

THE PROS AND PITFALLS OF
BINDING CONTRACTUAL ARBITRATION IN CALIFORNIA

AGENDA

1. California Law
2. Negotiating Contractual Provisions and Avoiding Common Pitfalls
3. Examining Particular Provisions
4. Right to Appeal
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BINDING ARBITRATION

CALIFORNIA LAW

California has a strong public policy in favor of arbitration.

Code of Civil Procedure § 1281: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."

Statutes governing petitions to compel arbitration reflect a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. Trial court could not deny subcontractor's motion to compel arbitration of its contract action against contractor, which parties had agreed to arbitrate, based on running of statute of limitations; statute of limitations was affirmative defense for arbitrator to decide. (*Wagner Const. Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19.)

In light of California's strong public policy favoring arbitration as a method of dispute resolution, courts should indulge every intendment to give effect to such proceedings and order arbitration unless it can be said with assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. (*Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223.)

However, absent a statute requiring a dispute to be arbitrated, binding arbitration is contractual in nature.

A party is not obligated to arbitrate unless he or she has expressly agreed to do so by entering into a valid and enforceable written contract with the party who seeks arbitration. (*Grey v. American Management Services* (2012) 204 Cal.App.4th 803.)

There is no state policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate and which no statute has made arbitrable. (*State Farm Mut. Auto. Ins. Co. v. Superior Court* (2004) 123 Cal.App.4th 1424.)

Right to arbitration depends on a contract, and party cannot be compelled to arbitrate dispute that it has not elected to submit to arbitration. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237.)

In the arbitration context, a party who has not signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he seeks enforcement of other provisions of the same contract that benefit him. (*Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705.)

[T]he policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate. An arbitration clause may not be hidden by printing it in small typeface on the opposite side of the signature page of an agreement. An arbitration clause may be deemed procedurally unconscionable if the parties do not initial it showing their agreement to be bound. (*Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462.)

Conduct of Arbitration Proceedings if Not Specified in Agreement: Code of Civil Procedure §§ 1282 – 1284.3 [A selection of those code sections are set forth below.]

1282. Unless the arbitration agreement otherwise provides, or unless the parties to the arbitration otherwise provide by an agreement which is not contrary to the arbitration agreement as made or as modified by all of the parties thereto:

(a) The arbitration shall be by a single neutral arbitrator.

(b) If there is more than one arbitrator, the powers and duties of the arbitrators, other than the powers and duties of a neutral arbitrator, may be exercised by a majority of them if reasonable notice of all proceedings has been given to all arbitrators.

(c) If there is more than one neutral arbitrator:

(1) The powers and duties of a neutral arbitrator may be exercised by a majority of the neutral arbitrators.

(2) By unanimous agreement of the neutral arbitrators, the powers and duties may be delegated to one of their number but the power to make or correct the award may not be so delegated.

(d) If there is no neutral arbitrator, the powers and duties of a neutral arbitrator may be exercised by a majority of the arbitrators.

1282.2. Unless the arbitration agreement otherwise provides, or unless the parties to the arbitration otherwise provide by an agreement which is not contrary to the arbitration agreement as made or as modified by all the parties thereto:

(a) (1) The neutral arbitrator shall appoint a time and place for the hearing and cause notice thereof to be served personally or by registered or certified mail on the parties to the arbitration and on the other arbitrators not less than seven days before the hearing. Appearance at the hearing waives the right to notice.

(2) With the exception of matters arising out of collective-bargaining agreements, those described in Section 1283.05, actions involving personal injury or death, or as provided in the parties' agreement to arbitrate, in the event the aggregate amount in controversy exceeds fifty thousand dollars (\$50,000) and the arbitrator is informed thereof by any party in writing by personal service, registered or certified mail, prior to designating a time and place of hearing pursuant to paragraph (1), the neutral arbitrator by the means prescribed in paragraph (1) shall appoint a time and place for hearing not less than 60 days before the hearing, and the following provisions shall apply:

(A) Either party shall within 15 days of receipt of the notice of hearing have the right to demand in writing, served personally or by registered or certified mail, that the other party provide a list of witnesses it intends to call designating which witnesses will be called as expert witnesses and a list of documents it intends to introduce at the hearing provided that the demanding party provides such lists at the time of its demand. A copy of such demand and the demanding party's lists shall be served on the arbitrator.

(B) Such lists shall be served personally or by registered or certified mail on the requesting party 15 days thereafter. Copies thereof shall be served on the arbitrator.

(C) Listed documents shall be made available for inspection and copying at reasonable times prior to the hearing.

(D) Time limits provided herein may be waived by mutual agreement of the parties if approved by the arbitrator.

(E) The failure to list a witness or a document shall not bar the testimony of an unlisted witness or the introduction of an undesignated document at the hearing, provided that good cause for omission from the requirements of subparagraph (A) is shown, as determined by the arbitrator.

(F) The authority of the arbitrator to administer and enforce this paragraph shall be as provided in subdivisions (b) to (e), inclusive, of Section 1283.05.

(b) The neutral arbitrator may adjourn the hearing from time to time as necessary. On request of a party to the arbitration for good cause, or upon his own determination, the neutral arbitrator may postpone the hearing to a time not later than the date fixed by the agreement for making the award, or to a later date if the parties to the arbitration consent thereto.

(c) The neutral arbitrator shall preside at the hearing, shall rule on the admission and exclusion of evidence and on questions of hearing procedure and shall exercise all powers relating to the conduct of the hearing.

(d) The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. On request of any party to the arbitration, the testimony of witnesses shall be given under oath.

(e) If a court has ordered a person to arbitrate a controversy, the arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party ordered to arbitrate, who has been duly notified, to appear.

(f) If an arbitrator, who has been duly notified, for any reason fails to participate in the arbitration, the arbitration shall continue but only the remaining neutral arbitrator or neutral arbitrators may make the award.

(g) If a neutral arbitrator intends to base an award upon information not obtained at the hearing, he shall disclose the information to all parties to the arbitration and give the parties an opportunity to meet it.

1282.6. (a) A subpoena requiring the attendance of witnesses, and a subpoena duces tecum for the production of books, records, documents and other evidence, at an arbitration proceeding or a deposition under Section 1283, and if Section 1283.05 is applicable, for the purposes of discovery, shall be issued as provided in this section. In addition, the neutral arbitrator upon his own determination may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents and other evidence.

(b) Subpoenas shall be issued, as of course, signed but otherwise in blank, to the party requesting them, by a neutral association, organization, governmental agency, or office if the arbitration agreement provides for administration of the arbitration proceedings by, or under the rules of, a neutral association, organization, governmental agency or office or by the neutral arbitrator.

(c) The party serving the subpoena shall fill it in before service. Subpoenas shall be served and enforced in accordance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of this code.

1283.05. To the extent provided in Section 1283.1 depositions may be taken and discovery obtained in arbitration proceedings as follows:

(a) After the appointment of the arbitrator or arbitrators, the parties to the arbitration shall have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof, as provided in Chapter 2 (commencing with Section 1985) of Title 3 of Part 4, and in Title 4 (commencing with Section 2016.010) of Part 4, as if the subject matter of the arbitration were pending before a superior court of this state in a civil action other than a limited civil case, subject to the limitations as to depositions set forth in subdivision (e) of this section.

[Subdivisions (b) through (e) omitted.]

NEGOTIATING CONTRACTUAL PROVISIONS AND AVOIDING COMMON PITFALLS

Because non-statutory binding arbitration is contractual in nature, the provisions in any agreement to arbitrate should be negotiated carefully to protect each party's interests. Too often, parties agree to "standard" arbitration provisions in an agreement without evaluating them. When agreements are silent on important provisions, Code of Civil Procedures §§ 1282 *et seq.* sets forth provisions for how the arbitration will be conducted. Issues to be carefully considered include:

1. What must be arbitrated and what will be excluded from arbitration.
2. Location of arbitration.
3. Who will be the arbitrating entity. If that entity no longer exists, who will be the alternate arbitrating entity. How the individual arbitrator(s) will be chosen and how many arbitrators will hear the case. [Code of Civil Procedure § 1281.6 allows the court to appoint an arbitrator in the absence of an agreed method.]
4. What rules will be used during the arbitration. If those rules no longer exist, what alternate rules will be used.
5. Whether expedited rules will be utilized.
6. Whether the arbitrator may consider dispositive motions.
7. What the scope of discovery will be and under what rules or statutes.
8. Whether the arbitrator must follow California or Federal law or is free to depart from law when issuing an award.
9. Whether the arbitrator may award punitive damages.
10. Who will pay fees and costs or how they will be split.
11. Whether the parties wish for a right of appeal different from provided in the California Code of Civil Procedure.

EXAMINING PARTICULAR PROVISIONS

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s).

The arbitration shall be administered by _____ pursuant to its _____ Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules].

In arbitration, dispositive motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statute of limitations or defenses based on clear contractual provisions. In such circumstances, an appropriately framed dispositive motion can eliminate the need for expensive and time consuming discovery. On balance, an arbitrator will consider the following procedure with regard to dispositive motions: (1) Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond; (2) based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion; and (3) if the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.

The arbitrator shall make an order setting the type and scope of discovery available to the parties. When making such order, the arbitrator shall consider the nature of the dispute, the relevance and reasonable need for the discovery requested, and the complexity of the issues being arbitrated.

Each party is entitled to one deposition of an opposing party or an individual under the control of an opposing party and that each side may apply for the taking of additional depositions, if necessary.

Discovery disputes shall be resolved by the arbitrator(s). Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone. The parties must negotiate discovery differences in good faith before presenting any remaining issues for the arbitrator's decision.

This Agreement and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of the State of _____, exclusive of conflict or choice of law rules.

RIGHT TO APPEAL

Unless the parties agree otherwise in their agreement, Code of Civil Procedure § 1286.2 only allow an award of an arbitrator to be vacated if (1) the award was procured by corruption, fraud or other undue means; (2) there was corruption in any of the arbitrators; (3) the rights of the party were substantially prejudiced by misconduct of a neutral arbitrator; (4) the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; (5) the rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title; or (6) an arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Code of Civil Procedure § 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision.

Denae Hildebrand Budde

Managing Shareholder

Denae Budde is a California native with more than 20 years of experience in real estate, business and insurance coverage. She has successfully represented individuals, businesses, financial institutions and insurers in litigation and arbitration matters as well in negotiating and drafting contracts, business formation documents, real estate documents and preparing coverage opinion letters. Denae has tried over fifty cases to verdict including a multi-million dollar insurance coverage jury trial.

Denae is a member of the Defense Research Institute (DRI) Insurance Law Committee and Women in the Law Committee. Denae has been a presenter on a number of trial, arbitration and insurance matters as well as published several articles. She has served on the Board of Directors for CCCBA and has been an Affiliate Governor on the Board of California Women Lawyers and Past President of the Contra Costa County Women's Section. She has also been a member of the Contra Costa County chapter of the Robert G. McGrath Inn of Court.

In November 2014, Denae was a panelist at the Contra Costa County Bar Association's MCLE Spectacular, entitled: "Mediation is a Process, Not an Event: Creating a Strategic Plan for Success that Works."

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Ellen's seventeen-year practice focuses on commercial insurers, financial institutions, title insurers and their insureds, and landlord/tenant issues. She has broad experience advising real estate clients on formal litigation and arbitration matters, as well as effectively and efficiently negotiating settlements and dismissals. She also advises clients regarding transactional real estate matters and creates real estate agreements.

In her spare time, Ellen coaches the high school Moot Court and Mock Trial teams of California High School in San Ramon.