's decision." Id. (emphasis in original).

> Arbitrators are not bound by rules of law, but may base their decisions on broad principles of justice and equity. With narrow exceptions, the courts are not permitted to review the validity of an arbitrator's reasoning or the sufficiency of the evidence to support the award.

Id. (internal citations omitted).

It is for these reasons that arbitrators receive the protection of judicial immunity—in the arbitrator's quasi-judicial capacity, "[a]rbitral immunity, like judicial immunity promotes fearless and independent decision making. . . . To this end, courts have refused to hold judges and arbitrators liable for their judicial actions." Id. at 430-31. Federal courts agree that, for these very same reasons, "'arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process.'" Id. at 432 (internal citations omitted).

This arbitral immunity applies absent a "clear absence of jurisdiction" or unless the arbitrator "engages in acts that fall outside his or her arbitral capacity." The immunity even applies to "corrupt or biased acts" and also extends to arbitration organizations. Id. Finally, this immunity also applies "where one or more of the parties to the arbitration seeks to impose liability based on the alleged bias of the arbitrator or the sponsoring organization." Id. at 441. (For a detailed discussion on arbitral immunity of arbitration organizations, see Stasz v. Schwab (2004) 121 Cal.App.4th 420.)

However, arbitrator immunity does not leave the parties without recourse in the event of arbitrator bias. Federal and state law, as well as the Ethics Standards, provide an extensive statutory scheme for the disclosure and disqualification of arbitrators on the grounds of potential bias. Under both federal and state law, "an arbitration award *must* be vacated if the arbitrator fails to disclose any dealing that might create the impression of possible bias." Stasz v. Schwab, supra, 121 Cal.App.4th at 439, fn.7 (2004) (emphasis added).

For example, in the case of Stasz v. Schwab, supra, the America Arbitration Association ("AAA") refused to stay the arbitration proceedings pending the resolution of plaintiff's appeal challenging the validity of the particular arbitration agreement at issue. Id. at 426-427. Plaintiff subsequently filed suit against AAA, claiming that the organization was biased and that it should have stayed the proceedings. Id. at 427. Finding that "[a] suit against an arbitrator or a sponsoring organization is nothing more than a collateral attack on the arbitration award[,]" the court held that "bias in the arbitration process should be remedied by challenging the arbitration award, not by seeking to impose liability on the arbitrator or the sponsoring organization." Id. at 440.

Moreover, this judicial oversight cannot be contractually modified by way of the arbitration agreement. For example, in the Azteca case, supra, the parties agreed to private arbitration pursuant to the AAA Rules and Procedures, which then contained a provision mandating that the AAA decide whether an arbitrator should be disqualified upon objection by a party, and that "its determination of the issue shall be conclusive." Azteca, supra, 121 Cal.App.4th at 1160. In holding that the Legislature's provisions for arbitrator disqualification "may not be waived or superseded by a private contract," it vacated the award. Id.

> While the parties may be free to contract among themselves for alternative methods of dispute resolution, such contracts would be valueless without the state's blessing. Because it imbues private arbitration with legal vitality by sanctioning judicial enforcement of awards, the state retains ultimate control over the "structural aspect[s] of the arbitration process. The critical subject of arbitrator neutrality is a structural aspect of the arbitration and falls within the Legislature's supreme authority.
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> "Participants who agree to *binding* arbitration are giving up constitutional rights to a jury trial and appeal. [Statutory] [d]uties of disclosure and disqualification are designed to ensure an arbitrator's impartiality." . . . Only by adherence to the Act's prophylactic remedies can the parties have confidence that neutrality has not taken a back seat to expediency.

Azteca, supra, 121 Cal.App. 4th at 1167-68 (citations omitted). Therefore, "parties cannot contractually override provisions of the act designed to protect the arbitration process." Id. at 1168, fn. 8.

Disclosure

Under California law, the statutory scheme for disqualifying arbitrators based upon potential arbitrator bias is set forth in sections 1281.9 and 1281.91 of the California Code of Civil Procedure. In 2001, the Legislature not only revised the statutory duties of disclosure among arbitrators, but it directed the Judicial Council to "adopt ethical standards for all neutral arbitrators" effective July 1, 2002. See Ovitz v. Schulman (2005) 133 Cal.App.4th 830, 838-39 (internal citation omitted). The Legislature amended Code of Civil Procedure section 1281.9(a) to provide:

> In any arbitration pursuant to an arbitration agreement, when a person is to serve as a neutral arbitrator, the proposed neutral *shall* disclose all matters that could cause a person aware of the facts *to reasonably entertain a doubt* that the proposed neutral arbitrator would be able to be impartial.

See also, Ovitz, supra, 133 Cal.App.4th at 838-39 (emphasis added). The Ethics Standards contain detailed disclosure requirements that further expand the list of disclosures delineated by Code of Civil Procedure section 1281.9. See Stds. 7, 8 & 12; see also, Code of Civil Procedure §1281.9(a). Finally, Section 1281.9(b) requires that "the proposed neutral arbitrator **shall** disclose all matter required to be disclosed pursuant to this section to all parties within 10 calendar days of service of notice of the proposed nomination or appointment." (Emphasis added.) See also Std. 7(c)).

> As we have seen, the Legislature has gone out of its way, particularly in recent years, to regulate in the area of arbitrator neutrality by revising the procedures relating to the disqualification of private arbitrators and by adding, as a penalty for noncompliance, judicial vacation of the arbitration award.

Azteca, supra 121 Cal.App 4th at 1167-68. Further, the Ethics Standards were adopted under the furtherance of Section 1281.5:

> [The Ethics Standards] establish the minimum standard of conduct for neutral arbitrators who are subject to [the] standards. They are intended to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process.

Id. Therefore, the arbitrator has an affirmative duty, pursuant to both the Code of Civil Procedure and the Ethics Standards to disclose any potential bias. Failure to do so may leave the court with no other choice but to vacate the arbitration award, as discussed in more detail below.

Disqualification

Following the appropriate disclosure by the arbitrator, a party may disqualify the arbitrator by serving a notice of disqualification in the manner and time specified by Code of Civil Procedure section 1281.91(b). Failure of an arbitrator to timely disqualify himself or herself pursuant to the proper demand of a party under Code of Civil Procedure section 1281.9(b) requires the court to vacate the arbitration award without imposing upon the party seeking to vacate the award an independent burden to demonstrate that a reasonable person would doubt the arbitrator's capacity to be impartial. See Azteca, supra, 121 Cal.App.4th at 1169.

This requirement is strikingly similar to the effect of a preemptory challenge to a superior court judge under section 170.6—"disqualification is automatic, the disqualified judge loses jurisdiction over the case and any subsequent orders or judgments made by him or her are void." Id. at 1170 (citing Lawrence v. Superior Court (1988) 206 Cal.App.3d 611, 615-16). The logic behind the automatic disqualification is that"the Legislature has already determined that any of the matters required to be disclosed by [section 1281.9(a)], necessarily satisfies that standard." Azteca, supra, 121 Cal.App.4th at1169 (citing the holding in International Alliance of Theatrical Stage Employees, etc. v. Laugh on (2004) 118 Cal.App.4th 1380, 1386-87). "On its face, the statute leaves no room for discretion. If a statutory ground for vacating the award exists, the trial court must vacate the award. Ovitz, supra, 133 Cal.App.4th 830, 844-45 (internal citations omitted).

However, following the arbitrator's disclosure, it is imperative that the parties act within the 15-day time period provided in section 1281.91(a) or (b) to avoid waiving the right to disqualify the arbitrator. Ovitz, supra, 133 Cal.App.4th at 845. Section 1281.91(c)) provides in pertinent part:

> The right of a party to disqualify a proposed neutral arbitrator pursuant to this section shall be waived if the party fails to serve the notice pursuant to the times set forth in this section, unless the proposed nominee or appointee makes a material omission or material misrepresentation in his or her disclosure.

See also, Ovitz, supra, 133 Cal.App.4th at 845. Thus, under California law, the parties must act with 15 days of the arbitrator's disclosure to avoid waiving their disqualification right.

Federal Nuances

In 2004, the Ninth Circuit held that "a party with *constructive* knowledge of potential partiality of an arbitrator waives its right to challenge an arbitration award based upon evident partiality if it fails to object to the arbitrator's appointment or his failure to make disclosures until after an award is issued." Fidelity Federal Bank v. Durga Ma Corp. (9th Cir. 2004) 386 F.3d 1306, 1313 (emphasis added). Under the Ninth Circuit's reasoning, the burden to object to the arbitrator on the grounds of bias is placed upon the parties, without requiring the arbitrator to make the necessary disclosures under California law, provided the party had constructive knowledge of the potential partiality.

In Fidelity, supra, pursuant to the arbitration agreement, each side appointed a party arbitrator with a third arbitrator to be appointed to comprise a three-member panel. See Fidelity, supra, 386 F.3d at 1308. Neither party requested a disclosure statement from any arbitrator at any time prior to the award, nor did any of the arbitrators provide a disclosure statement. Id. at 1309. Fidelity moved the district court to vacate the unanimous arbitration award against it, in excess of $2.3 million in damages, attorneys fees of approximately $836,000 and costs of about $164,000, claiming that the party arbitrator appointed by Durga Ma was "evidentially partial" to Durga Ma, due to various business and familial relationships between the arbitrator and lead counsel for Durga Ma, not claiming actual bias. See id. at 1310-11. The award was nevertheless confirmed by the district court.

The Fidelity court explained that standard of vacating an award under the Federal Arbitration Act is that of "evident partiality or corruption in the arbitrators," and not the much broader California standard of mandatory vacation of an arbitration award for *any* violation of California disclosure rules, "regardless of whether the undisclosed facts create a reasonable impression of partiality." 9 U.S.C. §10(a)(2); Code of Civ. Pro. §1286.2(a)(6)(A); see also, Fidelity, supra, 386 F.3d at 1312; Ovitz, supra, 133 Cal.App.4th 849-50. "Evident partiality" is present when the facts the arbitrator fails to disclose create "a reasonable impression of partiality," See Schmitz v. Zilveti (9th Cir. 1994) 20 F.3d 1043, 1046; see also, Fidelity, supra, 386 F.3d at 1312. The public policy behind the waiver doctrine in the Fidelity case was simply the policy favoring the finality of arbitration awards, placing the burden on the parties, and "favoring arbitration as a speedy and cost-effective means of resolving disputes." Id. At 1313. Significantly, however, it appears that this limited rule regarding waiver in federal cases only applies *after* an arbitration award has been issued. Id. Moreover, this holding has been questioned by California state courts:

> . . . [A]s the *Fidelity* opinion notes, "[s]everal federal courts hold that a party's failure to object to the real or evident partiality of an arbitrator before an award is issued does not waive the challenge *unless the party had real, actual knowledge of the conflict*." (Citation.) Thus, even if the *Fidelity* rule of waiver based on constructive knowledge derives from *section 10(a)(2) of the FAA*, the rule is not a universally accepted principle. As we have noted, decisions of the Ninth Circuit are no more persuasive in California than decisions of other circuits.

Ovitz, supra. 133 Cal.App.4th at 849-50.

Choice of Law

Finally, the cases of Ovitz, supra, and Fidelity, supra, both explore the issue of federal preemption of the California Arbitration Act. As a preliminary matter, there is a default presumption that the FAA supplies the rules which can only be overcome by a showing of "clear intent" to incorporate state law rules. Fidelity, supra, 386 F.3d at 1311-12. As the rules relating to arbitrator bias, disclosure and disqualification relate to procedural aspects of arbitration rather than the substance of the dispute, absent clear intent otherwise, the FAA applies. As the United States Supreme Court has stated:

> [T]here is no federal policy favoring arbitration under a certain set of procedural rules, the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration – rules which are manifestly designed to encourage resort to the arbitral process – simply does not offend . . . any [] policy . . . embodied in the FAA.

Volt Info. Sci., Inc. v. Board of Trs. Of the Leland Stanford Junior Univ. (1989) 489 U.S. 468, 476.

Assuming that the Ninth Circuit's "reasonable impression of partiality" test applies, in cases to which it applies, the FAA has a "limited preemptive effect" on state law, to the extent that it ***actually*** conflicts with the federal law. See Ovitz, supra, 133 Cal.App.4th at 851. Code of Civil Procedure section 1286.2(a)(6)(A) simply requires an arbitration award to be vacated if the arbitrator failed to timely disclose a known ground for disqualification, *presupposing* that the arbitration agreement was enforced and the arbitration was, in fact, held. Id. at 853. This section seeks to instill public confidence by enhancing "both the appearance and reality of fairness in arbitration proceedings," making arbitration an attractive method of dispute resolution. Id.

Thus, according to the court in Ovitz, the California scheme actually serves to further the purpose of the FAA rather than hinder it. Id. It does more than simply allow a party to "seize upon a technicality to vacate an arbitration award," as the undisclosed matters listed under section 1281.9(a) are those "that the Judicial Council (with authority from the Legislature) has deemed sufficient to undermine an objective perception of fairness." Id.

Therefore, in summary, the increasing use of process required the implementation of statutes governing that process in order to maintain judicial oversight. These statutory schemes cannot be waived by contract. Moreover, the only remedy for arbitrator bias is vacation of the arbitration award, and not a collateral attack on the arbitrator or his or her decision-making process. The burden is on the arbitrator to make the necessary disclosures pursuant to the Code of Civil Procedure and the Ethical Standards. Once the disclosures are made, the burden is then on the party to timely request a disqualification. Failure to do so may constitute a wavier of that right. Further, it is unclear whether or not a party can waive the right to disqualify an arbitrator for bias with mere ***constructive*** knowledge of potential bias, once the arbitration award has been issued. Additionally, although federal law governs in the absence of an agreement otherwise, federal law does not preempt the California statutes, as the California Arbitration Act serves to further the legislative intent of the Federal Arbitration Act.

Federal Courts Require Personal Jurisdiction of Debtor to Confirm and Enforce Foreign Arbitration Award Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

By Gregory B. Scarlett, Esq.

Pursuant to Article V, section 1 of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), United States courts are required to recognize and enforce arbitral awards made outside of the United States.[1] The provisions of the 1958 New York Convention are codified in the Federal Arbitration Act ("FAA"). See 9 U.S.C. sections 201-208. Although it is well-established that due process requires that American courts be able to assert personal jurisdiction over any party compelled to appear before the court and adjudicate a claim, in Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F. 3d 1114 (9th Cir. 2002), the Ninth Circuit Court of Appeals found it necessary to resolve the apparent issue of whether the Convention obviated the personal jurisdiction due process requirement in an action to confirm and enforce a foreign arbitration award.[2] The Ninth Circuit concluded that the Convention "does not eliminate the due process requirement that a federal court have jurisdiction over a defendant's person or property in a suit to confirm a previously issued arbitration award." Id. at 1118.

The decision in Glencore Grain would appear, at first glance, to address a "non-issue" easily resolved by reference to "hornbook law." But given the express language of the Convention, which creates a mandatory obligation on the part of participating states to confirm arbitration awards entered in another participating state, a real question arose as to whether the drafters of the Convention, by failing to address the issue of personal jurisdiction, may have actually intended to relax the jurisdictional requirements, with respect to participating states, for purposes of enforcing foreign arbitration awards. On the other hand, other than the fact that the signatories to the Convention consented to be governed by its "mandatory" provisions, there is no rationale for distinguishing actions to enforce foreign arbitration awards from actions to enforce foreign money judgments, and it has also been held that the latter are subject to the requirement that a court have personal jurisdiction over the judgment debtor.[3]

Glencore Grain involved a dispute between plaintiff/rice purchaser ("Glencore"), a Netherlands corporation with its principal place of business in Rotterdam, and defendant/rice manufacturer, a rice exporter incorporated in India with its principal place of business in New Delhi ("Shivnath"). Under a series of contracts between the parties, Glencore agreed to purchase approximately 300,000 tons of rice from Shivnath. The contracts were expressly governed by the law of England, and contained arbitration clauses requiring the parties to refer any dispute concerning the contracts for arbitration before the London Rice Brokers' Association ("LRBA") Panel of Arbitrators. Glencore Grain, supra at 1118. The pertinent contracts were negotiated in a foreign forum, the contracting parties were both foreign companies, and the contracts required performance, i.e., delivery of rice, at the Port of Kandla, India. Id.

Eventually, a dispute arose between the parties over delivery of the rice. Pursuant to the contracts, the dispute was submitted to the LRBA, and in a July 1997 decision, the LRBA awarded Glencore approximately $6.5 million. Shivnath did not challenge the arbitration award,

which became final and enforceable, but Shivnath subsequently refused to pay. Glencore Grain, supra at 1118. In March 1998, Glencore filed suit in India to enforce the arbitration award, and Shivnath responded with a challenge to the arbitration provisions in the contract and to the fairness of arbitration proceedings before the LRBA. In July 2000, while the enforcement action in India was still pending, Glencore filed suit in the federal district court, Northern district of California, seeking to confirm the foreign arbitration award under the Convention. Id. at 1118-1119.

Shivnath moved to dismiss the district court action on several grounds, including lack of personal jurisdiction. In response, Glencore argued that Shivnath had sufficient minimum contacts with California, and with the United States as a whole. In support of its argument, Glencore offered evidence that Shivnath had, in the past, shipped rice into the Port of Los Angeles, the Port of San Francisco, and various East Coast ports, and that Shivnath sold rice throughout the United States through a sales agent located in California. Glencore Grain, supra at 1119. However, the district court dismissed the action for lack of personal jurisdiction.[4] The court held that Glencore failed to demonstrate sufficient contacts to support an exercise of "general" jurisdiction, and could not demonstrate "specific" jurisdiction because no assertion was made that the underlying dispute arose out of or related to any activities by Shivnath within California or the United States as a whole. Id.[5]

Glencore appealed, and the Ninth Circuit affirmed the district court's dismissal. The Glencore Grain court then held that, under either California's long-arm statute or the federal long-arm statute, Shivnath lacked sufficient minimum contacts to support the district court's assertion of either general or specific personal jurisdiction. Glencore Grain, supra at 1123-1127.[6] The appellate court further noted that Glencore had failed to identify any property in the United States that could serve as the basis for the assertion of *quasi in rem* jurisdiction over Shivnath. Id.

However, before engaging in its lengthy and detailed "minimum contacts" personal jurisdiction analysis, the Glencore Grain court found it necessary to briefly address Glencore's argument that the Convention and the FAA provide for relaxed jurisdictional requirements, specifically with respect to the personal jurisdiction requirement, in suits to confirm arbitration awards. Glencore Grain, supra at 1120-1122. The Court found that Glencore's position lacked merit.

The FAA provides statutory subject matter jurisdiction in federal district courts for enforcement actions under the Convention.[7] "[I]f the place of the arbitration award is in the territory of a party to the Convention, all other convention states are required to recognize and enforce the award, regardless of the citizenship or domicile of the parties to the arbitration." Glencore Grain, supra at 1120 [citing Restatement (Third) of Foreign Relations Law section 487, Comment b (1987). The Convention sets forth a mandate for the recognition and enforcement of foreign arbitration awards. The Convention and the FAA create a "pro-enforcement bias. Id.[8] "Article III of the Convention is illustrative: 'Each Contracting State shall recognize arbitral awards as binding' without creating conditions or procedures more onerous than those applied to domestic arbitration." Id.

The FAA further provides that a court of the Untied States "shall" confirm a foreign arbitration award falling under the Convention, within three years after the award is made, "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention." 9 U.S.C. section 207. The FAA therefore incorporates by reference the seven enumerated exceptions or defenses to the mandatory recognition or enforcement of a foreign arbitration award.[9] An appellate court's review of a foreign arbitration award is limited, and does not extend to a review of the merits of the underlying arbitration. Review *de novo* is only appropriate with respect to the question of whether the debtor has established a defense under the Convention.[10]

Given the Convention's mandate to recognize and enforce foreign arbitration awards falling within its ambit, the plaintiff in Glencore Grain maintained that no personal jurisdiction requirement exists for such enforcement actions, pointing out that neither the Convention nor the FAA expressly requires personal jurisdiction, and lack of personal jurisdiction is not one of the seven enumerated defenses to an action to enforce a foreign arbitration award. Glencore Grain, supra at 1121. However, the Ninth Circuit noted that "[i]t is a bedrock principle of civil procedure and constitutional law that a 'statute cannot grant personal jurisdiction where the Constitution forbids it.'" Id. The appellate court pointed out that, though federal court subject matter jurisdiction is a constitutional authority conferred by statute, the personal jurisdiction requirement "flows from the Due Process Clause" and the existence of personal jurisdiction is determined not by statute but by application of the constitutional due process factors set forth in International Shoe Company v. Washington, supra.

Thus, the Ninth Circuit reasoned that neither the Convention nor the FAA can eliminate the personal jurisdiction requirement for district court actions to confirm foreign arbitration awards. Glencore Grain, supra at 1121. The Court went on to hold that, "in suits to confirm a foreign arbitral award under the Convention, due process requires that the district court have jurisdiction over the defendant against whom enforcement is sought or his property." Id. at 1122.[11]

Extending Arbitration Provisions Beyond the Four Corners of an Agreement

By Caroline A. Molloy, Esq.

Historically, courts have interpret contracts by first viewing the contract as a whole and then, in light of that evaluation, giving effect to each of the contract's expressed provisions. This basic tenant of contract construction is know as "the four corners rule."[1] However, in practically all legal areas, exceptions apply. An interesting exception to the "four corners rule" with respect to an arbitration provision is found in the case of1 Televisa S.A. De C.V. v. DTVLA WC Inc. 363 F.3d 840, (9th Cir. 2004) [2] in which the Ninth Circuit Court of Appeals bound the parties to an arbitration clause in a separate agreement.

In the Televisa case, the dispute was between the licensee, the broadcaster, DTVLA, and its licensor, Televisa. Their disagreement concerned the interpretation of three contemporaneously executed agreements: (1) a Sublicense Agreement; (2) a Letter Agreement; and (3) a Letter of Credit. The Sublicense Agreement provided: "All controversies and claims relating, relating to or arising out of this agreement that cannot be resolved by good-faith negotiations ("Arbitrable Disputes") shall be resolved only by final and binding arbitration conducted privately and confidentially in Los Angeles, California, metropolitan area by a panel of three arbitrators . . . ." Based on this express language, DTVLA submitted a demand for arbitration.

In contrast, the Letter Agreement, on which Televisa opposed the arbitration of this dispute, stated: "For any aspect herein related to the interpretation, fulfillment and judicial requirement of the obligations of Televisa hereto. . . Televisa and DTVLA expressly and irrevocably submit themselves to the jurisdiction and competence of the courts of Mexico City, Federal District, irrevocably waiving any other jurisdiction to which they might be entitled due to their present or future domiciles for all disputes related to or arising out of obligations of Televisa hereunder." The Letter Agreement's forum selection provision unequivocally contrasted any intent to arbitrate.

Notwithstanding, the express provision requiring that any dispute be decided by the Mexico City courts, the Court held in favor of arbitration, citing several factors in its ultimate decision. First, public policy undisputably promotes arbitration of disputes. As such, courts give full effect to the most minimal indication of the parties' intent to arbitrate.[3] Arbitration clauses using the phrase "arising out of or relating to" an agreement are intended by parties to cover a much broader scope of disputes. Indeed, courts resolve any question regarding the scope of the arbitration clause in favor of arbitration.[4] Only one ground exists for denying a demand for arbitration – where "... it may be said with positive assurance that the clause does not cover the dispute."[5] The clear language of the Sublicense Agreement could not render thus "positive assurance."

The Televisa Court also found that the Sublicense Agreement was the formal, more comprehensive agreement, covering numerous subjects including the licensing of intellectual property rights and standard contract terms. In fact, by its own terms, the Sublicense Agreement incorporated the Letter Agreement, rendering the latter merely a tangential, annexed agreement. Irregardless of the Letter Agreement's conflicting forum selection clause, the Court compelled arbitration because the parties readily knew of the Sublicense Agreement's sweeping statements endorsing and adopting arbitration as a means of resolving disputes.

The Televisa decision consequently sheds light on the future interpretation of forum selection clauses. When there exists contemporaneously-executed agreements, the interpreting parties, triers of fact, and attorneys alike now must look beyond the four corners of a single agreement, and instead, carefully evaluate all related agreements when any one of the related agreements contains an arbitration provision.

The Enforceability of Arbitration Clauses in Class Action Lawsuits

By Michael T. Smith, Esq.

Class action lawsuits pose particular challenges when the parties are subject to an arbitration clause. The first issue to resolve is whether the case is appropriate for transfer to arbitration based on the terms of the arbitration agreement. The plaintiff filing the class action may not be willing to transfer his claims to arbitration based on a perception that arbitration is a less favorable forum to obtain the maximum relief and a defendant will often have to move to compel arbitration. A Petition to compel arbitration of a class action lawsuit must be brought prior to or at the time that the defendant answers the complaint or the right to seek arbitration could be waived by the defendant under California law. [1] Where the class claims are based on a contract requiring arbitration of disputes, the court may stay the class action and order class wide arbitration. [2]

However, arbitration clauses within the contract related to the claims alleged in the class action may not be enforced by California courts if the agreement also contains a provision that requires that the party with the inferior bargaining power, usually the individual employee or customer, agree to waive his rights to pursue a class action lawsuit against the party with the superior bargaining power i.e. the employer or company. [3] Even if the class action waiver is worded so that it purports to apply to both parties equally, California courts are reluctant to enforce such waivers because of the fact acknowledged by the courts that large companies or employers rarely, if ever, file class action lawsuits against their customers or employees to obtain return of small sums of money or wages.

On the other hand, individual customers or employees often bring class action lawsuits to obtain the return of small sums of money or wages and by doing so perform important consumer or employee protection functions recognized by California law. A class action waiver within an arbitration clause operates to take away the individuals' right to pursue a class action lawsuit and such a waiver is, in fact, one sided. Individual customers or employees will rarely take the time and trouble to file small claims lawsuits against a defendant company to obtain the return of a small sum of money which could serve as a basis for a class action lawsuit.

Additionally, if the class action waiver contains language that prohibits its severance from the rest of the arbitration clause, then California courts will find that the entire arbitration clause is void as unconscionable, and will refuse to enforce such a clause. Alternatively, if the arbitration clause is silent on the issue of class actions, then it is more likely that the court will enforce the arbitration clause if the claims involved in the class action lawsuit derive from the subject matter of the contract within which the arbitration clause appears.

It is important to note that class action waivers are not unconscionable as a matter of law, but instead, require a plaintiff to present evidence establishing circumstances that make the class action waiver procedurally and substantively unconscionable. Procedural unconscionability occurs when there is oppression arising from unequal bargaining power between the parties or

surprise from terms buried within the agreement. Substantive unconscionability applies when the terms containing the arbitration clause are unfairly one-sided and overly burdensome upon the party with the weaker bargaining power. [4]

If a plaintiff fails to present sufficient evidence or otherwise meet his burden, then California courts may uphold an arbitration clause which contains a class action waiver and order that the class action be resolved through arbitration. The California Court of Appeals in the Konig v. U-Haul Co. case stated that class action waivers are not, in the abstract, exculpatory clauses, and are not inherently invalid. However, because damages in separate consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a windfall profit, a class action is often the only effective way to halt and redress such conduct. Moreover, such class action or arbitration waivers are indisputably one-sided. Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable. However, the plaintiff in Konig failed to submit evidence in the trial court that the damages sought involved the recovery of small sums of money, and consequently was unable to establish that procedural unconscionability existed.

The Federal Arbitration Act generally governs claims subject to arbitration involving interstate commerce. However, a claim otherwise subject to the Federal Arbitration Act will still be subject to state law principles governing the validity, revocability, and enforceability of contracts generally, thus state law will be applied to determine if an arbitration clause containing a class action waiver is valid and enforceable. [5] Generally, terms that are unconscionable will not be enforced and California courts will not enforce class action waivers which prohibit a customer or employee from pursuing a class action claim which involves a small monetary claim.

For example, a forum selection clause requiring that a California customer agree to arbitrate claims in Georgia has been held to be unconscionable and unenforceable because the forum selection clause was perceived as an unreasonable geographical barrier to California consumers to pursue small monetary claims through arbitration in Georgia. The rationale is legitimate when considering the burden placed on individual consumers if they had to travel out of state to arbitrate claims involving small sums of money that they would also be precluded from asserting though a class action by a class action waiver included with an arbitration clause.

Absent the availability of a class action lawsuit, law firms would likely not take an individual's case involving a small sum of money and thus the individual consumer would be left with the burden of arbitrating the claim outside his home state which would likely result in the claim not being pursued. Thus, in house counsel or transactional attorneys drafting one sided agreements are cautioned that California courts will not enforce contracts which include an arbitration clause, a class action waiver provision and a forum selection clause which chooses the forum of the company or employer over the forum of the consumer or employee.

Also, California courts will be reluctant to enforce a choice of law clause which chooses the law of another state where to do so would deprive the California party of the protection of fundamental public policy protections recognized under California law. [6] There is a public policy against exculpatory waivers recognized by statute in Civil Code section 1668 which may be violated by class action waivers because the impact is to shield a company from liability for many small instances of exploitation.

Also, Civil Code section 3513 prohibits contractual waiver of laws established for a public benefit and expresses a public policy against waiver of such rights. Thus, California courts may find that the public policy interest in California to protect its consumers against fraud or other wrongs outweighs the interests of the forum selected in the arbitration agreement and the California court will determine that California law applies and rule that the class action waiver is procedurally and substantively unconscionable. [7]

The case of Aral v. Earthlink is illustrative of the California Court of Appeals willingness to find an arbitration clause unconscionable when it is combined with a forum selection clause which chooses an out of state forum requiring the consumer to travel out of state to arbitrate his claim. The plaintiff, Ozgur Aral, desiring to obtain faster Internet access, ordered DSL service from EarthLink. He did not receive the kit containing equipment needed to operate the service--a DSL modem--for approximately five weeks. Yet when he received his EarthLink bill, he saw that he had been charged based on the date he ordered service.

The DSL service agreement that EarthLink generally sent with the DSL installation kit to customers provided that the parties' agreement was "governed by Georgia law without regard to conflict-of-law provisions"; that "[a]ny controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration, and administered by the American Arbitration Association under its Commercial Arbitration Rules"; and that "[a]ny such arbitration will be governed by Georgia law and will be held in Atlanta, Georgia." It further provided: "There shall be no class action arbitration pursuant to this agreement." Plaintiff brought a class action lawsuit in July 2003 on behalf of California EarthLink customers who ordered EarthLink broadband service and were charged for the service prior to the time that they received the equipment necessary to set up the service. The California Court of Appeals rejected the forum selection clause as unconscionable based on the recognized importance of class actions as an important tool of consumer protection in California.

The California Supreme Court has held that class action waivers in arbitration agreements are generally unconscionable and unenforceable when they are included in contracts of adhesion by a company that has superior bargaining power and which adversely affects the consumer's rights to seek redress of claims involving small sums of money. [8] The class action waiver in the Discover Bank case was given to the consumer by an amendment to the cardholder agreement in the form of a "bill stuffer" that the consumer would be deemed to accept if the customer did not close his account. The California Supreme Court found that an element of procedural unconscionability was present based on those facts.

Interestingly, the California Supreme Court recognized that generally, adhesive contracts are enforced, but that class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy. As stated in Civil Code section 1668: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." [9]

The California Supreme Court in Discover Bank recognized that California law, like federal law, favors the enforcement of arbitration agreements; however those agreements are subject to general contract principles at law or in equity governing the revocation of any contract. Thus, class action waivers or forum selection clauses included in an arbitration agreement will be evaluated based on general contract principles applicable to the revocation of any contract.

Interestingly, not all claims brought in a class action are subject to arbitration under California law. There are exceptions recognized by California courts where a claim is based on a statute which expressly provides that relief is to be sought in any "court of competent jurisdiction." The statutory language providing for relief in any "court of competent jurisdiction" excludes resolution of the claims through arbitration. For example, claims for injunction relief to protect the public in a class action lawsuit brought under California's Unfair Competition law (Business and Professions Code section 17200 et seq.) or under the Consumer Legal Remedies Act (Civil Code section 1750 et seq.) are not subject to arbitration and the injunctive relief must be sought through the California courts. [10]

In conclusion, class action lawsuits are subject to arbitration through the application of an arbitration clause contained within an agreement between the parties, including contracts of adhesion. However, the claims involved must be of the type that are subject to arbitration and the class action claims must be based on the subject matter of the contract containing the arbitration clause at issue. California courts will closely examine class action waivers contained within contracts of adhesion to determine if the class action waiver is procedurally or substantively unconscionable. An arbitration clause which includes a class action waiver and a forum selection clause which chooses the forum of the party with the superior bargaining power will be carefully scrutinized by California courts. Such clauses will likely be held to be unconscionable because they operate to deny California consumers or employees from performing their important public policy function of asserting class action claims to protect a large number of individuals from being cheated out of small sums of money.

Federal Courts Require Personal Jurisdiction of Debtor to Confirm and Enforce Foreign Arbitration Award

1. In 1970, Congress ratified the Convention, a multilateral treaty providing for the recognition and enforcement of foreign arbitration awards.

2. "Constitutional due process is satisfied when a nonresident defendant has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Glencore Grain, supra, 284 F. 3d at 1123 [quoting International Shoe Company v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154 (1945)].

3. See, e.g., Renoir v. Redstar Corporation (2004) 123 Cal. App. 4th 1145, 1151-1152 (in action to enforce foreign money judgment under California's Foreign Money-Judgments Act [Cal. Code of Civil Procedure sections 1713-1713.8], personal jurisdiction over defendant and service of summons required).

4. Curiously, in discounting the activities of Shivnath's agent, the district court, and later the appellate court, apparently ignored, or found inapposite, the Ninth Circuit's own prior decisions holding that, in determining the sufficiency of a defendant's contacts, it is not only the defendant's activities in the forum, but also actions by an agent on defendant's behalf, which support personal jurisdiction. See, e.g., Ochoa, et al. v. J.B. Martin and Sons Farm, Inc., 287 F. 3d 1182, 1189 (9th Cir. 2001); Theo. H. Davies & Co. v. Republic of the Marshall Islands, 174 F. 3d 969, 974 (9th Cir. 1999).

5. "Depending on the nature of a foreign defendant's contacts with the forum, a federal court may obtain either specific or general jurisdiction over him. A court exercises specific jurisdiction where the cause of action arises out of or has a substantial connection to the defendant's contacts with the forum. [Citations omitted.] Alternatively, a defendant whose contacts are substantial, continuous, and systematic is subject to a court's general jurisdiction even if the suit concerns matters not arising out of his contacts with the forum. [Citations omitted.] Whether dealing with specific or general jurisdiction, the touchstone remains 'purposeful availment.'" Glencore Grain, supra at 1123.

6. The general rule is that personal jurisdiction over a defendant is proper if it is permitted by a long-arm statute and if the exercise of that jurisdiction does not violate due process. See Fireman's Fund Ins. Co. v. Nat. Bank of Coops, 103 F. 3d 888, 893 (9th Cir. 1996). Pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure ("FRCP"), where there is no applicable federal statute governing personal jurisdiction, a federal court may rely on the forum state's long-arm statute. Glencore Grain, supra at 1123. However, FRCP 4(k)(2) [the so-called federal long-arm statute] may, in limited circumstances, be a basis for establishing jurisdiction where "the United States serves as the relevant forum for a minimum contacts analysis." Id. at 1126. Both the California long-arm statute and FRCP 4(k)(2) require compliance with "minimum contacts" due process requirement set forth in International Shoe, supra. See Harris Rutsky & Co. Ins. Services v. Bell & Clements Ltd., 328 F. 3d 1122, 1129 (9th Cir. 2003) (applying

California long-arm statute); Doe v. Unocal, 248 F.3d 915, 922 (9th Cir. 2001) (applying FRCP 4(k)(2) as a federal long-arm statute).

7. "[A]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such a action or proceeding, regardless of the amount in controversy." 9 U.S.C. section 203.

8. As noted by the Glencore Court, at page 1120, in Scherk v. Alberto-Culver Co., 417 U.S. 506, 520, fn. 15, 94 S. Ct. 2449 (1974), the Supreme Court explained the pro-enforcement policy of the Convention as follows: "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

9. Article V, section 1 of the 1958 New York Convention provides recognition and enforcement of the award may be refused only if it is shown that (1) a party to the arbitration agreement was under some incapacity, or the agreement is not valid under the law governing the agreement or the law where arbitration award was made, (2) the objecting party was not given proper notice of the arbitration proceedings, or was otherwise unable to present a case, (3) the arbitration award deals with matters outside the submitted scope of the arbitration proceeding, (4) the arbitration proceeding was not in accordance with the agreement of the parties, or (5) the arbitration award has not yet become binding or has been set aside. Article V, section 2, further provides that recognition and enforcement may be refused if it is found that (1) the subject matter of the underlying dispute is not subject to arbitration under the law of the country where enforcement is sought, or (2) recognition and enforcement of the arbitration award is contrary to the public policy of the country where enforcement is sought.

10. See China National Metal Products Import/Export Company, 379 F. 3d 796, 799 (9th Cir. 2004); Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., 969 F. 2d 764, 770 (9th Cir. 1992).

11. While noting the paucity of authority directly on point with respect to seemingly "unexceptional" issue, the Glencore Court nevertheless cited several pertinent authorities as lending support for its holding. See Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A., 622 F. Supp. 25 (S.D.N.Y. 1985) (addressing issue of personal jurisdiction in action brought by Liberian plaintiff to confirm an English arbitration award against a Saudi Arabian defendant, the district court concluded that the FAA did not "give the court power over all persons throughout the world who have entered into an arbitration agreement covered by the Convention. Some basis must be shown, whether arising from the respondent's residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court's power."); Dardana Ltd. v. Yuganskneftegaz, 2001 U.S. Dist. LEXIS 16078 (S.D.N.Y. 2001) (adopting holding of Bulk Shipping court); Italtrade Int'l USA, L.L.C. v. Sri Lanka Cement Corp., 2002

U.S. Dist. LEXIS 1322 (E.D. La. 2002) (same); see also Restatement (Third) of Foreign Relations Law section 487, Comment c (1987) ("An arbitral award is ordinarily enforced by confirmation in a judgment . . . . As in respect to judgments . . . an action to enforce a foreign arbitral award requires jurisdiction over the award debtor or his property."); CME Media Enters. B.V. v. Zelezny, 2001 U.S. Dist. LEXIS 13888 (S.D.N.Y. 2001) (court held it could exercise *quasi in rem* jurisdiction over debtor's property and therefore had jurisdiction to a foreign arbitration award); see, generally, Seetransport Wiking Trader v. Navimpex Centrala Navala, 989 F. 2d 572, 580 (2d Cir. 1993) (requiring personal jurisdiction in suit under Convention to confirm arbitration award against foreign sovereign).

Extending Arbitration Provisions Beyond the Four Corners of an Agreement

1. Cal. Civ. Proc. Code §1641.

2. Although the 9th Circuit and Televisa case ultimately determined it lacked jurisdiction over the appeal, its original publication is instructive regarding this area of law. Televisa S.A. De C.V. v. DTVLA WC Inc. (2004) 374 F.3d 1384.

3. Republic Niqueraqua v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991).

4. United Steel Workers v. Warrior and Gulf Navigation Co. 363 U.S. 574, 583; French v. Merrill Lynch 784 F.2d 902, 908 (9th Cir. 1986).

5. Georgia Power Co. v. Cimarron Cole Co., 526 F.2d 101, 106 (6th Cir. 1975).

The Enforceability of Arbitration Clauses in Class Action Lawsuits

1. California Code of Civil Procedure section 1281.5.

2. See Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1319-1323; Konig v. U-Haul Co. of California, (2006) 145 Cal. App. 4th 1243, 1251.

3. Cohen v. DirectTV, Inc. (2006) 142 Cal. App. 4th 1442, 1450-1451.

4. Konig v. U-Haul Co. of California, (2006) 145 Cal. App. 4th 1243, 1251.

5. Aral v. Earthlink, Inc., (2005) 134 Cal. App. 4th 544, 555.

6. Klussman v. Cross Country Bank, (2005) 134 Cal. App. 4th 1283, 1294.

7. Ibid.

8. Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 161.

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9. California Civil Code section 1668.

10. Cruz v. PacifiCare Health Systems, Inc., (2003) 30 Cal. 4th 303, 307.

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