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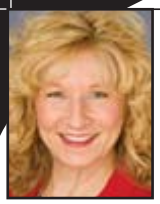

By Michelle A. Reinglass

Navigating arbitrations in employment cases

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Arbitration used to be a four-letter word to employees in employment cases. Not that it is fully embraced now, but a number of significant case decisions have been issued which serve to protect employees' rights when compelled to arbitrate their cases. Moreover, while arbitral bias may still exist, employees today have greater choices of potential arbitrators; more information is readily available about arbitrators and their awards through listservs and colleague forums, as well as some agency postings of the awards and biographical information. Additionally, arbitrators are issuing more significant-sized awards. Furthermore, more employers and their counsel are starting to feel the economic sting from employment arbitrations where they are required to pay the full arbitrators' fees which can become sizeable by the time of the actual Arbitration Hearing. These additional costs have had an impact in settlement of some cases.

Also on the plus side for employees, it is far easier to bring a discovery or case management dispute to the arbitrator than to do so in court where a formal motion is required to be filed followed by a formal, in-person hearing several weeks after the motion is filed. In arbitrations, a dispute may be brought simply by writing a letter, or sending an e-mail to the case manager, who then asks the arbitrator to set the earliest hearing date, which will generally be set by telephone. Limited to no briefing is required for these disputes to be heard, and a resolution or arbitrator order can result in a matter of days from when the matter arose. So, arbitration of employment disputes where mandated is not the end of the world.

However there are steps that lawyers should take upon being confronted with an arbitration agreement, or a motion or petition to compel arbitration filed in court.

Verify that the arbitration agreement is compliant and protects the employee's interests

• ***Armendariz* decision**

The California Supreme Court decision in *Armendariz v. Foundation Health Psychcare Services Inc.*, (2000) 24 Cal.4th 83 [99 Cal.Rptr.2d 745] upheld the arbitrability of statutory employment claims, but imposed a number of requirements to enforce arbitration agreements. In doing so, the California Supreme Court made it clear that statutory claims such as those arising under FEHA may be arbitrated only if the employee was permitted to vindicate his or her statutory rights.

The minimum requirements for an employment arbitration agreement to be enforceable as to an employee's statutory claims such as discrimination and harassment, include the following:

• **Provide for neutral arbitrator**;

• **Ensure no reduction or limitation of statutory rights otherwise affordable under California Fair Employment and Housing Act or Title VII**; (e.g. no limitation on damages otherwise available, etc). (In *Armendariz*, the Court noted that a predispute employment arbitration agreement containing a damages limitation on statutory claims "is contrary to public policy and unlawful."

• **Provide for more than minimal discovery**; The Court held that "adequate discovery is indispensable for the vindication of [statutory] claims..", and "employees are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited to judicial review".

• **Mutuality of obligations**; This requirement derived from *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519 [60 Cal.Rptr.2d 138], holding that the mandatory pre-dispute employment arbitration agreement must "impart a modicum of bilaterality," in other words, generally requiring both the employer and employee to invoke arbitration.

• **Provide for procedures allowing for or requiring written arbitration award and judicial review;** The arbitrator must issue a "written arbitration decision that will reveal..the essential findings and conclusions on which the award is based."

• **Employer must pay arbitration costs, unless they can justify that the employee would not be paying more than he or she would if filed in court** (e.g. filing fee). This requirement derived from *Cole v. Burns Intern. Sec. Serv.* (D.C.Cir. 1997) 105 F.3d 1465, holding that an arbitration agreement cannot "generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court."

Most arbitration agencies have enacted rules to comply with *Armendariz*. For example, American Arbitration Association has issued National Rules for the Resolution of Employment Disputes. An employee filing a Claim in Arbitration cannot be ordered to pay the steep filing fees or arbitrator fees. These rules provide for discovery including depositions, interrogatories, document production, among others so as to enable a "full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." (See Rule 7). The rules also require a reasoned award. (Rule 34). While the arbitrator is granted a certain amount of discretion in the interpretation of these rules, they are nonetheless subject to the law of the governing state. Hence an Arbitrator in California will be required to comply with and follow the requirements enumerated in *Armendariz*.

• ***O'Melveny* decision**

A more recent decision by the Ninth Circuit Court of Appeals struck down an aggressive arbitration agreement issued by a law firm to all of its 1,044 employees. The court in *Jacquelin Davis v. O'Melveny*

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& Myers (2007) 07 C.D.O.S. 5252, an overtime case brought by one of the firm's paralegals, found several violations of California law in the firm's agreement. One violation included its "take it or leave it" policy which included an e-mail stating that it "applies to and is binding on all employees (including associates) hired by – or who continue to work for – the firm...", and requiring employees unwilling to sign the agreement to leave the firm within three months. This provision which gave the employer "overwhelming bargaining power" over the employees, rendered the agreement procedurally unconscionable. The court also cited to the improper confidentiality restrictions, the fact that the employer firm was provided an overly broad opt-out clause where there were attorney-client issues, that the agreement illegally curtailed the employees' ability to bring administrative claims with public agencies, and its clause illegally restricting the time frame within which the employees could bring claims against the firm.

Who has jurisdiction?

While an arbitration agreement may establish if the court or arbitrator has jurisdiction to decide such things as arbitrability of the claim, an arbitration agreement is not self-executing. Furthermore, a party is not prevented from filing the case in court to allow the court to decide if the case should or should not be submitted to arbitration.

In *Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32 [12 Cal.Rptr.3d 711], the court upheld jurisdiction of the Superior Court. There the court held, "The submission of a dispute to private arbitration does not oust the superior court of jurisdiction. [Citations omitted.]

In *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790 at pp. 1795-1796 [13 Cal.Rptr.2d 678], the Court of Appeal discussed the effect of a private contractual agreement on a court's jurisdiction:

> Contractual arbitration is in no sense a 'trial of a cause before a judicial tribunal,' nor is it a usurpation or ouster of the judicial power vested in the trial court of this state by our Constitution. [Citations omitted.] as a result, there is nothing to prevent one of the parties to a contractual arbitration provision from resorting initially to an action at law. [Citations omitted.] The other party, if determined to pursue arbitration, must then take action to compel arbitration. [Citations omitted.] 'A right to compel arbitration is not....self-executing. If a party wishes to compel arbitration, he must take active and decided steps to secure that right...' In fact the Court held that the party seeking arbitration would be deemed to have waived the right to contractual arbitration by failing to file a petition to compel pursuant to Section 1281.2, or raise it as an affirmative defense in the answer to complaint. The Court went on to state "...an arbitration provision does not oust the court of jurisdiction to hear the matter but merely means if one party chooses to arbitrate, a petition may be filed to stay the proceedings, order arbitration and then confirm the award." However, "the trial court did not lose subject matter jurisdiction."

Challenging arbitration

If there is an arbitration agreement somewhere involving your client, and a complaint has been filed in court, it is a safe bet that the employer will petition to compel the matter to arbitration. The question then becomes whether to agree to the transfer, or fight the petition. If the arbitration agreement fails to comply with all requirements set forth in *Armendariz* it is generally worth fighting the petition to compel. Be warned however that in many cases, if the court finds something is missing, or a provision is unconscionable, the court will simply excise the unconscionable provision, or order to arbitration but add in the proviso that the terms of *Armendariz* will apply. Nonetheless it is this author's opinion that it is still worth trying to fight the petition. Below are some additional bases for challenging arbitration agreements.

• Failing to attach rules:

In *Ultimo v. Harper* (2003) 113 Cal.App.4th 1402 [7 Cal.Rptr.3d 418], the court affirmed a refusal to compel arbitration, relying in part on the fact that the unconscionable arbitration rules were not attached to the contract. "The inability to receive full relief is artfully hidden by merely referencing the Better Business Bureau arbitration rules, and not attaching those rules to the contract for the customer to review."

This case was relied on for the same principle in *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 721 [13 Cal.Rptr.3d 88]. There, NCR's policy similarly incorporated arbitration rules that were not attached and required the other party to go to another source in order to learn the full ramifications of the arbitration agreement. As the court noted,

> The policy poses the potential for preliminary legal battles, as well, by failing to address whether modified AAA rules or only those AAA rules in effect at the time the policy was implemented apply to employment disputes. Additionally, allowing the rules of the AAA to trump NCR's modification would fail to provide employees with adequate notice of the applicable rules of discovery. To compound matters, there is also the very real potential for disparate enforcement of the ACT policy terms, since arbitrators may disagree on whether the policy's limits on discovery are materially inconsistent with AAA rules. NCR deliberately replaced the AAA's discovery provision with a more restrictive one, and in so doing failed to ensure that employees are entitled to discovery sufficient to adequately arbitrate their claims. NCR should not be relieved of the effect of an unlawful provision it inserted in the ACT policy due to the serendipity that the AAA rules provide otherwise. (See *O'Hare v. Municipal Resource Consultants, supra*, 107 Cal.App.4th at pp. 281-282.)

• Clauses seeking to keep arbitration proceedings "secret" or confidential

Often employers want arbitration rather than a judicial tribunal in the hopes of keeping the proceedings and outcome confidential. To that end some arbitration agreements contain a clause seeking to impose "confidentiality" over

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the arbitration proceedings. As noted in the *O'Melveny* case above, such a provision is improper. "Secret proceedings" benefit the employer, permitting decisions reflecting an employer's discriminatory bias to be withheld from not only the public, but also from other similarly situated, and potentially similarly suffering employees.

"Secret proceedings" result in a "lack of public knowledge of an employer's discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law," and where arbitration agreements or other rules address these public policy concerns, arbitration can be compelled. (*Gilmer v. Interstate/Johnson Lane Corp*. (1991) 500 U.S. 20 [111 S.Ct.1647].) The *Armendariz* court acknowledged the risks of secrecy where arbitration agreements lack judicial review and written awards, but expressly chose not to address the secrecy and judicial review issues, deciding that arguments involving secrecy and judicial review were not yet ripe. It left those issues for another day. (*Armendariz*, *supra,* 24 Cal.4th at 107.)

After *Armendariz*, federal courts interpreting California law have reached the "secrecy" issues, and provide persuasive authority for the proposition that secret proceedings unconscionably favor employers by "reinforcing the advantages defendants already possess as repeat participants in the arbitration process." (*Acorn v. Household International, Inc*. (2002) 211 F. Supp.2d 1160, 1172.) Based upon the advantages reaped by defendants, secrecy provisions which operate as "gag orders" are unconscionable. (*Ting v. AT&T* (2003) 319 F.3d 1126, 1152.)

It is the declared public policy of both the United States of America and California that "no person shall be discriminated against and employment opportunities on the basis of . . . sex . . ." (*Price v. Civil Service Comm'n* (1980) 26 Cal.3d 257, 271 [161 Cal.Rptr. 475].) Both federal and state statutes outlaw discrimination based upon an employee's gender. (Title VII of the Civil Rights Act of 1964, 42 U.S.C., § 2000e et. Seq; Fair Employment and Housing Act, California Gov.Code, § 12940 et. Seq.) The *Ting* Court frowned upon secret proceedings or awards in the discrimination context, observing that such secrecy " . . . may prevent potential plaintiffs from obtaining the information needed to build a case of... unlawful discrimination . . ." (*Ting*, *supra,* 319 F.3d at 1152.)

The *O'Melveny* decision cited above, clearly outlawed such confidentiality provisions, and was deemed one of the provisions rendering the arbitration agreement invalid.

• Class actions

Late last year, the 2nd District Court of Appeal published a decision upholding an employee's class action waiver in arbitration with his employer. *Konig v. U-Haul Company of California* (2006) 2006 DJDAR 16494. The California Supreme Court had already granted review of a similar case decided by the 2nd District, *Gentry v. Superior Court* (2006) 135 Cal.App.4th 944 (rev. granted, April 26, 2006). In *Konig*, the appellate court again reinforced the ruling it made in *Gentry*. Both *Gentry* and *Konig* interpreted *Discover Bank v. Super. Ct.* (2005) 36 Cal.4th 148 [113 P.3d 1100], to require that each putative class member's claim be "predictably small" for a class action waiver to be invalidated in an employment case. In *Konig,* the Court explained that wage and hour claims can add up to amounts that it would not consider to be "predictably small." The burden was placed on the plaintiff to limit the size of the class's recovery, although in *Discover Bank*, the Court emphasized that the class action mechanism is not just based upon the amount at stake for each class member; the decision held that courts must consider whether denial of the class action would permit the defendant to benefit from its wrongful conduct and continue it with impunity.

On August 30, 2007, the California Supreme Court issued its decision in *Gentry v. Superior Court of Los Angeles County (Circuit City Stores, Inc., RPI)* SC S141502, which reversed the 2nd District Court of Appeal's decision and remanded the case. The Supreme Court answered in the affirmative whether a class action or class arbitration waiver would undermine a plaintiff's statutory rights. The Supreme Court, noting among other things the relatively modest wages earned by most employees denied minimum wage or overtime pay, and the impracticability of bringing individual actions to redress these claims, held that class action waivers are not only unfair to employees but also remove the incentive for employers to avoid engaging in illegal conduct.

Other decisions have held that class action waivers do not adhere to *Armendariz* requirements, because by their very nature they deprive employees of their legal remedies, and these types of actions typically involve minimum labor standards which are non-waivable. (*See, e.g. Barrentine v. Arkansas Best Freight System,* (1981) 450 U.S. 728 [101 S.Ct. 1437]; *Zavala v. Scott Brothers Dairy, Inc.*(2006) 143 Cal.App.4th 585 [49 Cal.Rptr.3d 503].) In *Keating v. Superior Court* (1982) 31 Cal.3d 584 [183 Cal.Rptr. 369], the California Supreme Court held that class action waivers "may have the effect of allowing an unscrupulous wrongdoer to retain the benefits of its wrongful conduct." Employment agreements whose objective, even indirectly, is to exculpate the employer are unenforceable as against public policy under Civil Code section 1668. Further, *Armendariz* held that a law established for a public reason cannot be contravened by a private agreement. Employment laws by their very nature are established for a public reason. Class action waivers may serve to insulate an employer from punishment for violating employees' statutory labor. In fact the court in *Discover Bank* deemed unconscionable the class action waiver because "the class action is often the only effective way to halt and redress such exploitation." Most employees suffering labor violations earn little, many earning only minimum wage. As such, their individual claims may be limited in size, making an individual suit too costly to bring. However employees lose not only their wages but also risk termination by complaining or taking legal action. To do so individually carries great risk regardless of the size of their individual claim. This

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is one of the rationales for holdings in cases such as *Discover Bank* allowing for class action waivers to be invalidated, as exculpatory for both monetary and non-monetary reasons, as well as for being against public policy.

Selection of arbitrator

Parties have more freedom in terms of selecting arbitrators. Parties should always do research on the potential arbitrators, and conduct due diligence by contacting colleagues, posting on listservs and otherwise tracking down their records and awards. This is significant in light of the waiver of a jury panel, and the absence of traditional appeal rights. This process should not be taken lightly.

If the arbitration agreement is compliant, know the rules and procedures

It is also important to become familiar with the rules of the agency or provider, or the individual Arbitrator. While rules in arbitration are relaxed, nonetheless there are some minimum standards in terms of preparing the claim or demand for arbitration, answers to counter claims, setting of hearings and conducting of pre-hearing discovery.

Have a reasonable discovery plan

At the initial case management conference, discovery will be discussed and the parties must be prepared to talk about what they need and why they need it. *Armendariz* only requires what is reasonably needed, so one needs to be prepared to set out and justify a reasonable discovery plan, including what witnesses are needed for deposition.

Preparation for the initial case management conference (CMC)

At the CMC, the parties should each be prepared to give their overview of the case and their positions. At this conference the following subjects should be addressed:

- issues to be arbitrated;
- date, time, place and estimated duration of the hearing
- resolution of discovery issues and establishment of discovery parameters, the law, standards, rules of evidence, and burdens of proof that are to apply to the proceeding
- exchange date for stipulations and declarations regarding facts, exhibits, witnesses and other issues;
- names of witnesses (including experts), scope of their testimony, and witness exclusion
- bifurcation of arbitration into liability and damages phases
- need for a court reporter or other stenographic recording of hearing
- scheduling and conduct of the arbitration hearing, including duration, time and place
- closing arguments – to be conducted orally or in writing
- form of the award
- damages and costs
- any other issues regarding the conduct of the arbitration or the proceedings.

(*See* e.g. AAA Rules, Rule 8.)

Preparing for, and handling the arbitration hearing

Preparation should be the same as one would give to a trial, although it is possible to take testimony via declaration or affidavit rather than live testimony. Although rules of evidence are relaxed (meaning more evidence generally is allowed in than at trial), the parties should still be fully prepared to argue for submission, or exclusion of evidence.

After the award – what next?

First, one needs to have a final award before proceeding to any next steps. Often it occurs that an interim award is issued, one which provides for the prevailing party to submit a request for costs and/or attorneys fees. Sometimes there is a question about the calculation of damages.

Once there is a Final Award (compliant with *Armendariz*), it either needs to be challenged or corrected, paid, confirmed, or in some rare cases, vacated. In a recent case, *Eternity Investments, Inc. v. Brown* (2007) 07 C.D.O.S. 6210, the Second District Court of Appeal, Division One, upheld confirmation of the plaintiff's award, over defendant's opposition. The Court of Appeal held that under the California Arbitration Act (Code Civ. Proc., §§ 1280-1294.2), a petition or responses seeking to correct or vacate an arbitration award, must be brought in the superior court within 100 days after service of a signed copy of the award (Code Civ. Proc., § 1288). Here, defendant did not file any such petition or response to correct or vacate the award, so when plaintiff filed a petition to confirm the award (which may be brought within four (4) years after service of the signed award), defendants had essentially waived their right to argue invalidity of the arbitrator's award. The Court concluded that because defendants did not bring a timely petition or response to correct or vacate the award, the trial court had no choice but to disregard defendants' challenge and confirm the award as made. (§1286.).

The lesson from this case for lawyers representing the prevailing party at arbitration, is to exercise patience before rushing in to confirm the award. It may make more sense to wait until the 100 days has expired, to avoid an order vacating or correcting the arbitrator's ruling based on an irregularity in the award. An exception to this might be where the court in which the post-award proceedings are filed matters. For example, if you are the prevailing party but your opponent's motion to vacate may do better in federal court with application of the Federal Arbitration Act (FAA), you may want to file the petition to confirm early and pick the superior court.

If however, you are on the losing end of the award, first take heed of the time limits to seek to correct or vacate the award. Code of Civil Procedure section 1285 authorizes any party to an arbitration to petition the Superior Court to vacate the award. Code of Civil Procedure section 1286.2 enumerates the grounds for vacating arbitral awards. These grounds are:

Subject to Section 1286.4, **the court *shall* vacate the award** if the court determines any of the following:

(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.

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(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.
(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 Sections 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, the subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.

Petitions to vacate an arbitration award pursuant to Section 1285 are subject to the provisions of Section 128.7

Under Code of Civil Procedure Section 1286.4, a petition or response must be made, duly served and filed, requesting the vacating or correcting of the award, and reasonable notice must be given that the court will be asked at the hearing to vacate or correct the award.

Code of Civil Procedure section 1286.6 sets out the grounds for correcting awards, including:

• evident miscalculation of figures or evident mistake in description of any person, thing or property referred to in the award

• arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted, or

• The award is imperfect in a matter of form, not affecting the merits of the controversy

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Among her many honors, Ms. Reinglass has been named each year since 2004 by Los Angeles Magazine *as one of California's "Super Lawyers."*