

**UTAH STATE BAR
2011 SUMMER CONVENTION
San Diego, California**

DISPELLING ARBITRATION MYTHS

**July 8, 2011
Session 3 (K)
10:00-11:00am**

**Carl F. Ingwalson, Jr.
San Diego, CA**

Carl F. Ingwalson, Jr.

Carl Ingwalson is a San Diego attorney, arbitrator and mediator with approximately 1,050 cases mediated and 550 cases arbitrated both privately and as a panelist of the American Arbitration Association and the San Diego Superior Court. With a B.A. degree from Miami University and J. D. from the University of Michigan School of law, his legal practice has been concentrated on commercial and construction legal matters, mediation, arbitration and dispute prevention.

He is a fellow of the College of Commercial Arbitrators, a fellow of the American College of Construction Lawyers, and a diplomat of the California Academy of Distinguished Neutrals and the National Academy of Distinguished Neutrals. He served three terms on the Board of Directors of the California Dispute Resolution Council, chaired the ADR Section of the San Diego County Bar Association for three years, and served fifteen years on the ADR Bench/Bar Committee of the San Diego Superior Court.

He is a member of the American Arbitration Association's commercial and construction arbitration and mediation panels, its large complex case panel, its fast track and expedited panels, and its Construction Arbitration Master Panel. Since 1996 he has served on its National Construction Dispute Resolution Council, an organization composed of representatives from various industry organizations that, among other things, proposes and considers changes to the Association's arbitration rules. He has received extensive arbitration and mediation training and, as a faculty member of the AAA University, has conducted trainings for Arbitrators and Mediators throughout the country.

Carl has also written and lectured on numerous legal and dispute resolution topics in California and elsewhere, most recently regarding non-signatory issues in arbitration. This year he is presenting his seventeenth annual "ADR Update" program to panelists of the American Arbitration Association, Southern California bar associations and private law firms. The program reviews all California and 9th Circuit appellate and supreme court opinions rendered in the prior year as well as opinions from the United States Supreme Court and selected cases from other jurisdictions. Other writings include *Arbitration and Non-Signatories: Bound or Not Bound?* (to be published in the Journal of the American College of Construction Lawyers), co-author, *Arbitration and the Unauthorized Practice of Law*, ABA Forum's The Construction Lawyer (Winter 2007); author, *Alternative Dispute Resolution*, California Litigation Review, Litigation Section, State Bar of California (2008); co-author, *Pass Through Claims and Liquidation Agreements*, ABA Forum's The Construction Lawyer (10/98); consultant, *Attorneys' Guide to California Construction Contracts and Disputes* (CEB, 2d edition, 1990); consultant, *Attorney's Guide to California Construction Contracts and Disputes* (CEB, 1976).

Carl is married to Wilma, a native of Largs, Scotland. They enjoy U.S. and European travel and a wide variety of local activities. Carl also conducts in-depth Civil War and genealogical research.

DISPELLING ARBITRATION MYTHS

MYTH #1: Arbitrators Split The Baby

With no empirical data and merely anecdotal “evidence,” many are averse to arbitration because Arbitrators, they say, “split the baby.” While acknowledging that some courts have been accused of doing the same and that neither result is appealable on that suspected ground, they advise against arbitration but not against litigation.

Many articles indicate it is nothing more than a “myth”¹ and there are numerous studies conducted over a period of many years supporting this contention. The author is aware of no studies supporting the myth.

In 1992 the American Arbitration Association (AAA) completed a review of 4,223 commercial arbitrations. In only 10% of the cases was the award roughly midway (40-60%) between the parties’ positions and there was nothing to indicate those awards were not on the merits. In 25% of the cases, the Arbitrator awarded at least 80% of the Claimant’s claims. In 33% of the cases, the claim was totally rejected.²

Researchers at the Global Center for Dispute Resolution Research reviewed AAA international awards issued during the years 1995-2000. It showed that “the majority were outright wins or losses.” After reviewing and analyzing all the awards, the researchers were able to infer “that arbitrators ‘as a rule, make decisive awards and do not split the baby.’”³

An AAA internal review of large construction industry cases indicated that only 13% of 656 matters involving claims of more than \$500,000 in 2000-2004 resulted in awards in the mid range (41-60%) of the amounts claimed.⁴

In another report, according to a survey of “all commercial awards” issued in 2000, only 9% (394 of 4,479) of claims and only 4.94% (56 of 1,254) of counterclaims resulted in mid-range (40-60%) awards

The AAA conducted another study focusing on international awards.⁵ In an address to the Swiss Arbitration Association in Geneva in January, 2007, William K. Slate II, AAA president and CEO, delivered the results of the study. According to Mr. Slate, the research was done on commercial arbitration cases administered by the International Centre for Dispute Resolution that went to award in 2005. The files of those 111 cases were reviewed for final claim, counterclaim and award information and the monetary value of each award was then measured against the claim and counterclaim amounts. The comparisons were charted and analyzed to reveal trends in the awards. Only 7% (8 awards) were in the midrange (41-60%) of their filed claim amount. Of the balance, 19% (21 awards) were totally denied, 19% (21 awards) were in the range from 0 to 40% of the claimed amounts and the remaining 55% (61 awards) were in excess of 60% of the amounts claimed (with the majority of those exceeding

1

See, for example, Solange E. Ritchie, *Arbitration Myth Busting: What Every Attorney And Client Needs to Know* (Plaintiff Magazine, (2007); Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not ‘Split the Baby’: Empirical Evidence from International Business Arbitration* (18 J. Int’l Arb., 573-578, 10/2008); Chris Phillips and Joe de la Fuente, *Arbitration’s Lucky Charms: How to Spot Red Flags, Green Lights, and Proceed Like a Blue Streak* (Lloyd, Gosselink, Blevins, Rochelle & Townsend, P.C., Austin, TX).

2

J. Kirkland Grant, *Securities Arbitration for Brokers, Attorneys and Investors* (1994). Also see Wall Street J. B:2 (09/27/93).

3

Richard Fullerton, *Searching for Balance in Conflict Management: The Contractor’s Perspective*. AAA, Disp. Resol. J. (02-04/2005).

4

www.ADR.Org/sp.asp?id=28701.

5

Splitting the Baby: A New AAA Study. www.ADR.Org.Com.

80% of the claim).⁶

MYTH #2: Repeat Player Effect.

Another popular myth relates to the alleged “repeat player effect” - the more often certain parties or attorneys participate in arbitration, the more familiar they become with the process and the more often they will realize favorable results. The “effect” is heightened, or so the theory goes, if the party, or its attorney, utilize the services of the same provider or Arbitrator in as many cases as possible. The same, of course, has been said of litigation. The more trials an attorney conducts, the more familiar the attorney is with the process. The more a party appears for depositions and testifies in court, the more acquainted the party becomes with the process, the proper demeanor during testimony, the need to preserve beneficial evidence and other factors that can affect the outcome of a trial. And how often have attorneys experiencing unfavorable litigation results in new jurisdictions claimed, “I got home-towned” by a local judge and a “repeat player” local attorney who knew the judge?

Repeat players in arbitration are often employers, public entities and large interstate or global business entities. Especially in the employment context, the repeat player myth has been a favorite topic but, “without more information about the merits of the individual cases surveyed,” purported evidence of such an effect has been unpersuasive. Similar to litigation, the more experienced the parties and attorneys, the better comparative results they’re likely to achieve. Repeat players, says author Lisa Bingham, “have frequent recourse to the courts or institutional facilities, while one-shotters will have few such occasions.” As a result, repeat players, whether in arbitration or litigation, will generally have several advantages over one-shotters.⁷

Subsequent to the study discussed by Bingham, “the AAA and others signed *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, a protocol approved by the American Bar Association. The protocol addresses how the dispute resolution process is structured and, to that extent, “seeks to counterbalance the advantage the repeat player employer enjoys in structuring the employment relationship.”⁸ I know of no similar protocols seeking to “counterbalance” the repeat player effect in litigation.

Additionally, the AAA adopted *Employment Arbitration Rules and Mediation Procedures* specially designed to address the unique aspects of employment disputes.⁹ Among other things, the rules mandate that Arbitrators disclose “all information that might be relevant to the standards of neutrality . . . including but not limited to service as a neutral in any past or pending case involving any of the parties.” Collectively, these protocols, rules and procedures “permit employees to identify when a particular employer is making repeat use of an arbitrator, and might alter the likelihood that the arbitrator would receive repeat appointments.” Bingham cautions that “numerous other providers are competing in the dispute resolution marketplace” and “these providers may not have the same

6

www.ADR.Org/sp.asp?id=32004.

7

Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*. Employee Rights and Employment Policy Journal, Volume 1, pages 194-195 (1997). Also see, Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*. 29 McGeorge Law Review (Winter 1998).

8

Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*. Employee Rights and Employment Policy Journal, Volume 1, page 214 (1997). The Protocols may be downloaded from the AAA website (www.ADR.Org). Also see, *ABA Adopts Due Process Protocol*. AAA, Disp. Resol. Times (Summer 1997).

9

Employment Arbitration Rules and Mediation Procedures (amended and effective November 1, 2009). The rules may be downloaded from the AAA website (www.ADR.Org).

institutional capacity or procedural protections.”¹⁰

The AAA also does not provide prior case information to its neutrals. A prospective Arbitrator is provided with the identity of parties and counsel in the pending matter, but is not told if any of those parties or attorneys have previously used the AAA to administer disputes. From the Arbitrator’s perspective, a new matter could be the first case or the thousandth case the AAA has administered for one or more of the parties or counsel.

In California, the combination of disclosure statutes and ethics standards mandate even more disclosures by potential Arbitrators.¹¹ Among other things, if an Arbitrator is serving, or within the preceding five years has served, in another prior or pending non-collective bargaining case involving a party to the current arbitration or a lawyer for a party and if that service was as (1) a neutral Arbitrator, (2), a party-appointed Arbitrator or (3) a neutral Arbitrator selected by a party-appointed Arbitrator in the current proceeding, the Arbitrator must disclose the names of the parties in each prior or pending case and, where applicable, the name of the attorney representing the party in the current arbitration who is involved in the pending case, who was involved in the prior case, or whose current associate is involved in the pending case or was involved in the prior case. The Arbitrator must also disclose the results of each prior case arbitrated to conclusion including (1) the date of the award, (2) the identity of the prevailing party, (3) the amount of monetary damages awarded, if any, and (4) the names of the parties’ attorneys. If the total number of cases disclosed is more than five, the Arbitrator must include a summary that states (1) the number of pending cases in which the Arbitrator is currently serving in each capacity; (2) the number of prior cases in which the Arbitrator previously served in each capacity; (3) the number of prior cases arbitrated to conclusion, and (4) the number of such prior cases in which the party to the current arbitration, the party represented by the lawyer for a party in the current arbitration or the party represented by the party-arbitrator in the current arbitration was the prevailing party.

While these California requirements are not applicable in other jurisdictions, there is nothing wrong with parties and counsel asking potential Arbitrators for the same information, either through the AAA’s Case Manager or in an interview arranged by the Case Manager.¹² Even where not required, some Arbitrators use the California requirements as guidelines when making their disclosures.

The “repeat player” argument was considered in a 2003 construction case.¹³ The appellate court referenced a statute that provides “unless otherwise agreed by the parties, the arbitration shall be conducted by a single arbitrator elected by the parties from the certified list created by the Public Works Contract Arbitration Committee. If the parties cannot agree on the arbitrator, either party may petition the superior court to appoint one from the panel of arbitrators certified by the Public Works Arbitration Committee.” The contractor argued the only Arbitrators on the list were those who indicated they would favor the state and, if they didn’t, they would never be acceptable to the state. “Unfortunately” said the court, “this position is supported by nothing more than hyperbolic language and, no doubt, the fervent conviction” of the contractor.

10

Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*. Employee Rights and Employment Policy Journal, Volume 1, page 215 (1997).

11

Code of Civil Procedure §170.1, §1281.9 and §1281.95. *Ethics Standards for Neutral Arbitrators* adopted by the state Judicial Council.

12

When is the last time you were allowed to interview a trial judge who was designated to hear your case? And then get a different judge if you didn’t like the answers?

13

Brutoco v. Superior Court, 107 Cal. App 4th 1326 (2003); review denied.

A similar argument was presented in a case involving the California Department of Transportation.¹⁴ The state's contract act required arbitration of construction disputes. When they couldn't agree on an Arbitrator, the contractor argued the procedure established under the act was unconstitutional since Arbitrators on the state panel would have a financial incentive to favor Caltrans, thus giving rise to a "repeat player effect." Caltrans' demurrer was sustained and affirmed on appeal. Referencing the disclosure requirements applicable to Arbitrators, including the state's Ethics Standards applicable to panel Arbitrators and which would require potential Arbitrators to disclose prior Caltrans matters, the court felt protections against such an effect were more than adequate.

The issue has also been raised in the employment context.¹⁵ A contract required that disputes be "submitted to and resolved exclusively by a panel of arbitrators from the NASD Dispute Resolution, Inc., or the New York Stock Exchange, Inc." Another agreement provided for arbitration "under the rules, constitutions, or bylaws" of these Self Regulatory Organizations (SROs). An employee said the agreements were unconscionable and among other things argued there was no neutral selection of Arbitrators but, instead, mandatory NASD or NYSE arbitration. The appellate court disagreed. NASD/NYSE or not, there was no evidence of a repeat player effect. The employee could participate in the selection process, potential Arbitrators had to make personal and financial disclosures, the history of each Arbitrator was available, each party had a peremptory challenge and an unlimited number of challenges for cause, and Arbitrators were bound by ethics standards.

- Those who remain concerned about split babies and repeat players often request "reasoned awards" as a means of forcing the Arbitrator to explain, in writing, the basis for the award. Most good Arbitrators will have done the reasoning in reaching their conclusions, but putting that reasoning in the form of an award can take more time so counsel should be aware of the additional cost their clients may incur and consider whether the information will benefit the client or merely be informational.

MYTH #3: Arbitration Costs as Much as Litigation.
&
MYTH #4: Arbitration Takes As Long As Litigation

Arbitration can, but should not, cost as much and take as long as litigation.¹⁶ When properly conducted by parties, counsel, providers and Arbitrators, it is, in fact, less expensive and more expeditious than litigation.

Litigation has long been the subject of much criticism and humor - too expensive, too time-consuming, too rigid. The system is adversarial as opposed to inquisitorial. "What this means," said one writer, "is that lawyer A tries to outwit lawyer B and the court decides on the winner by adding up points for technical merit and artistic

14

Coffman Specialties Inc. v. Dept of Transportation, 176 Cal. App. 4th 1135 (2009); review and depublication requests denied.

15

McManus v CIBC, 109 Cal. App. 4th 76 (2003); review denied (08/13/03).

16

House counsel for one company reported that a study of 9 disputes arbitrated and 10 litigated by his company reflected that arbitrations took 21 months and litigation took only 17 months. Dhyana Levey, *Mandatory Arbitration Faces Criticism*. Los Angeles Daily Journal (04/09/10). While I have no reason to doubt the numbers, I note that they relate to just one company and an extremely small case sample. As a result, they could be more indicative of how that company handles its disputes rather than to arbitration and litigation in general. My own review of 160 litigated employment cases reported during the past ten years in the same Los Angeles Daily Journal, and involving many different parties, different counsel and different courts, indicates that the average time from filing to verdict has been 26.6 months, significantly longer than house counsel's 17 months for his company. Some of the 160 still had trial court motions pending and all were subject to appeal and possible retrials.

impression.”¹⁷ The same writer explained, “the law of precedent is created by one court reckoning it is brighter than another court and setting a precedent that the lower court has to follow.”¹⁸ Ambrose Bierce said litigation is “a machine which you go into as a pig and come out of as a sausage.”¹⁹

Similar negativism has come from the courts themselves. “Litigation is almost always distressing for litigants. Learned Hand is reputed to have said that ‘as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death.’”²⁰ “Litigation,” said another court, “is frequently stressful and disagreeable, even when one is a plaintiff....Distaste for litigation is a normal event.”²¹ When a subcontractor complained that litigation to recover funds from a public agency “may last several years,” a unanimous United States Supreme Court acknowledged that “lawsuits are not known for expeditiously resolving claims.”²²

“Litigation has proven to be too costly and too time consuming to be used to resolve typical conflicts and issues in the construction industry.”²³ “[C]ourt backlogs are at least partially the product of litigating ridiculous catfights.”²⁴ “The entire legal profession - lawyers, judges, law professors - has become so mesmerized with the stimulation of the courtroom that we tend to forget that we ought to be healers of conflict. For many claims, trials by adversarial contests must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.”²⁵ The country has “designed a spectacular system for adjudicating disputes but it is too expensive to use.”²⁶

William Beringer, formerly general counsel to Siemens Energy & Automation, once explained, “we typically sought experienced trial lawyers with excellent track records who could be counted on to mount an aggressive case on the company’s behalf. Almost always, at the outset, our trial lawyers would assure us that we had a good case deserving of forceful and expensive lawyering. This was comforting advice, since had our outside counsel said otherwise, we might have questioned our judgment in retaining them. During the early years of the case, counsel usually would continue to tell us that our case was sound and worth fighting and that discovery and motions should continue. But too often, after two or three years of investing in litigation, they would advise us to settle. This was

17

Vernon, *Bluff Your Way in Law*, page 7 (Ravette Publishing 1996).

18

Id.

19

Ambrose Bierce, *The Cynic’s Word Book* (1906), retitled as the *Devil’s Dictionary* (1911).

20

Merenda v Superior Court, 3 Cal. App .4th 1, 11 (1992).

21

Pleasant v Celli, 18 Cal. App. 4th 841, 853 (1993).

22

Lujan v G & G Fire Sprinklers, 532 U.S. 189 (2001).

23

David T. Armstrong, *Controlling the Destiny of a Project*. ABA Forum on the Construction Industry, The Construction Lawyer (06/00)

24

Friedman v Stadum, 171 Cal. App. 3d 775,778, 781 (1985).

25

Chief Justice Warren E. Burger, *State of the Judiciary Address*. ABA Journal (1984).

26

Samuel R. Gross and Kent D. Syverud, University of Michigan Law Professors, *Don’t Try Civil Jury Verdicts in a System Geared to Settlement*, Los Angeles Daily Journal (05/06/99).

very frustrating to us.”²⁷

Arbitration, on the other hand, “is designed primarily to avoid the complex, time-consuming and costly alternative of litigation.”²⁸ When parties agree to resolve disputes through arbitration a “restrictive standard of review is necessary to preserve these benefits and to prevent arbitration from becoming a ‘preliminary step to judicial resolution.’”²⁹ When arbitration clauses are properly drafted, when cases are properly administered by an experienced provider, when time-tested rules are utilized, when experienced well-qualified Arbitrators are selected, when retained counsel are experienced with the process, and when parties remain involved in objective decision-making, there is no doubt arbitration is more expeditious and cost effective than litigation.

“The strict procedural requirements that govern litigation in federal courts do not apply to arbitration. Arbitration offers flexibility, an expeditious result, and is relatively inexpensive when compared to litigation.”³⁰ “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.”³¹ A study of medical issues concluded “that arbitration affords consumers the same damages as in trial, is faster and less expensive.”³² There is a “strong public policy favoring arbitration as a speedy and relatively inexpensive method of dispute resolution.”³³ “Because it is often cheaper and quicker alternative to going to court, government agencies use arbitration to resolve disputes with their employees.”³⁴ “California has a long-established and well-settled policy favoring arbitration as a speedy and inexpensive means of settling disputes.”³⁵ California’s Department of Transportation uses it to resolve construction disputes. Labor unions bargain for it on behalf employees. “Utah’s public policy favors arbitration.”³⁶

“In hindsight,” said one court, “it may become apparent that the actual costs of arbitration, with its faster, simpler, and more economical procedures, were less than the probable expenses of resolving the same claim in

27

William Beringer, *Converting to ADR*. AAA, Currents (12/98).

28

Hoffman v. Cargill, Inc., 236 F.3d 458, 461 (8th Cir. 2001)], 236 F.3d at 462

29

Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994).

30

Schoendube Corporation v Lucent, 422 F.3d 727 (9th Cir. 2006), referencing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S.Ct. 1647 (1991).

31

Lifescan v Premier, 363 F.3d 1010 (9th Cir. 2004).

32

Ken Zuetel, *Arbitration in Health Care Helps Patients, Taxpayers*. Los Angeles Daily Journal (02/16/01). California Association of Health Plans study titled ‘*Settling Disputes Through Arbitration: A Superior Alternative to Court*’ (February 2000).

33

Aguilar v. Lerner, 32 Cal. 4th 974, 983 (2004)(concurring opinion), referencing *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 9 (1992).

34

San Diego Union-Tribune (02/15/01)

35

Hightower v Superior Court, 86 Cal. App. 4th 1415 (2001), referencing *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal. 3d 312, 322 (1983). Similarly see *Slaughter v Bencomo Roofing*, 25 Cal. App. 4th 744 (1994) citing *Boys Club of San Fernando Valley, Inc. v Fidelity & Deposit Co.*, 6 Cal. App. 1266, 1271-1272 (1992).

36

Kent B. Scott & James B. Belshe, *Utah’s Revised Uniform Arbitration Act: A Makeover for the Face of Arbitration*. Utah State Bar Journal (December 2003).

court.”³⁷ “In permitting and indeed encouraging arbitration of disputes, the legislature sought to facilitate and promote a quicker, more cost effective, less cumbersome, yet binding means of dispute resolution.”³⁸ “[L]itigants come to arbitration for economic reasons looking for speed and savings in cost.”³⁹ “Businesses choose arbitration for the same reasons they make business decisions - because they believe that, on balance, arbitration maximizes benefits and minimizes risks and costs.”⁴⁰ The purpose of the California Arbitration Act “is to promote contractual arbitration . . . as a more expeditious and less expensive means of resolving disputes than by litigation in court.”⁴¹

Drafting. Proper drafting is not for the faint of heart. As Mark Twain said, “the difference between the right word and the almost right word is the difference between lightning and the lightning bug.”

Drafters often give too little thought to drafting (merely “cutting and pasting” an arbitration something-or-other from one form to another) or give too much thought to drafting (devising unworkable, unintelligible, ambiguous multi-page monstrosities that try to micro-manage the entire process). Too often they omit necessary fail safe clauses. Too often they provide for unending “litigation style” discovery. Too often they impose well-intentioned but ambiguous and unworkable terms and conditions.⁴² As one court said:

“A cautionary note - we spend too much time trying to make sense out of arbitration agreements precisely because litigants spend too little time in drafting them. Increasingly, we have been presented with incoherent hybrids and bizarre mutations of supposed agreements for judicial or contractual arbitration. Oftentimes the ‘remedy’ is worse than the disease. We can only warn: Read the label before applying.”

When articles are written, they usually contain a laundry list of twenty or thirty issues “drafters should consider.” Except for the truly gifted, my personal recommendation is to keep it simple. Specify administration by a good provider, incorporate established provider rules and select an experienced Arbitrator. The rest will take care of itself without expensive protracted battles over a dysfunctional arbitration provision. For discussion purposes, the following are clauses, some standard and some not, that are worth considering; whether to use them is up to the reader.

1. **Mediation.** If a dispute arises out of or relates to this contract, or the breach thereof, whether in contract, tort or otherwise, the parties shall first try in good faith to resolve the dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association, before resorting to arbitration.
2. **Arbitration.** Thereafter, any remaining unresolved dispute, that arises out of or relates to this contract,

37

Little v Auto Stiegler, 29 Cal. 4th 1064, 1088 (2003)

38

T.R. Mills Contractors, Inc. v. WRH Enterprises, LLC, 93 S.W. 3d 861 (Tenn. Ct. App. 2002).

39

Charles A. Legge, former U.S. District Judge, in the Los Angeles Daily Journal (04/24/01).

40

Justice Kennard (dissent), *Advanced Micro v Intel*, 9 Cal. 4th 362, 391 (1994), expressing her belief that the majority decision upholding an award would “make businesses think twice about whether they should agree to resolve disputes by arbitration.”

41

Hightower v Superior Court, 86 Cal. App. 4th 1415 (2001) citing *Mercury v Superior Court*, 19 Cal. 4th 332, 342 (1998).

42

National Union v Nationwide Insurance, 69 Cal. App. 4th 709, 716 (01/28/99).

or the breach thereof, whether in contract, tort or otherwise, including issues relating to arbitrability,⁴³ shall be resolved by binding⁴⁴ arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, pursuant to the Federal Arbitration Act, and judgment on any award rendered by the Arbitrator(s) shall be final and non-appealable⁴⁵ and shall be entered in any court having jurisdiction thereof.⁴⁶ Copies of the Association's rules may be viewed on its website at www.ADR.Org.

3. **Venue.** Any such mediation or arbitration shall be at San Diego, California, provided, however, that the Arbitrator, in the Arbitrator's sole discretion, may conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.⁴⁷
4. **Court Fees.** If a court grants a motion to compel arbitration over the objection of any party, that court is authorized to make an interim award of attorney fees relating to the motion.⁴⁸ Thereafter, any fees relating to the arbitration proceeding shall be an issue for decision by the Arbitrator.
5. **Arbitration Fees.** 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.

Provider. Some will argue there's no need for an intermediary provider organization - an *ad hoc* proceeding with the Arbitrator handling everything works just as well. I disagree. I've handled numerous arbitrations on an

43

Reviewing numerous cases, one author concludes, "Parties wishing to give an arbitrator the power to resolve the threshold question of arbitrability should include unambiguous language to that end within the arbitration provision, which may include referring to the rules of an arbitration provider (like the AAA) that grants its arbitrators with such power." Brian T. Hafter, *ADR Claim Jumpers*. Los Angeles Daily Journal (01/24/07). Also see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

44

Many, whose prior experience, if any, with arbitration may have been in non-binding judicial arbitration or non-binding arbitration pursuant to California's Mandatory Fee Arbitration Act or other statutes, may not realize arbitration pursuant to private contracts is binding. Absent clarification, some courts have viewed this "ambiguity" as a factor to be considered when deciding whether to enforce an arbitration provision and a Texas case made it to the state's supreme court before the issue was decided.

45

And consider *Mactec, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005)

46

A federal appeals court ruled it is not necessary for an arbitration clause to expressly state "a judgment of the court shall be entered upon the award," language from FAA §9, for an award to be enforceable under the FAA. See *Qorvis Communications, LLC v. Christopher Wilson*, 549 F.3d 303 (4th Cir. 2008) that noted comments in *Hall Street* to the effect that §9 did not have to be satisfied by any magic language. Rather, courts must enforce arbitration awards "so long as the parties expected judicial enforcement of their agreement." Justin Kelly, Appeals Court Says FAA Wording Not Needed for Award Enforcement. ADR World (12/09/08). I consider it better practice to include the language since other circuits might rule differently and since it makes it less likely a party could successfully argue it didn't know awards were binding and enforceable.

47

This is intended to help address third-party document discovery under the FAA. While the law is in flux, I believe the 2nd and 3rd Circuits currently do not authorize such discovery while the 4th and 8th Circuits do authorize such discovery. In *Amgen v. Kidney Center*, 879 F. Supp. 878 (1995) a court enforced a subpoena issued by a party's attorney in the District where the third party was located, a location other than where the arbitration was being held.

48

See discussion in *Acosta v. Kerrigan*, 150 Cal. App. 4th 1124 (2007).

ad hoc basis when contracts did not mention a provider and have seen the benefits providers bring to the process. They can answer many questions and handle many issues between the parties, schedule hearings, facilitate telephone conferences and an exchange of pleadings, motions and other documents, and handle a myriad of problems at no charge (things an *ad hoc* Arbitrator is likely to bill for) and without risking a claim that one party or the other had an improper communication with the Arbitrator and thereby created possible grounds for vacatur.

Some are concerned, and should be concerned, about provider fees, but they should consider the benefits received. All providers have overhead costs for rent, salaries and other expenses that must be covered and, one way or another, they collect those costs from users of the process. Users of arbitration should consider not only (1) the provider's administrative fees, but also (2) the hourly cost of the provider's neutrals, (3) the provider's *Billing Guidelines* (available on request) for its neutrals, and (4) the provider's and its neutrals' policies and fees if a hearing is cancelled.⁴⁹ For some, the initial fee is high while other fees are low; for others the in-the-door initial filing fee is low but subsequent fees are higher. Counsel and parties should consider all fees, not just some of them.

Those who charge the higher initial fee and lower subsequent fees provide one other benefit to parties - higher initial fees tend to discourage frivolous claims. Totally specious claims can be made in litigation, and with some *ad hoc* Arbitrators or providers, by paying only a nominal filing fee, but a party will have to "pay to play" if it wants to make those same claims in an arbitral forum where the filing fees are based on the claim amount. Minimizing such claims also minimizes discovery costs, expert costs, attorney fees and other expenses and results in a significant cost benefit to parties. Parties don't have to pay to defend the absurd.

Rules. Most, if not all, major providers have established rules that are available on-line. These rules have evolved over many years and are the result of much thought and input from people familiar with the process. They handle a plethora of potential problems. Incorporating such rules in a contract, and providing for administration by the provider who disseminated those rules, rather than trying to micro-manage the process by writing custom provisions in a contract, will save the parties significant time and expense.

Arbitrators. One benefit of arbitration is the ability to select the neutrals. Too much time - and time means money for the parties - is wasted in court trying to explain words of art or industry concepts or expert opinions to judges or juries not familiar with the subject matter at hand. In Arbitration, parties can read Arbitrator resumes, they can specify desired qualities (eg. not just construction but "plumbing;" not just intellectual property but "web hosting"),⁵⁰ they can read how much training an Arbitrator has received and programs the Arbitrator has attended, they can see how much training an Arbitrator has conducted and how many programs the Arbitrator has presented, and they can view organizational memberships (eg. bar association ADR sections, the College of Commercial Arbitrators, and current and former organizations bearing on the subject matter such as employment, construction, patents, etc). As indicated above, when circumstances justify or questions exist, Case Managers can even arrange for parties or counsel to directly interview Arbitrators.⁵¹

Experienced Arbitrators are also well versed in writing sustainable awards, knowing what issues are for Arbitrators and what issues are for courts, knowing what motions and discovery might benefit the process and which might cause nothing but added expense for the parties, what stipulations can expedite the process, what issues

49

This is an important consideration since most arbitrations are settled and result in cancellation of the evidentiary hearings. For some, the entire estimated fee for the balance of the case will still be charged; for others, policies of providers and Arbitrators will significantly restrict any such charges.

50

In a California construction arbitration, parties requested an Arbitrator who was familiar with construction and could conduct the hearing in Farsi; they selected an AAA panelist from Atlanta who could so. In a San Francisco case, parties wanted an arbitrator with experience in oil shale; they selected an AAA panelist from Colorado who had desired experience.

51

I've been interviewed by counsel three times - once regarding my experience with mold issues, once regarding my attitude towards discovery in arbitration and once regarding whether I try to follow the law when writing awards (I do).

should be covered in preliminary hearings,⁵² how to minimize parties' costs and expedite the arbitration to give them what they bargained for when they chose arbitration to resolve their dispute, what orders will benefit the process and which may cause problems, the importance of early identification of potential witnesses, the effectiveness of using tandem experts, what potential conflicts must be disclosed, and other issues.

There is also a large body of "arbitration law" applicable to the process. About ten years ago several construction advocates decided it made sense to select other construction lawyers to arbitrate their cases, rather than going through an arbitration provider. It took little time before they realized the people they were selecting as neutrals were, although well versed in construction law, were not well versed in arbitration law and that led to problems. The attorney who related the story to me not only went back to using a provider, but became a construction panelist with the AAA. My own database of arbitration cases runs hundreds of pages and includes every California and 9th Circuit case, as well as many from other jurisdictions, decided in the past seventeen years, and many from long prior to that.

We learned many years ago from representatives of four major construction organizations (AIA, AGC, ASA and EGCA) that their members' biggest complaint with the duration of arbitrations related to frequent continuances. As indicated on the attached agenda, there are techniques available to minimize continuances just as there are numerous ways to receive evidence. Experienced Arbitrators are familiar with these techniques and others that help parties achieve the process they expected.

Advocates. It is a pleasure to work with counsel who are familiar with the process and know how to work together among themselves and with the Arbitrator to assure an efficient, cost-effective, arbitration.

Litigation and arbitration are different processes bound by different statutes, different rules and different legal precedents. Counsel should accept an advocacy role only if they fully understand the client's goals and the applicable arbitration rules and procedures and legal authority in the involved jurisdiction.

One of the key benefits of arbitration is the ability to select the trier-of-fact. As indicated above, counsel should be diligent in selecting Arbitrators whose resumes reflect significant training and involvement in arbitration activities, Arbitrators with subject matter expertise, and Arbitrators with a demonstrated record of completed arbitrations.

Advocates will also greatly assist their clients by cooperating with each other to minimize procedural disputes, reach realistic stipulations, schedule witnesses, exchange documents and achieve a fair and expeditious process.

Parties. Users of arbitration should, with the assistance of counsel experienced with the process, draft clear and unambiguous arbitration provisions, incorporating rules of a recognized provider and not trying to micromanage the process. Incorporating deadlines for completing the arbitration can be beneficial, but must be realistic.⁵³

It's highly recommended that parties stay actively involved throughout the arbitration, communicating with counsel, participating in preliminary hearings and conference calls rather than letting advocates agree and the Arbitrator order what may prove to be unworkable and unchangeable orders, participating in the Arbitrator selection, helping to control motion and discovery practice, considering a realistic and beneficial form for an award, and being attuned to settlement possibilities.

52

A sample agenda is attached. It is then customized for each case before being forwarded to counsel prior to the hearing so they and the parties can be prepared and not require three or four conference calls to resolve something that could be handled in one.

53

In one of my matters, the contract said the award had to be issued no later than thirty days after filing of the demand initiating the arbitration. Drafters were apparently unaware that applicable rules gave the Respondent fifteen days from service of the demand to file an answering statement. Time would then be needed to select an Arbitrator and for the Arbitrator to make required conflict disclosures after which parties had a statutory fifteen days to object to the Arbitrator based on the disclosures. A timely award was rendered on the last day, but parties still had time to object to the Arbitrator's appointment.

PROTOCOLS
for
EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION

Arbitration has existed for hundreds of years as an effective alternative to litigation as a means of resolving disputes. In recent years, however, too many parties and counsel, through contracts or during the process, have increasingly been attempting to transform the process into something more akin to litigation and greatly increasing costs to the parties by engaging in expensive, and frequently unnecessary, discovery, filing inappropriate or unnecessary motions, and seeking numerous continuances. As a result, it may not be the expeditious process, and it may not be the comparatively inexpensive process, that existed previously.

Recognizing this, many users of arbitration (usually represented by sophisticated house counsel) together with Arbitrators, arbitration providers and advocates representing users of arbitration, convened in a National Summit in Washington D.C. in 2009 under the auspices of the College of Commercial Arbitrators. The College was established in 2001 and I was admitted as a Fellow in 2005. The Summit was sponsored by

- The American Bar Association
- The American Arbitration Association
- JAMS
- The International Institute for Conflict Prevention and Resolution
- The Chartered Institute of Arbitration
- The Straus Institute for Dispute Resolution at Pepperdine University School of Law, and
- Seventy-two Fellows of the College.

The purpose was to consider mounting complaints that the process was becoming too slow and costly. Panel presentations were made, participants made comments, and issues and questions were posed to those in attendance who then responded electronically. In some instances, there was significant agreement; other times there was startling disagreement, often between the party representatives and the advocates retained to represent them.

All responses were then considered, subsequent written recommendations were received and, after analysis, the results were published in the *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, copies of which may be downloaded at no charge from the College website (www.TheCCA.Net). We urge parties, advocates, providers and arbitrators to carefully review the Protocols and implement them as effectively as possible so parties receive the efficient and relatively inexpensive process they have a right to expect.

I also highly recommend the College's *Guide to Best Practices in Commercial Arbitration* (2d Ed., JurisNet LLC, 2010) which can be ordered by phone (800-887-4064). This is a 350 page hardcover publication covering all aspects of arbitration with chapters written and edited by some of the most experienced and sought-after Arbitrators in the country.

OTHER READING⁵⁴

01. *Symposium. Winds of Change: Solutions to Causes of Dissatisfaction with Arbitration.* DePaul Business & Commercial Law J., Vol 7, No. 3 (Spring 2009). Articles include:
 - a. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation."*
 - b. Stephen L. Hayford, *Building a More Perfect Beast: Rethinking the Commercial Arbitration Agreement.*
 - c. L. Tyrone Holt, *Wither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation's Ill Effects.*
 - d. Robert A. Holtzman, *The Role of Arbitrator Ethics.*

- e. Hon. Curtis E. von Kann, *A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek*.
02. *Symposium on Gilmer v. Interstate/Johnson Lane Corporation: Ten Years After*. Ohio State J. on Disp. Resol., Vol 16, No. 3 (2001). The numerous articles relating to employment and labor arbitrations include:
 - a. Theodore J. St. Antoine, *Gilmer in the Collective Bargaining Context*.
 - b. Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*.
 - c. Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace*.
 - d. Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*
 - e. Alex J. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*.
03. Mark E. Appel, *The Chess Clock: A Time-Management Technique for Complex Cases*. AAA, Disp. Resol. J., Vol 61, No. 2 (05-07/2006).
04. Tom Brewer & Deborah Rothman, *eDiscovery in Arbitration*. College of Commercial Arbitrators (10/31-11/01/2008).
05. Kathy A. Bryan & Helena Tavares Erickson, *Business Arbitration Can and Should be Improved in the United States*. ABA, Dispute Resolution Magazine (Spring & Summer, 2008).
06. Cedric C. Chao & James M. Schurz, *Navigating Uncertainty in Drafting Arbitration Agreements: Expanded Judicial Review of Arbitration Awards*. Morrison & Foerster LLP (2008).
07. Richard Dewitt & Rick Dewitt, *No Pay No Play: How to Solve the Nonpaying Party Problem in Arbitration*. AAA, Disp. Resol. J. (02-04/2005).
08. Ernst & Young, *Outcomes of Arbitration. An Empirical Study of Consumer Lending Cases* (11/30/2004); available on-line.
09. David M. Heilbron, *A Few Thoughts About Evidentiary Rules and Saving Hearing Time in Large Cases*. College of Commercial Arbitrators (11/01/2008).
10. David W. Lannetti, *Protecting Contracting Parties in Construction Arbitrations Based on the Availability - or Nonavailability - of Nonparty Discovery*. ABA Forum on the Construction Industry, The Construction Lawyer, Vol. 29, No. 3 (Fall 2009).
11. George E. Lieberman & Jodi A. Janecek, *Discovery in an Arbitration Proceeding*. Washington & Lee Law School, For the Defense, Vol. 51, No. 10 (10/2009).
12. Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards*. AAA, Disp. Resol. J., Vol. 60, No. 3 (08-10/2005).
13. Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*. 15 Ohio St. J. on Disp. Resol. 19 (1999).
14. Bruce E. Meyerson, *Does an Arbitrator Have the Power to Grant Sanctions?* ABA Section of Litigation, Conflict Management (Summer 2010).
15. Lawrence R. Mills & Thomas J. Brewer, *A Courtroom Lawyer's Guide to Arbitration*. Litigation, Vol. 31, No. 3 (Spring 2005).
16. Phillip D. O'Neill, *The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse*. AAA, Disp. Resol. J., Vol. 60, No. 4 (11/2005-01/2006).
17. Allen L. Overcash, *A Proposal to Increase the Efficiency of Arbitration in Large Complex Cases*. AAA, Punch List, Vol. 24, No. 4 (02-04/2002).
18. Allen Poppleton, *The Arbitrator's Role in Expediting the Large and Complex Commercial Case*. AAA, The Arbitration Journal, Vol. 36, No. 4 (12/1981).
19. Kent B. Scott, *Arbitration - Trouble Again?* Utah Bar Journal, Vol. 20, No. 4 (07-08/2007).
20. Thomas J. Stipanowich, *Arbitration: The 'New Litigation.'* 2010 U. Ill. L.Rev. 1 (2010).

21. John M. Townsend, *Drafting Arbitration Clauses. Avoid the 7 Deadly Sins*. AAA, Disp. Resol. J., Vol. 58, No. 1 (02-04/2003).
22. Leslie Trager, *The Use of Subpoenas in Arbitration*. AAA, Disp. Resol. J. (11/07-01/2008).
23. John Wilkinson, *Arbitration Contract Clauses. A Potential Key to a Cost-Effective Process*. AAA, Disp. Resol. J. (Fall 2009).
24. *Arbitration Discovery in Domestic Commercial Cases. Report by Arbitration Committee of Dispute Resolution*, New York State Bar Association (04/2009).
25. *CPR Protocol on Determination of Damages in Arbitration*. International Institute for Conflict Prevention & Resolution (2010).
26. *CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*. International Institute for Conflict Prevention & Resolution (2010).
27. *Guidelines for Arbitrators Concerning Exchanges of Information*. AAA International Centre for Dispute Resolution (2008).
28. *IBA Rules on the Taking of Evidence in International Commercial Arbitration*. International Bar Association (06/01/1999).

UNITED STATES SUPREME COURT RECENT HOLDINGS

Granite Rock Company v. International Brotherhood of Teamsters, 130 S.Ct. 2847 (06/24/10) (*arbitrability*). The Supreme Court framed two major issues (1) whether a federal court has jurisdiction to determine if a CBA agreement exists and (2) whether an LMRA §301(a) action is available against a union that is non-signatory to the CBA. In both commercial and labor cases (1) whether parties agreed to arbitrate a particular issue and (2) whether the dispute concerns contract formation are “*generally*” for judicial determination, but that doesn’t quite resolve the issue here where the issue was “*when (not whether)*” the new contract was ratified. Parties agreed it was proper for the DC to decide whether ratification was arbitrable, but disagreed whether the DC answered that question correctly. The Local and the USCA said the “*date*” of ratification was for the Arbitrator. The SC reversed the appellate court and said, where a party contests either (1) formation of the parties’ agreement or (2) absent a clause committing such a dispute to the Arbitrator, its enforceability or applicability, the court must decide.

Jackson v. Rent-A-Center, 130 S.Ct. 2772 (06/21/10) (*arbitrability*). As framed for the Supreme Court, the issue was whether the DC is, in all cases, required to determine claims that an arbitration agreement subject to the FAA is unconscionable, even when the parties have clearly and unmistakably assigned this “*gateway*” issue to the arbitrator for decision. The SC said under the FAA, where an agreement to arbitrate includes an agreement that the Arbitrator will determine enforceability of the agreement, if a party challenges enforceability of (1) the arbitration agreement the court is to decide and (2) the contract as a whole the Arbitrator is to decide. Here, Jackson did not challenge the specific delegation provision until his brief to the court. This was too late. This court found that Jackson challenged only the validity of the contract as a whole, and not a specific enforceability provision that could have been severed.

Series of Class Action Cases

Green Tree v. Bazzle, 539 U.S. 444, 123 S.Ct. 2402 (2003)(*absent a contrary contract provision, Arbitrator makes the decision whether class-wide relief is available*). It’s important to note this was a plurality decision, not a majority decision. The issue was whether the phrase indicating the Arbitrator was to be “*selected by us*” meant to arbitrate only this Consumer’s dispute and, by implication, thereby prevented class arbitration. While these words may be limiting, other language relating to “*all disputes*” was broad. Since the “*dispute about what the arbitration contracts mean is a dispute ‘relating to the contract’ and the resulting ‘relationships,’*” the court felt the “*parties seem*

to have agreed that an arbitrator, not a judge, would answer the relevant question, and any doubt about the ‘scope of arbitrable issues.’” For Class #1, the court interpreted the contract to permit class arbitration. For Class #2, the Arbitrator interpreted the contract to permit class arbitration but the court felt there was a likelihood he may have been influenced by the court’s earlier interpretation rather than making an independent interpretation.

Stolt-Nielsen Transportation Group, Ltd. v. Animal Feeds International Corp., 130 S.Ct. 1758 (04/27/10) (*under the FAA parties must agree to class action*). The court’s order granting certiorari allowed the court to address the question that had been left open in *Green Tree Fin. Corp. v. Bazzle* and to resolve a conflict among lower courts relating to drafting and class action issues. The primary issue related to whether the FAA lets Arbitrators order class arbitrations where the agreement to arbitrate is silent on the issue. The secondary issue was whether manifest disregard is still a ground to challenge an award in the second circuit. The appellate court had relied on *Green Tree* without recognizing it was only a plurality decision. Private commercial arbitration is a creature of contract to be enforced according to the terms and parties are “generally free to structure their arbitration agreements as they see fit.” From these principles, “it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to it” and the panel in the subject case imposed class arbitration even though parties stipulated there was no agreement for class arbitration. Those who specialize in class actions felt *Stolt-Nielsen* left many questions still unanswered:

- Is it applicable only to sophisticated parties or also to consumers.
- Is it applicable only to clause construction?
- Does the case mean silence alone means no class arbitration?
- Will the case be applied retroactively to pending class arbitrations?
- Will it affect designation of lead counsel?
- What, if any, role with the Arbitrator play in fairness hearings?

Concepcion v. A.T&T Mobility, LLC, 23 U.S. ____ (04/27/11)(*FAA preemption; class prohibitions*). State law is preempted by the FAA. Justice Scalia wrote that class actions would interfere with “fundamental attributes of arbitration,” including its streamlined nature. “The switch from bilateral to class arbitration sacrifices the principal advantage of arbitration -- its informality -- and makes the process slower, more costly and more likely to generate procedural morass than final judgment.” He said class arbitration “greatly increases risks to defendants” because it involves less rigorous appellate review than traditional litigation. “Arbitration is poorly suited to the higher stakes of class litigation,” Scalia wrote. Citing AT&T Mobility’s agreement to pay claimants a minimum \$7,500 if they win an arbitration award greater than the company’s final settlement offer, the Court said it was unlikely the Concepcions’ claims under the contract would go unresolved. The opinion puts arbitration’s faster procedures on the same footing as private enforcement of disputes as key goals that justify the FAA’s promotion of arbitration processes. “Consumers remain free to bring and resolve their disputes on a bilateral basis under *Discover Bank*, and some may well do so,” said the court, “but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.” Scalia also noted the increased preliminary procedures (e.g. the certification process) and the procedural formality needed for a class arbitration. The Court remanded the case for further action.

- a. Most agree that *Concepcion* negates the holding in *Discover Bank v. Superior Court*, 36 Cal. 4th 48, 113 P. 3d 1100 (2005), that allowed the state’s consumer protection law to remove a class arbitration waiver where a credit card company’s dispute resolution processes weren’t shown to provide the equivalent relief that consumers could get from a class arbitration.

1 AMERICAN ARBITRATION ASSOCIATION

2 San Diego, California

3 Case No.

4 Claimant,

Preliminary Hearing Agenda

5 and

7 Respondent.

8
9 **PRIOR TO THE HEARING, COUNSEL SHOULD CONFER WITH EACH OTHER AND THEIR**
10 **CLIENTS AND HAVE CALENDARS AVAILABLE SO THE FOLLOWING ISSUES CAN BE**
11 **DISCUSSED AND DATES SCHEDULED DURING THE PRELIMINARY HEARING.**

11 01. AAA

12 a. Case Manager

- 12 - Name:
- 13 Direct:
- 13 E-Mail:

14 b. Supervisor

- 14 - Name:
- 15 Direct:
- 15 E-Mail:

16 02. **CALL IN.** The Case Manager will provide a call-in number and access code so you can dial in to the
17 call from anywhere.

18 03. **ARBITRATOR**¹

18 a. Name	Carl F. Ingwalson, Jr.
19 Address	P.O. Box 91166, San Diego, CA 92169-1166
19 Phone	858-581-1125
20 Fax	858-483-6515
20 E-Mail	CIngwalson@CFILaw.Com

21 04. **PARTIES & COUNSEL.** Names of parties and counsel will appear in all captions, orders, awards and
22 other documents as indicated below. Please verify that the following is accurate so corrections can be
23 made if necessary.

23 a. Claimant

- 23 i. Counsel
- 24 - Name
- 24 - Address
- 25 - Phone
- 25 - Fax
- 26 - E-Mail

26 b. Respondent

- 27 i. Counsel

28 1

This is for informational purposes only. There are to be no *ex parte* communications with the Arbitrator or his office except in accordance with such orders as may be issued by the Arbitrator.

- 1 - Name
- 2 - Address
- 3 - Phone
- 4 - Fax
- 5 - E-Mail
- 6 c. If there is a change of counsel, new counsel must be provided with copies of all *Scheduling and Procedure Orders* and be prepared to comply with those Orders so the proceeding is not delayed and the parties' costs are not increased.

7 **05. PLEADINGS.**

- 8 a. *Demand for Arbitration* dated _____.
- 9 i. Nature of Dispute:
- 10 ii. Relief Sought:
- 11 iii. Clarification Needed:
 - 12 - Eg: What "other" relief is requested?
 - 13 - Eg: Do the parties want the award to address anything other than monetary issues?
 - 14 - Eg. Damages "*according to proof*" must be quantified.
- 15 b. *Answering Statement and Counterclaim Request* dated _____.
- 16 i. Nature of Dispute:
- 17 ii. Relief Sought:
- 18 iii. Clarification Needed:
- 19 c. Stipulate:
 - 20 i. That all conditions precedent to arbitration (eg mediation) have been met or waived?
 - 21 ii. That all issues, whether set forth above or otherwise, that are submitted to the Arbitrator shall be deemed arbitrable in this proceeding?
- 22 d. Are attorney fees being requested? If so, on what basis?

23 **06 LAWS & RULES.**

- 24 a. The arbitration is being conducted pursuant to the written agreement of the parties as shown in Paragraph _____ of the contract dated _____.
- 25 b. Parties are expected to be familiar with all applicable laws and regulations affecting the process of this arbitration.
- 26 c. AAA rules applicable to this proceeding will be the Construction Industry Arbitration Rules (adopted and effective October 1, 2009).

27 **07 CONFLICT DISCLOSURES.**

- 28 a. Have counsel and parties reviewed the Arbitrator's *Disclosure Statement* dated _____?
- 29 b. Are there any concerns about the information disclosed?

30 **08. SUBPOENAS.** Subpoenas are not issued as a matter of course but will usually be issued if relevant and appropriate to the arbitration proceeding. If necessary, subpoena forms can be obtained from the AAA, completed by counsel and submitted to the Arbitrator (see below re *Communications*) and opposing counsel with a cover letter indicating why the subpoena is relevant and appropriate in this proceeding.

31 **09. EVIDENTIARY HEARING.**

- 32 a. **Dates:**
 - 33 i. How many hours will Claimant take to present its case in chief? _____
 - 34 ii. How many hours will Cross-Claimant take to present its case in chief? _____
 - 35 iii. Hearing dates: _____
 - 36 iv. If an in-person evidentiary hearing is required, it will be at the AAA, 600 B Street, Suite 1450, San Diego, CA 92101-4586
 - 37 - Phone 619-239-3051
 - 38 - Fax 619-239-3807
 - 39 v. Are there any special needs (eg. hearing, vision or speech disabilities; fears of elevators or heights; wheelchairs) the Arbitrator should be aware of?

- 1 vi. Are there any diversity issues or concerns (eg. religious holidays; language problems; cultural
2 issues) the Arbitrator should be aware of?
- 3 vii. To avoid wasting time and imposing unnecessary expense on parties, they are expected to
4 stipulate to all uncontested matters (eg. identity and capacity of parties, relevant documents,
5 issues agreed, issues disputed, amounts paid, etc).
- 6 b. **Postponement**
- 7 i. Postponements delay resolution, increase costs for parties and create greater dissatisfaction with
8 the process. A request to postpone a scheduled evidentiary hearing will be granted only:
- 9 (a) For good cause and
- 10 (b) After a hearing in person or by conference call
- 11 - with all counsel and parties participating or
- 12 - with all counsel after receipt of a written *Application for Postponement* indicating the
13 grounds and good cause for the postponement and signed by all counsel and parties.
- 14 c. **Hearing Procedure.** To reduce the time and expense for parties, the following methods of
15 presenting evidence will be discussed.
- 16 i. Witnesses. Normally, Claimant calls its witnesses first and, when Claimant has concluded its
17 presentation, Respondent calls its witnesses.
- 18 (a) Would it be beneficial to vary this?
- 19 (b) Would it be beneficial to call any witnesses out of order?
- 20 ii. Documents Only (ie. submit all evidence by *Declaration*).
- 21 (a) Alternatively, direct testimony by Declaration with the witness present for cross-
22 examination and rebuttal.
- 23 iii. Grillenberger Method (ie. narrative testimony).
- 24 iv. Attorney Testimony (ie. similar to the Grillenberger Method but with counsel testifying in a
25 narrative fashion, with references to exhibits and with or without aids such as PowerPoint;
26 witnesses present then verify the accuracy of the testimony and exhibits).
- 27 v. Opening Statements (ie. waive opening; the Arbitrator will have read opening briefs).
- 28 vi. Chess Clock (ie. parties agree to specific time limits for each side's presentation, both direct and
indirect, or limited to direct).
- vii. Video-Conferencing (facilities are available but advance arrangements are necessary).
- viii Day Baseball (ie. parties select award range and advise Arbitrator who may pick one or the other
extreme or, alternatively, anything in between).
- ix. Night Baseball (ie. similar to Day Baseball but numbers are not disclosed to Arbitrator; if award
is higher than high number, it's reduced to the high number; if award less than low number, its
increased to the low number; if it's between the parties high and low numbers, it will be the
award).
- x. Witness Caucuses, percipient and/or expert (ie. witnesses meet by themselves, or with a
facilitator, to determine areas of agreement
- xi. Witness Panels (ie. all witnesses to testify regarding a specific issue are present, sworn and
examined and cross-examined as a panel).
- (a) In person or direct by affidavit.
- e. **Settlement:** While the AAA encourages voluntary resolutions, the Arbitrator doesn't want to hear
about any negotiations, mediations, settlement discussions, demands, offers, etc.² If there is a
statutory offer to settle pursuant to Code of Civil Procedure §998 or if there are settlement credits
to be applied, tell the Case Manager and have the Case Manager advise the Arbitrator of the fact that
there was such an offer or were credits, but not their substance or who made such an offer. That way
the Arbitrator can leave the hearing open to handle any related issues.
- f. **Award.** Arbitrators often indicate their reasoning in reaching the Award. On the positive side,

1 parties like to know the reasoning. On the other hand, it increases time and expense and, if a motion
2 to confirm, correct or vacate is filed, that reasoning will become public knowledge. What is the
preference of the parties?

3 **10. EXPERTS**

- 4 a. Will there be experts?
5 b. Could a joint expert be used to help reduce time and costs for the parties?
6 c. Would an “*experts only*” meeting be beneficial?
7 d. Will there be written reports? _____ If so, exchange by _____
8 e. Opposing experts are to be present at the same time (ie. in tandem).
9 i. For direct and cross or for only cross-examination and rebuttal (with reports being their direct
10 testimony)?
11 ii. During their tandem appearance, they may be asked questions by counsel, the Arbitrator and
12 other experts.

13 **11. WITNESSES.**

- 14 a. How many witnesses are anticipated?
15 i. Claimant _____
16 ii. Respondent _____
17 b. *May Call* date for exchange of percipient _____ and expert _____ witness lists for conflict check.
18 c. *Will Call* date for exchange of percipient _____ and expert _____ witness lists of those
19 expected to actually testify.
20 d. Listing a witness on either list does not obligate the designating party to actually call the witness.
21 e. Each party is responsible for securing the timely appearance, by subpoena or otherwise, of every
22 witness from whom it wants to elicit evidence.
23 f. Outlines of testimony are not needed since they increase costs for the parties, but the Arbitrator will
24 enforce rules regarding irrelevant or cumulative testimony. Litigation privileges will generally be
25 recognized.
26 g. Scheduling of witnesses.
27 i. In large cases with many witnesses, counsel may meet to prepare a detailed schedule as to when
28 each witness will appear and how much time each party will have for direct, cross and re-direct.
Would this be helpful? _____
ii. Would it help to have the Arbitrator present? _____

12. EXHIBITS.

- a. A single *Joint Exhibit Book* can be helpful, but is not required since preparation increases costs for
the parties and the Arbitrator can cope with the same exhibit being in multiple books.
i. Would it be beneficial for the Arbitrator to review any specific exhibits before the hearing?
ii. It usually helps to arrange exhibits chronologically.
iii. Put exhibits on CD ROM?
iv. No exhibit not timely exchanged will be admitted at the evidentiary hearing without a showing
of good cause.
vii. The Arbitrator only needs copies of exhibits but originals should be available at the hearing in
case they’re needed.
b. The Arbitrator and each opposing party are to be provided with their own sets of exhibits.
c. Parties often submit voluminous exhibits, but discuss only few. It would be beneficial if exhibits
were limited to those that are essential.
d. The Arbitrator reserves the right to destroy exhibits, his notes and other writings and documents in
his possession at any time.
e. If electronic presentations are planned, check with the Case Manager so any necessary arrangements
can be made (e.g. to arrive early to set up equipment so the hearing can start on time).
f. Offered exhibits will be deemed admitted and presumed to be authentic unless an objection is raised
when the exhibit is offered.
g. Exchange exhibits by _____.

- 13 **BRIEFS.** Pre-hearing Briefs are to be exchanged and transmitted to the Arbitrator by _____ (see
1 below re *Communications*).
- 2 14 **REPORTER.** Does any party want a Reporter? _____
- 3 a. If required, the Reporter must be arranged and paid by the requesting Party or jointly if all agree.
4 The Reporter's transcript will not be the official record of the proceeding unless all so stipulate and
5 the Arbitrator so orders. The Arbitrator is to be provided with a copy of the transcript in the same
6 manner as provided to the parties (eg. hard copy, disk, CD, a certified CART service). If real time
7 transcripts are provided to parties at the evidentiary hearing, they shall also be provided to the
8 Arbitrator.
- 9 15 **PRELIMINARY HEARING.** Another conference call will be conducted on _____
- 10 16 **COMMUNICATIONS.**
- 11 a. Ex parte communications, whether direct or indirect, with a trier-of-fact (whether a Juror, a Judge
12 or an Arbitrator) are inappropriate and prohibited.
- 13 b. However, direct communications with the Arbitrator are permitted provided:
- 14 i. If in writing (eg. correspondence, motions, briefs, submission of witness lists, issuance of
15 subpoenas, etc.), that the writing reflects an identical copy sent simultaneously to each opposing
16 counsel (or party if unrepresented) using the same form of delivery as with the Arbitrator.
- 17 ii. If by telephone (eg. to facilitate discovery, scheduling, etc.), that the communication be by
18 conference call with opposing counsel (or party if unrepresented) on the line before the call is
19 placed to the Arbitrator.
- 20 c. Communications regarding the following should be directed solely to the Case Manager:
- 21 i. Financial arrangements (eg. Arbitrator compensation and AAA administrative fees).
22 (a) Arbitrators are reluctant to charge cancellation and postponement fees, but may do so when
23 appropriate. When hearings are scheduled, the Arbitrator must reserve the days estimated
24 by the parties followed by days set aside for or study time. Late cancellations or
25 postponements prevent Arbitrators from rebooking the time. If parties foresee a need for
26 a postponement or reach a settlement and want to cancel the hearing, notice should be given
27 at the earliest possible date so the Arbitrator can try to rebook the time and avoid a
28 cancellation fee.
- ii Arbitrator disclosures, objections, and potential conflicts of interest.
- iii Settlement negotiations, settlement credits and offers pursuant to CCP §998.
- 17 **MISCELLANEOUS.** Benefits of arbitration may be lost due to "*over-lawyering*" and other causes (eg.
excessive discovery, hearing postponements, unnecessary exhibits, inappropriate objections, poor
scheduling of witnesses, failure to adhere to times for starting a hearing, for lunches and for breaks,
cumulative and irrelevant testimony, disjointed hearings, etc.). For the benefit of the parties, and to give
them the process they have a right to expect, the Arbitrator asks that parties and counsel be sensitive to
these concerns.