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THE CALIFORNIA ARBITRATION ACT AND THE 1988 REAL ESTATE ARBITRATION AMENDMENTS: COMING OF AGE?

FRANCIS O. SPALDING*

I. INTRODUCTION: ODD BEDFELLOWS

In 1988, the California Legislature enacted one of the longest, and in many ways one of the most significant, amendments to the California Arbitration Act¹ since the adoption of that Act in 1961². Assembly Bill No. 1240, carried by Assemblyman Byron Sher, Democrat of Palo Alto, was introduced on March 3, 1987 under the extra-legislative sponsorship of the California Association of Realtors. Chaptered on September 14, 1988, after significant legislative markup over two sessions, the Bill added to the Act Sections 1298-1298.8,³ its first provisions dealing ex-

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1. CAL. CODE CIV. PROC. §§ 1280-1297.432 (West 1991).

2. See generally Recommendation Relating to Arbitration (Dec. 1960), 3 Cal. Law Revision Com.; Feldman, *Arbitration Modernized--The New California Arbitration Act*, 34 S. CAL. L. REV. 413 (1961).

3. As with earlier provisions of the Arbitration Act, this new enactment implicitly reserves for possible later additions a number of section numbers within the range used. The sections actually included in this enactment are:

§ 1298(a)-(e). As discussed *infra* in note 5, A.B. 405, a cleanup bill enacted so as to become operative on the same date as A.B. 1240, modified certain provisions of subsections (a)-(d) of § 1298. As now in force, §§ 1298(a) and (b) are quoted in full *infra* at note 17; § 1298(c) is quoted in full *infra* at notes 18 and 19; § 1298(d) is quoted in full *infra* at pp. 328-29; and § 1298(e) is quoted in full *infra* at p. 328. § 1298.5, quoted in full *infra* at note 60. § 1298.7, quoted in full *infra* at pp. 332-33. § 1298.8, quoted in full *infra* at note 12.

pressly with arbitration clauses in real estate contracts.⁴ Under Section 1298.8, the provisions of this new enactment became operative, and apply to contracts entered into on or after July 1, 1989.⁵

Perhaps it might be thought that, with a piece of the Arbitration Act all its own at last, California real estate arbitration has come of age. Certainly it has joined a select circle. Heretofore, among private domestic arbitrations only medical malpractice arbitrations have been thought to require this kind of specific mention and treatment in the California Act.⁶ Yet thousands of real estate disputes have been arbitrated in California without the blessing of specific statutory mention, under the terms of the Act applicable generally to "agreements"⁷ or "written agreements,"⁸ whatever the subject matter. Indeed, in mid-1988, almost a full year before the effective date of Sections 1298-1298.8, the aforementioned California Association of Realtors⁹ saw fit to add to its standard sample set of real estate contract forms new versions of many of its most basic forms—deposit receipts, investment purchase contracts and listing agreements—that included an optional arbitration clause.¹⁰ This step on the part of so important a supplier of real estate

4. The only other section of the Act in force at the time of enactment of §§ 1298-1298.8 having even a remote explicit connection with real estate matters is § 1281.5, which provides a procedure for recording and enforcement of a mechanic's lien without waiver of an otherwise enforceable right to arbitrate. *See infra* pp. 331-32. Section 1281.8(b), added in 1989, allows parties to arbitration agreements to seek "a provisional remedy in connection with an arbitrable controversy . . . upon the ground that the award . . . [in that controversy] may be rendered ineffectual without provisional relief." § 1281.8(b). Provisional relief is defined in § 1281.8(a) to include, *inter alia*, issuance of a writ of possession and appointment of a receiver.

5. A.B. 405, also carried by Assemblyman Sher, was enacted May 25, 1989 as an urgency measure to become operative on July 1, 1989, concurrent with AB 1240. This Bill revised §§ 1298 principally by adding the modifier "binding" to each definitional reference to "arbitration" in §§ 1298(a) and (b) in order to make clear the inapplicability of these provisions to real estate disputes subject to judicial or court-annexed arbitration under CAL. CODE CIV. PROC. §§ 1141.10-.32. Under these sections, particularly §§ 1141.11 and 1141.20, judicial arbitration is generally *mandatory* but *non-binding*; arbitrations under CAL. CODE CIV. PROC. §§ 1280-1298.8, on the other hand, are generally *voluntary* but *binding*. As to A.B. 405, see also notes 16 and 58, *infra*.

6. CAL. CODE CIV. PROC. § 1295. *See infra* note 25.

7. *Id.* § 1280(a).

8. *Id.* § 1280(f).

9. *See supra* p. 307.

10. Cal. Ass'n of Realtors, Real Estate Standard Forms Sample Packet, Summer 1988.

contract forms constitutes persuasive evidence, if the proposition were subject to any doubt, that arbitration has long been widely accepted and used in this field without benefit of statutory sections specially addressed to real estate transactions.¹¹

Why, then, did the Legislature think it appropriate to add these novel provisions, specific to real estate contracts, to the California Arbitration Act? In so doing, did the Legislature do its technical work of legislative draftsmanship well? Beyond language, did it adopt wise policies governing the arbitration of real estate disputes? Because of the structure and content of Sections 1298-1298.8, it is simplest to divide these inquiries, considering separately, on the one hand, the provisions of Section

11. Because arbitration is a private rather than a public process; because administrative organizations may have proprietary, competitive or other reasons for keeping information about case loads confidential; because such statistics as are available may not be kept or published in categories that address the inquiry at hand, useful statistics are not always easy to come by. The American Arbitration Association (hereinafter "the AAA"), certainly both the oldest (founded 1926) and the largest domestic administering organization, is generally forthcoming with figures and often supplies or can make available statistics on its case load that are revealing. An AAA press release dated October 3, 1990, for example, reports:

The [AAA] reported today real estate claims filed [nation-wide] in the past three years increased by 120%. There were 510 cases filed in 1987, [548 in 1988] and 1125 in 1989. Real estate disputes, as indicated by case filings, are strong again this year with 1062 cases filed as of August 1990.

Statistics distributed at the AAA's San Francisco Arbitration Day programs in 1988, 1989 and 1990 reported total national AAA commercial case filings for these same years. If, as appears, these statistics are comparable, the real estate filings reported by the 1990 press release constitute the following percentages of the AAA's total commercial filings in these years:

AMERICAN ARBITRATION ASSOCIATION NATIONAL CASE FILINGS

<u>Year</u>	<u>Total Commercial Case Filings</u>	<u>Real Estate Claims Filed</u>	<u>Real Estate Per Cent of Total</u>
1987	9,533	510	5.35%
1988	10,979	548	4.99
1989	12,206	1,125	9.22

An unpublished compilation of real estate case filings for the California regions of the AAA (San Francisco, Los Angeles, San Diego and, since 1989, Orange County) suggest comparable growth there, on a higher base:

AMERICAN ARBITRATION ASSOCIATION CALIFORNIA CASE FILINGS

<u>Year</u>	<u>Total Commercial Case Filings</u>	<u>Real Estate Claims Filed</u>	<u>Real Estate Per Cent of Total</u>
1987	2,280	221	9.69%
1988	2,715	252	9.28
1989	3,139	531	16.92

1298(a), (b) and (c) that require the use of specific boilerplate language in arbitration clauses applicable to real estate contracts; and, on the other, those of Sections 1298(d) and (e) and of 1298.5 and 1298.7 that address other aspects of the arbitration of real estate disputes.¹²

These relatively narrow inquiries may satisfy the curiosity of those whose interest to arbitration is limited to the real estate sphere. Those interested in the efficacy and utility of arbitration generally, however, should consider as well how this major addition may play on a wider stage; for viewed in the larger context of the California Arbitration Act as a whole, this new enactment suggests these additional questions: what significance might these provisions, addressed in terms exclusively to arbitration of real estate disputes, have for the future of California arbitration law generally, and what effect, if any, might they have upon California's role as a bellwether in the development of modern arbitration law?

This article, after addressing the foregoing questions, concludes with some thoughts on amending statutes in general, and the California Arbitration Act in particular.

II. SECTIONS 1298(a)-(c): LIFE IN A BOILERPLATE FACTORY

A. LEGISLATIVE PURPOSE: A CAUTIONARY TALE

California courts have declared repeatedly over the years that arbitration is a preferred method of dispute resolution in California.¹³ On their face, Sections 1298(a)-(c) do not seem to

12. Section 1298.8, the only other section added by A.B. 1240, serves only to establish the operative date, and to limit the Act's applicability to contracts or agreements entered into after that date:

This title shall become operative on July 1, 1989, and shall only apply to contracts or agreements entered into on or after that date.

See supra p. 308.

13. *See, e.g.*, *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc., v. 100 Oak Street*, 35 Cal. 3d 312, 322, 673 P.2d 251, 257, 197 Cal. Rptr. 581, 587 (1983); *Keating v. Superior Court*, 31 Cal. 3d 584, 604, 645 P.2d 1192, 1203; 183 Cal. Rptr. 360, 371 (1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Madden v. Kaiser Foundation Hospitals*, 17 Cal. 3d 699, 706-07, 552 P.2d 1178, 1182, 131 Cal.

reflect a legislative purpose wholly consistent with that frequent judicial declaration.

For a start, Sections 1298(a) and (b) require that, in the classes of contracts to which they apply,¹⁴ the arbitration clause be “clearly titled ‘ARBITRATION OF DISPUTES.’” “Clear title,” however, is not enough: in a printed form, the phrase (and perhaps the entire clause—one of a number of ambiguities in the act)¹⁵ must meet specific requirements of a kind once more familiar to typographers and graphic artists than to lawyers, judges and arbitrators: “at least 8-point bold type” if in the same color as the rest of the contract or, if in “contrasting red” then in “at least 8-point type.”¹⁶ In a typed contract, the phrase must be “set out in capital letters.”¹⁷

Rptr. 882, 886 (1976).

14. See *infra* pp. 317-18.

15. See *infra* pp. 317-18; see also pp. 319-21.

16. As originally enacted, §§1298(a) and (b) called for printing this required title either in 10-point bold type if in the color of the rest of the contract, or, alternatively, in “8-point type”—presumably in normal, or roman, rather than bold, face—if in “contrasting red.” A.B. 405 included this simplification in typographic requirements—one that seems to a lawyer salutary if modest, however it might strike a typographer. See *supra* note 5.

17. As now in force, §§ 1298(a) and (b) read:

(a) Whenever any contract to convey real property, or contemplated to convey real property in the future, including marketing contracts, deposit receipts, real property sales contracts as defined in Section 2985 of the Civil Code, leases together with options to purchase, or ground leases coupled with improvements, but not including powers of sale contained in deeds of trust or mortgages, contains a provision for binding arbitration of any dispute between the principals in the transaction, the contract shall have that provision clearly titled “ARBITRATION OF DISPUTES.”

If a provision for binding arbitration is included in a printed contract, it shall be set out in at least 8-point bold type or in contrasting red in at least 8-point type, and if the provision is included in a typed contract, it shall be set out in capital letters.

(b) Whenever any contract or agreement between principals and agents in real property sales transactions, including listing agreements, as defined in Section 1086 of the Civil Code; contains a provision requiring binding arbitration of any dispute between the principals and agents in the transaction, the contract or agreement shall have that provision clearly titled “ARBITRATION OF DISPUTES.”

If a provision for binding arbitration is included in a printed contract, it shall be set out in at least 8-point bold type or in contrasting red in at least 8-point type, and if the

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Section 1298(c) goes beyond the title of the arbitration clause to require specific language of warning, with typeface requirements similar to those of Sections 1298(a) and (b):¹⁸ all caps if typed; or “at least 10-point bold type” if in the same color as the rest of the contract or, if in “contrasting red” then in “at least 8-point bold type.”¹⁹

provision is included in a typed contract, it shall be set out in capital letters.

Since the advent of laser printers, it has become ever easier to produce, at a lawyer's or legal secretary's desk, both what looks like traditional “printing” and what looks like traditional “typing,” perhaps even in a single pass over a blank sheet of paper. One may hope, without great optimism, that we may somehow be spared litigation over whether a particular laser-printed contract is “printed” or “typed.”

18. CAL. CODE CIV. PROC. § 1298(c) reads:

Immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision described in subdivision (a) or (b), and immediately following that arbitration provision, the following shall appear: “NOTICE: BY INITIALLING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE ‘ARBITRATION OF DISPUTES’ PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHT YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALLING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE ‘ARBITRATION OF DISPUTES’ PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.” “WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE ‘ARBITRATION OF DISPUTES’ PROVISION TO NEUTRAL ARBITRATION.”

19. At first blush, the concluding language of § 1298(c) seems not unlike the parallel provision in in §§ 1298(a) and (b):

If the above provision is included in a printed contract, it shall be set out in at least 10-point bold type or in contrasting red print in at least 8-point bold type, and if the provision is included in a typed contract, it shall be set out in capital letters.

Compare supra note 17. Close examination, however, reveals that the typeface requirements here are *not* the same as in §§ 1298(a) and (b): here, if printed in black (or in the same color as the rest of the contract) *this* warning must be in *10-point bold* (rather than 8-point bold) type, as in §§ 1298(a) and (b); while if “contrasting red print” is used, the

Section 1298(c) goes somewhat further, however, albeit in a fashion that is oblique if not downright backhanded. Still another requirement, applicable to arbitration clauses in real estate contracts alone, seems to lurk in the reference to a "line or space provided for the parties to indicate their assent or nonassent to the arbitration provision described in subdivision (a) or (b)." The opening phrase of boilerplate warning itself refers again to this same "line or space:" "NOTICE: BY INITIALING IN THE SPACE BELOW" Perhaps it might be thought that the signature lines at the end of the entire contract could be considered the "line or space;" Section 1298(c), however, is not so easily satisfied. It would seem that the statute requires that these elements appear in this order and juxtaposition:

1. "The arbitration provision," meaning the substantive terms thereof;
2. The 148-word boilerplate warning, which must "immediately follow" the arbitration provision, and which must be "immediately before"
3. "The line or space provided for the parties to indicate their assent or nonassent"

Thus, unless the arbitration provision and the warning are the very last provisions of the contract, the statute now seems to require, as to the class of contracts covered,²⁰ that there be a separate written assent to the arbitration clause—a requirement without parallel anywhere else in the California law of arbitration.²¹

Whatever the precise dimensions of the requirements of sections 1298(a)-(c), it seems fair to conclude from these portions of the new enactment that the Legislature entertained as its principal purpose the desire to inform, through the medium of boiler-

warning must be in 8-point *bold* type (rather than in the 8-point normal (or roman) permissible under §§ 1298(a) and (b)). While A.B. 405 simplified the typographic requirements of §§ 1298(a) and (b) somewhat, it made no change in the language of A.B. 1240 as to the parallel provision of § 1298(c). *See supra* notes 16 and 17. There is neither evident reason nor obvious justification for the extraordinarily confusing melange of typeface requirements that results within the narrow compass of § 1298. Perhaps the cautious lawyer should consider adding a typescaling rule to his or her desk equipment.

20. *See infra* pp. 319-21.

21. As to medical malpractice arbitration, Section 1295(b) deals with this problem by directing that the all-cap boilerplate warning appear "immediately before the signature line provided for the individual contracting for the medical services." *See infra* note 25.

plate, those who may be considering inclusion of an arbitration clause in their real estate contracts of some of the differences between arbitration and litigation. The penalty for omitting or departing from the mandatory text is not stated, but it may be inferred: invalidation of any purported arbitration clause that does not meet all of the stated requirements.²²

B. LEGISLATIVE HANDIWORK: WHAT DID MUMBLES SAY?

The proposition that the consumer should be better informed is unarguable. Two questions follow, however: first, whether the boilerplate addressed to “consumers”—here, parties to real estate contracts—in hopes of achieving this purpose is clear enough and easily enough understood to have a realistic chance of accomplishing that end; and, second, whether the more technical provisions governing the use of the required boilerplate—the language addressed not to consumers but to real estate professionals and their lawyers—is reasonably clear and intelligible.

1. *Drafting the Boilerplate: Getting It Right*

The language of warning required by Section 1298(c) is hardly felicitous. The attempt, essentially, is to summarize, in something under 150 words, a subject on which books have been written.²³ Inevitably such an attempt produces awkward or imprecise phrasing—“court or jury trial,” for example, or “judicial rights to discovery and appeal.”

More particularly, as to the main message of the Section 1298(c) warning, the similarly intended requirement applicable to medical service contract arbitration clauses, found in Section 1295 of the Act,²⁴ is flagged in a relatively simple 38-word statement limited, essentially, to conveying the advice that signing the “court or jury trial.”²⁵ The warning of Section 1298, by con-

22. *Cf. Rosenfield v. Superior Court*, 143 Cal. App. 3d 198, 191 Cal.Rptr. 611 (1983), which adopts this approach as to a case falling under § 1295. *See generally infra* note 25.

23. *See, e.g., M. DOMKE, COMMERCIAL ARBITRATION* (1990).

24. CAL. CODE CIV. PROC. § 1295.

25. The boilerplate language required by § 1295(b) reads:

“NOTICE: BY SIGNING THIS CONTRACT YOU ARE
AGREEING TO HAVE ANY ISSUE OF MEDICAL MAL-

trast, runs to some 148 words, adding not only the reference to the possible loss of “judicial rights to discovery and appeal,” and a 28-word warning about the consequences of failing to submit to arbitration after agreeing to do so, but also a good deal of unwelcome general prolixity.²⁶

PRACTICE DECIDED BY NEUTRAL ARBITRATION
AND YOU ARE GIVING UP YOUR RIGHT TO A JURY
OR COURT TRIAL. SEE ARTICLE 1 OF THIS
CONTRACT.”

The last sentence of this warning reflects the requirement of § 1295(a) that any arbitration clause covering disputes as to professional malpractice in a contract for medical services “shall have such provision as the first article of the contract” That section goes on to require that the arbitration clause—that is, Article 1 of the contract—shall be, in terms:

It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

As to this aspect of § 1295(a), if this requirement should be read to *limit* the arbitration clause to this language (rather than simply to require that the agreement *include* this language) the parties to such a contract are hamstrung in any attempt to tailor the terms of their arbitration clause. *See infra* note 44. Nor does the language appear to be perfectly designed for ready understanding by the average lay reader—albeit that in this respect it is far superior to the language of § 1298, discussed *supra*.

Nor is it wholly clear what the effect of the choice of California arbitration law effectively *compelled* by this boilerplate would be in a case, if one should arise, as to which the Federal Arbitration Act, 9 U.S.C. §§ 1-15, is applicable—that is, essentially, a case arising out of “a contract evidencing a transaction involving commerce,” *id.* at § 2. It was held in *Volt Information Sciences, Inc., v. Board of Trustees of the Leland Stanford University*, 489 U.S. 468 (1989) that even in such a case the parties, by virtue of so modest a device as a general choice of law clause electing to apply the law of the situs of the project contracted for, might effectively *agree* to follow California law including provisions of the California Arbitration Act inconsistent with those of the Federal Act. *See also infra* note 56.

At least, however, under § 1295, only the “NOTICE” required by § 1295(b) is subject to specific typographic requirements—there, “10-point bold red type” (and, since it so appears in the statute, presumably all capital letters as well). The longer and more discursive additional text requirement of § 1295(a), so far as appears, may be in ordinary upper and lower case. *See infra* note 27. As to the positioning of this notice, see *supra* note 21.

26. For example, for “your right to a court or jury trial” in § 1295, § 1298(c) substitutes “any right you might possess to have the dispute litigated in a court or jury trial”—exactly twice as many words.

Moreover, Section 1298(c) introduces another kind of clarity problem—one well understood by typographers and commercial art directors (and even by some lawyers who have begun to use desktop publishing in their practices), if not, apparently, by the members of the California Legislature: that all-cap type is substantially more difficult to read than type set in upper and lower case.²⁷ To be sure, the literal requirement of the statute is that the warning paragraph appear all in caps only in a *typed* con-

27. See, e.g., R. PARKER, LOOKING GOOD IN PRINT 36 (1988):

Headlines set in upper-case type occupy more space and slow readers down. Readers are unaccustomed to words set exclusively in upper-case type, which are difficult to view at a glance. In general, limit upper-case headlines to two or three words.

In subsequent chapters entitled "Building Blocks of Design," *id.* at 45-63, and "Tools of Emphasis," *id.* at 65-76 (which begins with the caveat, "The tools of emphasis are most effective when used with restraint"), the same volume discusses dozens of ways of adding emphasis to printed text, including bold type, *id.* at 51-52, and color, *id.* at 67-68; all-cap type is nowhere mentioned in these pages.

In R. PARKER, NEWSLETTERS FROM THE DESKTOP 90 (1990), the same author adds another element to the explanation:

The main problem with uppercase type is that it's hard to read. Lowercase ascenders and descenders help the reader identify the letters and recognize words, whereas uppercase shapes blend together into uniform rectangles.

The reader who remains in doubt about the relative legibility of all-cap and upper and lower case styles may compare the ease and speed with which he or she can read and understand the following side-by-side renditions of the warning of § 1298(c), which differ only in the use of type cases:

tract,²⁸ but both the lawbook publishers and the formsellers seem to be following the style of the Legislature's slip version of the new enactment in printing this language of the statute all in caps.²⁹

A more serious problem of clarity, tracing to ambiguity in the boilerplate provisions, lies in substantially identical provisions of Sections 1298(a) and (b). In each of these sections, after setting out the requirement for "clearly titling" the arbitration clause "ARBITRATION OF DISPUTES" in the classes of contracts covered,³⁰ the statutory language continues, "If a provi-

"NOTICE: BY INITIALLING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHT YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALLING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL. UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION, IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY." "WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION."

"Notice: By initialling in the space below you are agreeing to have any dispute arising out of the matters included in the 'ARBITRATION OF DISPUTES' provision decided by neutral arbitration as provided by California law and you are giving up any right you might possess to have the dispute litigated in a court of jury trial. By initialling in the space below you are giving up your judicial rights to discovery and appeal, unless those rights are specifically included in the 'ARBITRATION OF DISPUTES' provision. If you refuse to submit to arbitration after agreeing to this provision, you may be compelled to arbitrate under the authority of the California Code of Civil Procedure. Your agreement to this arbitration provision is voluntary." "We have read and understand the foregoing and agree to submit disputes arising out of the matters included in the 'ARBITRATION OF DISPUTES' provision to neutral arbitration."

28. As to typed real estate contracts, which are almost certain to have been fully negotiated, the policy arguments in favor of warning have far less force than in the case of printed form contracts. *See infra* pp. 326-27. *See also supra* note 17.

29. *See, e.g.*, Deering California Civil Practice Codes, Part 2 684 (1990, for use in 1991); Professional Publishing Corp. Form 101-R.3 CAL (5-89), "second version" (*see infra* note 32).

30. The full language relevant to the point here under discussion reads, in § 1298(a):
Whenever any contract . . . contains a provision for binding

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sion for arbitration is included in a printed contract *it shall be set out in . . . [stated type face requirements].*” (Emphasis added.) Read literally and alone, this latter sentence seems plainly to require that the entire arbitration clause—“it”—be set out in the required typeface; but read together with the immediately preceding sentence in the same subsection, “it” could be understood quite plausibly to refer to the last words of that preceding sentence, “ARBITRATION OF DISPUTES” (which appear all in capitals in the statutory text). If the former is the correct reading, of course, the requirement in a typed contract is that the entire arbitration clause be typed entirely in capital letters.³¹

Interestingly, one of the major publishers of real estate forms—a member of the only definable class seemingly certain to benefit from the enactment of Sections 1298-1298.8—apparently had some initial trouble with this issue. Both in a deposit receipt form dated “3-89” and in another dated “5-89” Professional Publishing Corp. printed the “clear title” in 8-point bold type and the 1298(c) warning language in 10-point bold type but

arbitration of any dispute . . . the contract shall have that provision clearly titled “ARBITRATION OF DISPUTES.”

If a provision for binding arbitration is included in a printed contract, it shall be set out in at least 8-point bold type or in contrasting red in at least 8-point type, and if the provision is included in a typed contract, it shall be set out in capital letters.

and, in § 1298(b):

Whenever any contract or agreement . . . contains a provision requiring binding arbitration of any dispute . . . the contract or agreement shall have that provision clearly titled “ARBITRATION OF DISPUTES.”

If a provision for binding arbitration is included in a printed contract, it shall be set out in at least 8-point bold type or in contrasting red in at least 8-point type, and if the provision is included in a typed contract, it shall be set out in capital letters.

As to these terms, these provisions appear to be almost precisely parallel. Yet there are seemingly random differences in language between them: “contract or agreement” as opposed to “contract” (*cf.* § 1280 defining “agreement”), for example; and “provision for binding arbitration” as opposed to “provision requiring binding arbitration.” Although specific problems in interpretation and application do not immediately suggest themselves, it is difficult to imagine a justification for such differences and, nurtured by the minds of inventive counsel, they may ultimately find their place in the appellate reports.

For the full text of §§ 1298(a) and (b), see *supra* note 17.

31. As to fully negotiated contracts, presumably the kind most likely to be typed, see pp. 326-27, *infra*. See also *supra* note 17.

rendered the substantive provisions of the arbitration clause itself in 8-point normal (or roman) type. A revised version of the same publisher's deposit receipt form, also dated "5-89," apparently not only caught the point noted here but also, erring on the side of caution, rendered the entire substance of the arbitration clause in 10-point bold--2 points, or 0.028 inches, higher than required by Sections 1298(a) and (b).³²

2. Coverage Language: Who? What? Where? When? Where? How?

In addition to setting out the "clear title" boilerplate requirement, Sections 1298(a) and (b) establish the classes of real estate contracts to which all of the boilerplate requirements of Section 1298³³ apply. Far and away the most serious problems of clarity related to the boilerplate provisions of Section 1298 are to be found in this coverage language. If the boilerplate language itself is subject to criticism for its clumsiness and verbosity, the problems with the coverage language found in Section 1298(a) and (b) include downright impenetrability.

32. This was by no means the only problem experienced by Professional Publishing in getting the boilerplate right. Its first cut at a new deposit receipt form omitted a substantial part of the 148-word warning of Section 1298(c). Paragraph 37 of Professional Publishing Corp. Form 101-R.3 CAL (3-89), entitled, "ARBITRATION OF DISPUTES" and otherwise conforming to the verbiage requirements of § 1298(a)-(c), omitted from the boilerplate language of § 1298(c) the sentence, "By initialing in the space below you are giving up your judicial rights to discovery and appeal, unless those rights are specifically included in the 'ARBITRATION OF DISPUTES' provision." A quick revision corrected that error. The missing sentence was added in ¶ 37 of one version—presumably the first May 1989 version—of the Professional Publishing Corp. form identified as Form 101-R.3 CAL (5-89). This version, however, perpetuated another error: as in the preceding version, the 1298(c) warning language came *before* rather than *after* the substantive provisions of the arbitration clause, as the statute directs. As noted *supra* at p. 313, § 1298(c) requires that the 148-word boilerplate warning be placed "immediately before the line or space provided to indicate their assent or nonassent to the arbitration provision . . . and immediately following that provision . . ."

It took still another revision—the third in two months—to correct that flaw, one that, if not caught, presumably would have risked invalidating the arbitration clause in any contract that used it after July 1, 1989. *See supra* note 22. This "second" May 1989 version is also identified as Professional Publishing Corp. Form 101-R.3 CAL (5-89), with no mark or code—nothing apart from the substantial textual differences in its ¶ 37—to distinguish it from the "first" May 1989 version. It was this version that also moved to address the ambiguity in §§ 1298(a) and (b) by putting the entire "substantive" arbitration clause in 8-point bold type (*see supra* pp. 317-18, and that first printed the entire warning all in capital letters (*see supra* pp. 316-17).

33. And presumably the rule of § 1298.7 as well; *see infra* pp. 332-33.

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Section 1298(b) begins by imposing the statute's boilerplate requirements on contracts "between principals and agents in real property sales transactions . . ." This language seems clear enough on its face, although it may not be immediately apparent why other kinds of principal-agent agreements—rental listing agreements, management agreements and the like—are excluded from apparent coverage.

The same sentence then proceeds, however: ". . . including *listing agreements*, as defined in Section 1086 of the Civil Code . . ." (Emphasis added.)³⁴ Well enough—except that, while subsection (e) of Civil Code Section 1086 defines a "*listing*"³⁵ as a contract authorizing an agent to "sell" or "find . . . a buyer" for property, subsection (b) of Section 1086 defines "sell" and "sale" as including lease and exchange and subsection (c) defines "buyer" as including a lessee or exchange participant. Presumably the intention was to incorporate into Section 1298(b) of the Arbitration Act all of these Civil Code Section 1086 definitions—and thus to make the subsection applicable to listing agreements for lease, as well as for sale. If, however, this is the best that the Legislature can do with statutory cross-references, perhaps some sort of dexterity test ought to be added to the "practical" section of the California bar examination. It is less clear how non-lawyer real estate licensees—who inevitably will be the ones obliged to make a high proportion of the firing-line decisions necessitated by this provision—are meant to cope with this kind of verbal juggling.

But 1298(b) is a model of clarity compared with the mares' nest of Section 1298(a). That Section applies in terms to arbitration clauses in ". . . any contract to convey real property, or contemplated to convey real property in the future including marketing contracts, deposit receipts, real property sales contracts as defined in Section 2985 of the Civil Code, leases together with options to purchase, or ground leases coupled with improvements . . ." Powers of sale in deeds of trust or mortgages are expressly excluded.³⁶

34. For the full text of §§ 1298(a) and (b), see *supra* note 17.

35. Civil Code § 1086, however, neither defines nor uses the term "listing agreement"—the term as to which § 1298(b) refers to § 1086 for definition.

36. For the full text of §§ 1298(a) and (b), see *supra* note 17.

For a start, what, if you please, is a “contract . . . contemplated to convey real property in the future” (as distinct from a “contract to convey real property”)? Next, please define a “marketing contract” (and while you are at it, please be sure to distinguish a “marketing contract” from a listing agreement as defined under Civil Code Section 1086). Then perhaps you will explain why “real property sales agreements as defined in Civil Code Section 2985” (installment land contracts to you—one of the genuine gooney birds of California real property law) are singled out for special mention and coverage. While some of this terminology may have found a place high in the analytical framework of certain scholars of the California law of real estate transactions, no part of it should be imported without definition into specialized corners of the Code of Civil Procedure—especially where the subject at hand is a system that is supposed to avoid the complexities of the law and that, in evident fact, will be used frequently by non-lawyers in circumstances where advice of counsel (for whatever it may be worth in such circumstances) is nowhere in sight.

Imprecise or impenetrable coverage definitions may be frustrating or worse for prospective contracting parties, but they should at least be good for the formsellers’ business. For with coverage definitions as muddy as these, the only way to be certain that an arbitration clause will not be subject to invalidation³⁷ is to include the boilerplate (including every precise requirement of wording and typeface and color) mandated by Section 1298 in any contract that might conceivably fall within its coverage—which means, roughly, any contract having anything remotely to do with real estate. This likely means as a practical matter, that most real estate professionals (and perhaps even some lawyers), should lay in a goodly supply of printed contract forms (once the formsellers have worked out all of the bugs),³⁸ however well or ill suited they may otherwise be to the purpose at hand.

A special note of caution may be in order concerning the use of submission agreements in real estate disputes. Most disputes find their way into arbitration by virtue of an arbitration clause

37. See *supra* note 22.

38. See also *supra* p. 318.

embedded (as a procedural appendage that the parties never expect to use) in a contract of wider scope dealing with substantive arrangements that are the motivation for the larger agreement.³⁹ It is also possible, however, and often desirable, to bring an existing dispute to arbitration even where the parties have not embedded an arbitration clause in their original contract; this is accomplished by entering into a submission agreement—that is, a separate contract, subsequent both to the original agreement between the parties and to the development of a dispute between them, in which the parties agree to submit that subsisting dispute to arbitration.

Readily available California real estate form contracts will likely continue to contain arbitration clauses that (once the bugs have been worked out)⁴⁰ conform precisely to the boilerplate requirements of Section 1298, typography, order, spacing and all; parties who use such forms need only initial the right boxes in order to embed the form arbitration clause in their agreement. It is much less likely, however, that it will occur to formsellers—or that if it does, they will find it economic—to market form *submission* agreements for real estate disputes. Yet, although the statute is silent on the point (and although a boilerplate warning about the risks of arbitration in a submission agreement is an oxymoron if there ever was one), there can be no guarantee whatsoever that Section 1298 may not be held as fully applicable to agreements to submit real estate disputes arising out of the classes of contracts covered⁴¹ as it is to arbitrations arising out of real estate contracts with embedded arbitration clauses. Caution would surely counsel that the boilerplate requirements of Sections 1298(a)-(c) be met in such submission agreements.

Nor is it likely that the parties to such submission agreements will be prompted from other quarters to be alert to the boilerplate requirements. The American Arbitration Association's widely circulated Commercial Rules pamphlet,⁴² for exam-

39. Such clauses are sometimes described as "future disputes" clauses because they provide for arbitration of disputes that may arise in the future. *See generally* American Arbitration Association, Commercial Arbitration Rules at 5 (as amended and in effect January 1, 1991) [hereinafter "AAA Rules"].

40. *See supra* p. 318.

41. *See supra* pp. 319-20.

42. AAA Rules, *supra* note 39, at 5.

ple, includes both a sample embedded arbitration clause and a sample submission agreement. Since that pamphlet is used nationally, however, and since real estate disputes make up only a small part of the AAA commercial case load,⁴³ these suggested clauses do not, and cannot reasonably be expected to, include, or make any reference to, the peculiar language and typeface requirements that the California Legislature has seen fit to impose upon real estate arbitration agreements in that State.

C. THE BEGINNING OF WISDOM?: "ARBITRATION MAY BE HAZARDOUS TO YOUR HEALTH"

Was any of this small carload of boilerplate was really a necessary or desirable addition to the California Arbitration Act? Is there something special about real estate contracts that requires their being singled out for all this special attention from the wide array of other kinds of contracts that may contain arbitration clauses? Boilerplate no doubt has some advantages. As noted, it is probably good for formsellers' business, and requiring it by statute, perhaps, minimizes the demands of lawmaking put upon the Legislature; but will real estate contracts (or the arbitration clauses therein) be better, in some sense—in any sense—for having included in their baggage all the legislative verbiage commanded by Section 1298?⁴⁴

43. See *supra* note 11.

44. The Legislature must be given credit for having avoided, once it was called to its attention, one potentially devastating pitfall in the original draft of A.B. 1240. As originally submitted by the California Association of Realtors, the Bill included required boilerplate to the effect that, by accepting the arbitration provision, the parties agreed that "*any dispute arising out of this contract*" must be arbitrated. (Emphasis added.) See A.B. 1240 as introduced March 7, 1987.

The language of this original draft set up this syllogism:

1. In order to be valid and enforceable, a contract comprehended by the legislation must include the precise language required by the statute.
2. The precise language required by the statute provides that "any dispute" (which in the context would seem necessarily to mean "all disputes") arising out of the contract "will be determined by submission to . . . arbitration"
3. Therefore parties to such a contract cannot lawfully limit the arbitration promise in the contract to less than all disputes that might arise under the contract.

Thus, had this language survived, it would have been impossible under the Act to tailor a binding arbitration agreement to arbitrate some, but not all, disputes arising out of a real estate contract—a result that, quite unnecessarily and to no purpose, would

The rest of the California Arbitration Act reflects, and has often been interpreted to reflect, a strong policy preference for arbitration.⁴⁵ It hardly seems likely that Sections 1298-1298.8 were intended to abrogate that general policy preference, even as to real estate contracts; yet the unbendingly literal warning mechanism put in place by Section 1298(c), even if effective to achieve its protective purposes, seems to strike no balance whatsoever with the policy preference for arbitration; rather it almost seems designed to crush the latter policy. For it treats arbitration as if it were something akin to tobacco smoke: a threat to life's good things, without compensating benefit, an inferior, if not an unfair, alternative to litigation.

For example, fully one-fifth of the 148 words in the boilerplate warning statement are devoted to this somber caution: "IF YOU REFUSE TO SUBMIT TO ARBITRATION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE." Who knows what terror the "authority of the California Code of Civil Procedure" may strike into the heart of a lay person, unaware that it is only a book? The statement is true, of course; but it is probably no more balanced or appropriate a warning statement about arbitration than would be the warning statement about a judicial proceeding that, "Should you fail or refuse to testify fully and freely on the witness stand, the judge may order you to jail without trial and hold you there until you purge yourself of your contempt." Arbitration, after all, is not without advantages. In the usual case, it is substantially faster, cheaper and

have made arbitration both less attractive and less useful.

A comparison of this first draft of § 1298(c) with the language of § 1295(b), *supra* note 25, suggests that the former may have been patterned originally on the latter. If so, this is additional evidence that, from its inception, § 1298(a)-(c) was not thought through with the requisite care and thoroughness.

For § 1295(b) was part of a statutory scheme designed in terms *solely* for use in contracts of adhesion under which all disputes *would* be arbitrated; whereas only a small proportion of the contracts to which § 1298(a)-(c) would apply are contracts of adhesion (*see infra* pp. 325-27).

Likewise, as noted *supra* in note 25, the contract language mandated by § 1295(b) could stand alone as a complete arbitration clause; and it is at least arguable that § 1295(b) is in fact intended to insure that arbitration clauses, in the medical services cases to which that statute applies, are strictly limited to the language there required; while the boilerplate mandated by §§ 1298(a)-(c), standing alone (either in its original form or as ultimately enacted), would accomplish absolutely nothing by way of binding the parties to an arbitration promise.

45. *See supra* note 13.

more private than litigation—particularly if the parties are willing to forgo full formal discovery in favor of the kind of “discovery substitutes”⁴⁶ that arbitration can afford. Moreover, in arbitration the parties, if they wish, can insure that the finder of fact is a neutral expert in the field, rather than risking entrusting their fate to a neutral novice. If the uninformed reader of the warning is get any of this side of the story, however, he or she must do so somewhere outside the language of Section 1298(c).⁴⁷

The statutory warning will not induce knowledgeable parties to refuse an arbitration clause that they otherwise want to adopt; nor will knowledgeable real estate licensees and lawyers hesitate to explain to their clients what arbitration is and what its advantages and disadvantages are. But what about the rest? How many parties, ignorant of arbitration, will be driven off, still ignorant, by the threatening tenor of the boilerplate warning, or by the know-nothing advice of an agent?

Fortunately, there is some indication that, since the advent of Sections 1298-1298.8, the real estate community, or segments of it at least, are undertaking to learn something about the arbitration process. Those who are most successful in doing so will come to realize that arbitration is neither the religion some of its advocates seem to make of it, nor the devil’s workshop described by its most committed detractors, but rather another way of resolving disputes—one that necessarily entails tradeoffs but one that at its best can get disputes resolved far faster and far more economically and with greater privacy than can the litigation alternative.

However successful real estate professionals prove to be in learning to cope with the demands put upon them by Section 1298, it is instructive, in evaluating the wisdom of this new enactment, to compare it with Section 1295, enacted in 1975, dealing with contracts for medical services. For as noted,⁴⁸ like Sec-

46. See Spalding, *Avoiding Delay in Arbitration: Counsel’s Role*, ALTERNATIVE DISPUTE RESOLUTION NEWSALERT, CALIFORNIA EDITION 1, 5 (March 1991).

47. To be sure, the warning language of Section 1298(c) does seem to throw one left-handed compliment to California arbitration—it acknowledges that any arbitration involved is at least “neutral arbitration as provided by California law.” Even this concession, however, carries with it the unfortunate negative implication that another kind of arbitration—“non-neutral”? biased?—may also be known to California law.

48. See *supra* note 25.

tion 1298, Section 1295 features the requirement of specific boilerplate contract language; and for the moment, at least, these are the only places in the California Arbitration Act where such requirements are imposed upon the use of arbitration clauses.

Most if not all contracts for medical services of the kind covered by Section 1295 are by definition contracts of adhesion—that is, contracts completely drafted and offered by the medical service provider essentially on a take-it-or-leave-it basis.⁴⁹ Some kinds of real estate contracts (for example, some residential apartment leases and residential loan documents) may be contracts of adhesion; a great many, however, are not. Moreover, again far removed from the circumstance of medical service contracts, even those non-adhesive real estate contracts that are written on pre-printed forms—deposit receipt forms, for example—almost always include, in spaces explicitly provided for the purpose, significant terms tailored by the agreement or negotiation of the parties to the particular transaction and inserted by them into the finished contract.

Of course the tailorable real estate form contract, as tailored by the parties to the circumstances of their transaction, will likely include some standardized, pre-printed language—including, possibly, an arbitration clause. In this limited sense, such a real estate contract bears at least some resemblance to an adhesive contract for medical services. Yet the circumstances in which these two types of contract are used are otherwise vastly different. For one thing, in the tailorable form contract the standardized language is ordinarily still negotiable, leaving to the parties the choice whether to accept, modify or reject the form-drafter's suggestion; while as a practical matter none of the terms of the contract of adhesion, such as the typical medical services contract, is negotiable, leaving to the prospective subscriber only the choice whether to accept the contract as a whole or to reject it and seek medical services elsewhere. For another, even if pre-printed form language is used for the arbi-

49. Admittedly, Section 1295(e) declares that such contracts are "not contract[s] of adhesion, nor unconscionable nor otherwise improper," but they do fit precisely the definition of a contract of adhesion. See, e.g., *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 819-20; 623 P.2d 165, 172; 171 Cal. Rptr. 604, 611 (1981) (contracts of adhesion are not unenforceable unless also unconscionable).

tration clause in the tailorable form contract, that form language *has not been drafted by one party*—it is the product of the formseller, whose interest, presumably, lies in satisfying prospective parties on *all* sides of the transactions in question; while by definition the form language in an adhesive contract is drafted by the party with superior bargaining power. Likewise, the parties to a tailorable form contract, at least in the real estate field, may have any imaginable permutation or combination of relative sophistication and bargaining power.

Perhaps there is a case to be made for requiring boilerplate warning to the uninformed, if a form arbitration clause is to be used, both in contracts of adhesion for medical services and in tailorable real estate form contracts; but surely each is a quite different case, and whatever the case to be made for the medical services model it would be wholly inapposite to the circumstances of the real estate contract.⁵⁰

There are, moreover, at least two additional classes of real estate contract that have no parallel, as a practical matter, in the modern medical services field. One, common in the real estate field especially above the “retail” level (one, incidentally, particularly likely to involve the services of lawyers in the drafting) is the genuinely and fully negotiated contract that makes no use whatsoever of a pre-printed form. The case for requiring boilerplate warning language in such a contract is hard to imagine. Another class is the real estate contract—hand made or on a tailorable form that does not include a printed arbitration clause—between lay persons who are fully aware of, and desire to use, the arbitration process but who are unaware that the Legislature has adopted a boilerplate requirement. Is it really necessary or desirable social policy in cases such as these to put at risk fully negotiated arbitration provisions, if otherwise unobjectionable, in the service of a form of words that is, at best, turgid and hard to read and, at worst, unbalanced and intimidating?

Even if it is possible to make some respectable defense of the patent requirements of the boilerplate device employed in Sections 1298(a)-(c), it is impossible to conceive a defense of any

50. *See supra* note 45.

character for such half-hidden traps for the unwary as the requirement of those Sections for a separate "line or space," different from the signature line for the contract as a whole, upon which the parties must record their assent to the arbitration clause.⁵¹

Regrettably, ignoring every distinction of context and circumstance, the Legislature has seen fit to use very much the same brush in drawing boilerplate requirements for arbitration clauses in California real estate contracts as it used in creating Section 1295 in 1975. The statutory boilerplate requirements of Section 1298(a)-(c) are in force, however, and as noted they do apply not only to arbitration clauses in printed form contracts (and to hand-drafted arbitration clauses inserted into tailorable form contracts) but also, with equal force, to fully negotiated, individually drafted contracts (and to submission agreements).⁵² Thus lawyers in real estate practice who wish to include arbitration clauses in contracts they draft need to insert the boilerplate language of Section 1298 (*very* carefully proofread and all in caps) into their word processor forms⁵³—unless they wish to start cramming custom-drawn contracts onto commercial printed forms.

III. SECTIONS 1298(d)-1298.7: CLEANING OUT THE CLOSET

The remaining sections⁵⁴ of the 1988 real estate arbitration enactment are something of a catchall. Some may be necessary, some wise enough if perhaps unnecessary and some ill-considered nonsense. Certainly no large legislative purpose can be ascribed to them as a group, except perhaps to say that they have little or nothing to do with the legislative purpose of Sections 1298(a)-(c).⁵⁵ For purposes of this analysis, these disparate sections are best considered one by one, and to some extent out of the order in which they appear in the statute.

51. See *supra* p. 313.

52. See *supra* p. 321.

53. As noted *supra* in note 17, however, care as to typeface may be in order if the word processor and associated printer are capable of producing what a court might consider to be a "printed" rather than a "typed" contract.

54. As to § 1298.8, see *supra* note 12.

55. As to which see pp. 310-14, *supra*.

A. SECTION 1298(e): ESCROWHOLDER'S ESCAPE HATCH?

Section 1298(e) provides: "In the event an arbitration provision is contained in an escrow instruction, it shall not preclude the right of an escrowholder to institute an interpleader action." There certainly may be some wisdom in preserving or carving out a remedy especially important to professional stakeholders, a remedy that may be difficult or even impossible to afford in arbitration if all who might legitimately claim a share in the stake are not party to the same arbitration agreement.⁵⁶

On the other hand, as drawn, the statute would appear to make it impossible to bind even a willing stakeholder to an arbitration promise made *in an escrow instruction*. The remedy in such a case would appear to be a separate agreement embodying the arbitration promise—in effect, a submission agreement,⁵⁷ albeit one that might be drawn concurrent with the original contract. This clumsy procedure might be subject to more severe criticism if the problem invoking it seemed likely to arise with any frequency. (If it does arise, however, the draftsman will omit the requisite boilerplate at his or her peril.)

B. SECTION 1298(d): AN EXCESS OF CAUTION?

Section 1298(d) reads:

Nothing in this section [presumably the entirety of Section 1298] shall be construed to diminish the authority of any court of competent jurisdiction with respect to real property transactions in areas involving court supervision or jurisdiction, including, but not limited to, probate, marital dissolution, foreclosure of liens, unlawful detainer or eminent domain.⁵⁸

Standing alone, the phrase "areas involving court supervision or

56. Or to two or more arbitration agreements that are subject to consolidation; CAL. CODE CIV. PROC. § 1281.3, a provision that has no parallel in either the Uniform Arbitration Act, 7 U.L.A. 5 (1985) or in the Federal Arbitration Act, 9. U.S.C §§ 1-15 (West 1970), allows for judicial consolidation of separate arbitration proceedings under the conditions there set forth. It was this consolidation provision that was principally drawn into issue in *Volt Information Sciences, Inc., v. Board of Trustees of the Leland Stanford University*, 489 U.S. 468 (1989); *see supra* note 25.

57. *See supra* p. 321.

58. A.B. 405 added unlawful detainer to this list. *See supra* notes 5 and 16.

jurisdiction” seems a bit loose-jointed for a statute; arbitration itself, for example, could well be considered an “area” in which a court may be “involved” in “supervision or jurisdiction.” Yet since it is hard to think of anything in Section 1298—substantially all of which, except for this and the preceding short rump provisions, deals with boilerplate and more boilerplate—that could on any theory be contended to diminish the authority of any court anywhere, any risk on this branch seems a small one.

There may be a more serious risk that this language, seemingly otherwise unnecessary if not downright useless, might prompt some misguided challenge to the well-established notion that, unless limited by the arbitration agreement, an arbitrator has the power to award equitable or other non-monetary relief—power especially important, if anywhere, in the real estate field.⁵⁹

C. SECTION 1298.5: A PASSING GRADE—ALMOST

Section 1298.5 confirms the availability of a sound and efficient procedure:⁶⁰ concurrent filing of a notice *lis pendens* in a

59. Indeed, under Rule 43, AAA Rules, *supra* note 39, at 19, the arbitrator is given the authority to “grant any remedy or relief that [he or she] deems just and equitable and within the scope of the agreement of the parties . . .,” including, explicitly, specific performance of a contract. This grant of authority is generally understood to be, if anything, broader than the authority of a court to afford relief. Cf. *Nogueiro v. Kaiser Foundation Hospital*, 203 Cal. App. 3d 1192, 250 Cal. Rptr. 478, (1988); *Baker v. Sadick*, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984); CAL. CODE CIV. PROC. § 1283.4.

As to contractual and other limitations on the arbitrator’s remedial authority, see *Thompson v. Jespersen*, 222 Cal. App. 3d 964, 272 Cal. Rptr. 132, (1990) (award of \$75,000 in attorneys’ fees and \$10 in compensatory damages invalid under AAA Rule 43 where parties’ contract silent on attorneys’ fees); *Cobler v. Stanley, Barber, Southard, Brown & Assoc.*, 217 Cal. App. 3d 518, 265 Cal. Rptr. 868 (1990) (award of damages for emotional distress vacated where no tort claims found to be within scope of issues submitted to arbitrator). It has even been held in one recent case involving private voluntary arbitration of intra-profession disputes that the arbitrators may be given the power to decline to arbitrate otherwise arbitrable disputes because of “the magnitude of the amount involved or the legal complexity of the controversy.” *Berke v. Hecht*, 208 Cal. App. 463, 257 Cal. Rptr. 738 (1989).

60. Section 1298.5 reads:

Any party to an action who proceeds to record a notice of pending action pursuant to Section 409 [dealing with a “notice of pendency of action” or *lis pendens*] shall not thereby waive any right of arbitration which that person may have pursuant to a written agreement to arbitrate, nor any right to petition the court to compel arbitration pursuant to Section 1281.2, if,

judicial action relating to an arbitrable matter growing out of that action, and of an application to stay the court action pending arbitration—all without risking waiver of a right of arbitration, or of entitlement to petition the court to compel arbitration. It might be questioned whether a new enactment was entirely necessary to achieve this result: preexisting Section 1281.4, which allows for stay of a pending action, probably already assured this result; and the cases on waiver suggest, if they do not squarely hold, that filing an action for the purpose of recording a notice *lis pendens* would not constitute waiver of the right to arbitrate.⁶¹ Still there seems little harm and the possibility of some good in providing a specific statutory warrant for this procedure.

Even here, however, there lurks a possible ambiguity that could have potential for serious mischief. The opening sentence of Section 1298.5 begins, “Any party to an action who proceeds to record a notice of pending action pursuant to Section 409”—words that, whether taken alone or read in their actual context, seem to speak of a party to an action *previously* filed. Sixty-odd words later, still in the same sentence, the Section reads, “[I]f, *in filing an action to record that notice*, the party at the same time presents to the court an application that the action be stayed pending arbitration” (Emphasis added.) This latter phrase seems not only to misread Section 409, governing the filing of such notices⁶² but also to require that, the

in filing an action to record that notice, the party at the same time presents to the court an application that the action be stayed pending the arbitration of any dispute which is claimed to be arbitrable and which is relevant to the action.

61. See Keating, *supra* note 11 (participation in a lawsuit alone not enough to constitute waiver; “there must be judicial litigation of the merits of arbitrable issues,”) 31 Cal. 3d at 605, 645 P.2d at 1204, 183 Cal. Rptr. at 372; *Doers v. Golden Gate Bridge District*, 23 Cal. 3d 180, 588 P.2d 1261, 151 Cal. Rptr. 837 (1979) (mere filing of suit by claimant not a waiver). Cf. *Christensen v. Dewor Developments*, 33 Cal. 3d 778, 661 P.2d 1088, 191 Cal. Rptr. 8 (1983) (waiver under CAL. CODE CIV. PROC. § 1281.2(a) as determined by trial court affirmed); *Davis v. Blue Cross of Northern California*, 25 Cal. 3d 418, 600 P.2d 1060, 158 Cal. Rptr. 828 (1979) (waiver where insurer failed to advise insured of availability of arbitration under insurance contract).

62. CAL. CODE CIV. PROC. § 409, itself not perhaps a model of clarity in all respects, provides, in relevant part:

[P]laintiff, at the time of filing the complaint [in an action concerning real property or affecting the title or the right of possession of real property], . . . or at any time afterwards, may record . . . a notice of the pendency of the action

“action” referred to be filed *concurrent* with an application to stay the arbitration. A trial judge aware of what is afoot, and of what is at stake, ought to be able to give Section 1298.5 the effect that was almost certainly intended: to allow a party to an action, in the words of Section 409, “concerning real property or affecting the title or the right of possession of real property,” to file a notice *lis pendens* without waiving rights under an applicable arbitration clause. This assumes, of course, that the party “at the same time”—presumably at the same time that the notice is filed, not the same time that the underlying action was filed—applies to the court in which the action is pending for a stay pending arbitration. The language poses a quite unnecessary risk, however, that a court may try to make sense out of an attempt at literal reading of the language, with results that are hard to predict but that seem unlikely to be good.

This unnecessary source of confusion or worse may trace to insufficiently careful attention to draftsmanship. It seems more likely, however, that it is the product of a careless borrowing of other statutory language not wholly apt here. A comparison of the language of Section 1298.5 with that of preexisting Section 1281.5(a)⁶³ suggests that the latter is the source of much of the former; in the following side-by-side comparison of the two sections, the identical language is italicized:

(Emphasis added.)

63. See *supra* note 4 and *infra* notes 93, 94 and 95.

Section 1298.5

Any party to an action who proceeds to record a notice of pending action pursuant to Section 409 shall not thereby waive any right of arbitration pursuant to a written agreement to arbitrate, nor any right to petition the court to compel arbitration pursuant to Section 1281.2, if, in filing an action to record that notice, the party at the same time presents to the court an application that the action be stayed pending arbitration of any dispute which is claimed to be arbitrable and which is relevant to the action.

Section 1281.5(a)

Any party to an action who proceeds to record and enforce a lien by commencement of an action pursuant to [Cal. Civ. Code §§ 3082-3267] shall not thereby waive any right of arbitration which that person may have pursuant to a written agreement to arbitrate if, in filing an action to enforce that claim of lien, the claimant at the same time presents to the court an application that the arbitration of any issue, question or dispute which is claimed to be arbitrable under the agreement and which is relevant to the action to enforce the claim of lien.

It is beyond the scope of this article to explore in detail the differences between filing an action to enforce a mechanic's lien and filing a notice *lis pendens* in a pending real property action. Two observations should suffice here. First, borrowing of language in situations that are clearly parallel is without question a technique of statutory drafting much to be commended where appropriate. Second, however, the differences between the forms of interim relief dealt with in these two sections seem obvious enough to raise a clear alert to the risk of careless parallelism. Had that alert been heeded, the problem discussed here would almost certainly have been identified and quite likely avoided. Certainly it would have been easier to avoid that problem in the drafting stage than it is now to foresee precisely what trouble may arise from the failure to avoid it.

D. SECTION 1298.7: THROUGH A GLASS, DARKLY

One last substantive section of the new enactment remains to be confronted: Section 1298.7. To call it opaque is to flatter it. It provides:

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In the event an arbitration provision is included in a contract or agreement covered by this title,⁶⁴ it shall not preclude or limit any right of action for bodily injury or wrongful death, or any right of action to which Section 337.1 or 337.15 is applicable.⁶⁵

Section 337.1 of the Code of Civil Procedure deals with patent deficiencies in buildings and improvements and Section 337.15 with latent deficiencies in the survey of, or construction upon, real property.

If “right of action” here means “right of action in a judicial, rather than in an arbitral, proceeding,” then the lawmakers seem to have intended to provide that claims for bodily injury and wrongful death are, for some reason unstated and unfathomable, never to be arbitrable over the objection of a party to a real estate dispute, no matter what the agreed arbitration clause says.

Granted that personal injury claims are not a commonplace in real estate contract disputes, still this would seem a surprising result indeed as to such claims, since, so far as appears, bodily injury claims are arbitrable under any other kind of arbitration clause covered by the California Arbitration Act, provided only that it is determined that the parties have so agreed. Section 1295,⁶⁶ for example, expressly applies to arbitration of claims of bodily injury or death resulting from “professional negligence of a health care provider”; and Section 1283.1 makes special provision for discovery in the arbitration of “disputes arising out of or resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another.”⁶⁷ Likewise, there is no evident reason why causes of action under Sections 337.1 and 337.15, unlike private rights of action arising under almost every other section of the Codes, should be forever barred from arbitration over the objection of a party, when that party (and the others involved) have previously made an otherwise-binding agreement to arbitrate.

64. CAL. CODE CIV. PROC. § 1298.7.

65. See *supra* note 33.

66. See *supra* note 25.

67. See *infra* notes 94 & 101.

If, on the other hand, “right of action” means, as it ordinarily would, “a right of action cognizable in court unless the parties have agreed to arbitrate it,” then Section 1298.7 would seem to be designed to prevent anticipatory waiver of these rights by contract—but only in a real estate contract containing an arbitration clause; surely this is an absurd result, if not an unintended one.

In all likelihood it will fall to some hapless band of future litigants to bear the burden of making some sense out of this legislative murk.

This section has been described by one commentator as “a legislative compromise worked out between [the California Association of Realtors] and the California Trial Lawyers Association”⁶⁸ The suggestion appears to be that the Trial Lawyers wanted to bar by statute the arbitration of all tort claims but that the compromise “reduced the exclusion of all tort causes of action to the bodily injury exclusion.”⁶⁹ Assuming that the Trial Lawyers had the legislative clout to accomplish in this circumstance what neither they nor anyone else has yet succeeded in doing anywhere else in the Arbitration Act, namely “exclusion of all tort causes of action” from arbitration,⁷⁰ it is a shame that some minimal lawyerly standard of draftsmanship was not met in embodying this unfortunate “compromise.”

IV. BOILERPLATE ON A WIDER STAGE: GOOD FOR REAL ESTATE, GOOD FOR AMERICA?

Beyond its impact upon arbitration of real estate disputes under California law, the boilerplate requirements of Section 1298 serve to pose larger questions. For example, do the boilerplate warning requirements now on the books in Section 1298 governing arbitration clauses in real estate contracts⁷¹ and in the earlier Section 1295, governing arbitration clauses in medical

68. Caron, *Arbitration of Real Estate Disputes*, L.A. LAW., January 1990, at 33, 35 n. 4.

69. *Id.* The footnote goes on to say that § 1298.7, as compromised, “should preserve the right to arbitrate emotional distress claims, since ‘bodily injury’ is more restrictive than ‘personal injury.’”

70. *See supra* p. 333.

71. *See supra* pp. 310-14.

services contracts,⁷² suggest that there are more warning requirements to come? Certainly there is little evident logic in imposing boilerplate warning requirements in two specific fields as disparate as real estate and medical services⁷³—but in no others.

Perhaps it is to be anticipated, then, that the California Legislature will go on to direct, one at a time, the inclusion of boilerplate warnings in securities industry arbitration clauses, in lawyer-client fee arbitration agreements, in arbitration clauses in construction and architectural services contracts and so on. It remains to be seen whether, in the face of the clear rule that labor arbitration is governed by federal labor law,⁷⁴ lawmakers might even go so far as to mandate the ultimate anomaly: requiring inclusion of a boilerplate warning about the risks of arbitration in a labor-management collective bargaining agreement.

But if that is the trend to be anticipated, arbitration in California is already in trouble. For what is already on the books as to real estate arbitration clauses and medical service arbitration clauses is not just two warning language requirements—but two *different* warning language requirements. As noted,⁷⁵ Section 1295 requires a relatively simple 38-word warning in medical service contract arbitration clauses. Substantially the same warning in Section 1298, by contrast, runs to some 148 words.⁷⁶

There is nothing appetizing about the prospect of six, ten or a dozen different warning clauses in the Arbitration Act; but the most serious worry is the possibility of the ultimate “Balkaniza-

72. See *supra* note 25.

73. See *supra* pp. 325-27.

74. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Local 175, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Vaca v. Sipes*, 37 S.Ct. 903 (1967); *Allis-Chalmers Corp. v. Lueck*, 105 S.Ct. 1904 (1985); *Dryer v. Los Angeles Rams*, 40 Cal. 3d 406, 411-413, 709 P.2d 826, 828-30, 220 Cal. Rptr. 807, 809-11 (1985) and cases there cited. Cf. *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 828-31; 623 P.2d 165, 178-80; 171 Cal. Rptr. 604, 617-19 (1981).

75. See *supra* note 25. As there noted, the bold/all-cap requirement of § 1295(b) is accompanied by the requirement, in § 1295(a), of 103 additional words of boilerplate; this portion of the § 1295 boilerplate warning, however, tries to make fewer points and makes them in a way both that is easier to understand and that presents a better balanced comparison of arbitration to litigation; and it amounts as well to a complete mandated arbitration clause. See *supra* notes 25 and 44. Also, the statute permits the “warnee” to read this portion of the boilerplate in upper and lower case. See *supra* note 27.

76. See *supra* p. 312.

tion” of the California law of arbitration that would follow from requiring different precise language in a host of different substantive areas. Should that happen, more and more arbitration clauses, homemade and otherwise, will be rendered unenforceable solely on the narrowest and least significant of technical grounds. In the case of professionally drafted arbitration agreements, attention of the draftsman will inevitably be drawn away from productive concerns, such as tailoring the clause to the special requirements of the parties or the transaction, in favor of emphasis on including exactly the right boilerplate verbiage, in exactly the right order, in exactly the right typestyle and with exactly the right “line or space.”⁷⁷

Moreover, if warning clauses proliferate, where there is possible overlap of subject matter in a single contract—for example a contract falling both under Section 1298 as to its real estate aspects and under a different warning section dealing with, say, construction contracts—there will lurk the absurd possibility of two different warning statements in the same contract—or, far worse, of litigation over the question whether the proper one of two possibly applicable statements was chosen. It may be extreme to suggest that such a development would have the effect of repealing the “modern” California Arbitration Act, but the result would certainly constitute an unfortunate and wholly unwarranted movement in that direction.

Surely, if the Legislature in its wisdom is in fact committed to—or susceptible to—the adoption of more widespread boilerplate warning requirements, it ought at least to bite the bullet and adopt a single comprehensive, decently worded piece of boilerplate applicable wherever a warning is thought necessary.

In a still wider aspect, however, it is even possible to ask the unaskable question: whether mandated contract boilerplate has any real effect whatever in instructing and raising the consciousness of the masses. Presumably it is for social researchers and educational psychologists to have the definitive last word on this question of efficacy. Pending their answer, however, the rest of us may be excused should we conclude, as a general matter, that

77. See *supra* p. 313. As noted *supra* p. 318. even the formsellers—seemingly the principal beneficiaries of Sections 1298(a)-(c)—have had trouble getting it right.

the boilerplate device is at best rudimentary and unimaginative, clumsy and inflexible. It is beyond the scope of this article to explore alternative techniques of statutory draftsmanship in detail; but it is impossible to believe that serious and thoughtful effort could not produce better, simpler, more flexible statutes that achieve whatever warning purpose the objective evidence suggests may be needed. No consumer problem, real or imagined, can possibly justify trussing up the Arbitration Act like a Thanksgiving turkey and stuffing it with the gizzards of legal verbiage.

There is one final caution that the California Legislature ought to take, however unwillingly. The Federal Arbitration Act⁷⁸ lies just over the horizon.

Whether to this point the Federal Act has played much of a role in the arbitration of real estate disputes is a question of some uncertainty. Real estate transactions are probably less likely than many other types of commercial contracts to held to be "in" commerce; but the jurisdictional reach of the Federal Act extends beyond the channels of commerce themselves to arbitration clauses in "contracts evidencing a transaction involving commerce,"⁷⁹—language that might well be held to reach at least some real estate transactions. The real reason for uncertainty, however, is that, where the applicable provisions of the California and Federal acts are substantially identical—and in most aspects, California law has been scarcely less hospitable to arbitration than is Federal law⁸⁰—it has rarely been necessary to decide the question under which act a particular arbitration proceeds, whether in deciding a petition to confirm or vacate in the federal⁸¹ or state trial courts or in a case on appeal.⁸²

78. 9 U.S.C §§1-15 (19).

79. *Id.* § 2.

80. *But see* p. 339, *infra*.

81. *Southland Corp. v. Keating*, 465 U.S. 1 (1984), discussed *infra* at note 83, obliges state courts to apply federal arbitration law in deciding arbitration cases that fall within the ambit of 9 U.S.C. § 2 (*see supra* note 25). It is much more doubtful that the Federal Arbitration Act affords an independent basis for the exercise of federal jurisdiction. *See Bernhardt v. Polygraphic Corp.*, 350 U.S.198 (1956) (because arbitration law is "substantive" for purposes of the *Erie* doctrine, a federal court may not apply the Federal Arbitration Act in a case that is in federal court solely on the basis of diversity of citizenship.) *Compare* Frankfurter, J., concurring, *id.* at 205, 208 (it might be unconstitutional for the Congress to undertake specifically to make federal arbitration law applicable in diversity cases) *with* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)

Meanwhile, however, arbitration cases of California origin in fields outside of real estate, such as *Southland Corp. v. Keating*⁸³ and *Perry v. Thomas*,⁸⁴ have gone far to suggest the wide sweep now being given to the Federal Act. These cases are noteworthy in this context because they are ones that state courts found not subject to arbitration under state law but that were found by the United States Supreme Court to be arbitrable under the Federal Act, thus preempting state law.

Thus, should the process of Balkanization by boilerplate described here proceed, with the inevitable effect of making California arbitration law substantially less arbitration-friendly than it has been, it is not impossible to imagine that vigorous advocates and sensitized federal judges might combine forces to federalize local arbitration law right out from under the noses of a boilerplate-minded Legislature.

V. AMENDING THE CALIFORNIA ARBITRATION ACT: SEARCH FOR TOMORROW

It would certainly be fair to characterise the foregoing as almost unremittingly critical of the enactment of Sections 1298-1298.8. Readers who have stayed the course to this point may or may not agree with that criticism. It is perhaps unnecessary to

(Fortas, J.) (in a diversity case, a contract "evidencing a transaction involving commerce" under 9 U.S.C. § 2 is governed by the federal arbitration act; no constitutional question is presented because Congress has not "fashion[ed] federal substantive rules to govern . . . simple diversity cases . . ." but rather has "prescribe[d] how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate." *Id.* at 405). *See also infra* note 83.

82. Cf. *Volt Information Sciences, Inc., v. Board of Trustees of the Leland Stanford University*, 489 U.S. 468, 109 S.Ct. 1248 (1989), discussed *supra* at notes 25 and 42.

83. 465 U.S. 1 (1984) (provision of California Franchise Investment Law, interpreted by the California Supreme Court to mean that arbitration of disputes covered by the provision cannot be compelled into arbitration, is preempted by the Federal Arbitration Act where, per § 2 thereof, the contract "evidences a transaction involving commerce").

84. 482 U.S. 483 (1987) (in a dispute over compensation in the securities industry, the Federal Arbitration Act preempts provision of California Labor Code expressly providing that arbitration cannot be compelled in such a case). *See also Cook v. Barratt American, Inc.*, 219 Cal. App. 3d 1004, 768 Cal. Rptr. 629 (1990) *op. withdrawn by order of ct.* (7/11/90), 1990 Cal. LEXIS 3021, *cert. den.* 1191 US LEXIS, 111 S.Ct. 2052 (1991). (under federal arbitration law applicable to contract of employment, arbitration clause may be enforced as to sex discrimination claim under state law; refusal of a federal Court of Appeals in another case to compel arbitration of federal law sex discrimination claim not "persuasive precedent").

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agree with every word of the foregoing, however, in order to accept this conclusion: by no measure can Sections 1298-1298.8 be taken as any appropriate indication that real estate arbitration in California—or at least under California law—has in any sense come of age. The arbitration of real estate disputes may be coming into its own by virtue of other forces,⁸⁵ and that process will no doubt be aided by the addition of form arbitration clauses to many widely-accepted California real estate forms,⁸⁶ but the process would be far better off, on balance, without Sections 1298-1298.8;⁸⁷ certainly any increased use of arbitration clauses in form real estate contracts—or in real estate contracts of any other kind—was in no way dependent upon their enactment.⁸⁸

If Sections 1298-1298.8 do not evidence the coming of age of real estate arbitration in California, is it possible that their en-

85. See *supra* note 11.

86. Although it is no part of the purpose of this article to undertake a general critique of California real estate forms apart from the points on arbitration discussed here, one wider-ranging editorial comment can perhaps be made relevant here by observing that the highly questionable practice it embodies is in no way required by anything in Sections 1298-1298.8.

The practice in question, initially adopted by at least one form publisher, sets up the arbitration clause in such a way that, if the parties to the contract do not both agree either to include or to exclude the clause, they have no contract but rather must regard the last to elect as having made a counter offer. See Professional Publishing Corp. Form 101-R.4 CAL (5-89) ¶ 46, which so requires as to the liquidated damages clause, as to the arbitration clause and, indeed, as to the otherwise-much-to-be-commended mediation clause, *id.* ¶ 37.

Treating the liquidated damages clause in this way may be both realistic and desirable—and as to some classes of real estate contracts perhaps even necessary under California's strict rules governing liquidated damages clauses; see CAL. CIV. CODE §§ 1671 and 1675-81, particularly at § 1677 (which, incidentally, may be a part of the history of the Legislature's fascination with bold type and red print). But, important and valuable as arbitration and mediation can be, there seems little reason to make them into potential deal-breakers for parties—and agents—where the substantive terms of the transaction are otherwise fully agreed upon.

In any event, nothing in §1298(c)—or for that matter in any other part of §§ 1298-1298.8—requires this treatment of the arbitration clause. See *supra* note 3.

As discussed *supra* at p. 313, §§ 1298(a)-(c) require a separate “line or space” for “assent or nonassent to the arbitration provision”—but these sections do *not* require *two* spaces, one for assent, the other for “nonassent.” It would be perfectly permissible, under the statute, for the form to provide that the arbitration clause is incorporated into the contract if assented to by both (or all) parties, but not otherwise—a format frequently used in the forms to deal with other variable or negotiable terms and conditions of the contract.

87. As noted *supra* at pp. 328 and 329-31, a clarified § 1298.5, and perhaps a modified § 1298(e), might be worth salvaging.

88. See *supra* p. 308.

actment nevertheless marks in some way the maturation of the California Arbitration Act as a whole? The twenty-seven years between 1961 and 1988 do not match the human standard for maturity, but as the venerable Statute of Frauds bears witness, the life cycle of statutes does not necessarily parallel that of lawyers.

Like all historical processes that survive, common law arbitration was by and large a seamless, internally consistent system that meshed effectively with the larger social systems of which it was a part. The adoption of so-called "modern" arbitration statutes in the 1920's⁸⁹ and thereafter vastly strengthened the arbitration process by providing for specific enforcement of the arbitration promise and for the stay of any pending judicial proceeding addressing, on the merits, the same issues as those encompassed by the arbitration promise.⁹⁰ In due course over the next generation and more, this change—powerful in impact but narrow and focussed in scope—was duly accommodated both within the arbitration process and within the larger social order, so that the former retained—or at least regained—internal consistency, and so that reasonable systemic harmony was maintained.

Changes such as those embodied in the Uniform Arbitration Act⁹¹ and in the substantial elaboration and refinement of that Act entailed in the 1961 revision of the California Arbitration Act⁹² have been made with careful consideration of the systems into which they were being inserted; and by and large these

89. 9 U.S.C. §§ 1-17, enacted in 1925; N.Y. Arbitration Act of 1920, now N.Y. Civ. PROC. §§ 7501-7510; 1927 Cal. Stat. ch. 225; Uniform Arbitration Act, 7 U.L.A. 5 (1985). See also First Report of the Judicial Council of Cal. 20-21 (1926). For an interesting discussion of the history of California arbitration law, see *Pacific Gas & Electric Co. v. Superior Court*, 227 Cal.App.3d 51, 277 Cal.Rptr. 694 (1991).

90. See, e.g., CAL. CODE CIV. PROC. §§ 1281-1281.2; 9 U.S.C. §§ 2-4; Uniform Arbitration Act §§ 1-2, 7 U.L.A. 5-69 (1985). Whether a statute as spare as the Federal Arbitration Act (and as ambiguous; cf. the distinction seemingly drawn between "courts of the United States" in § 3 and "any United States District court" in § 4), although "modern" in the limited sense discussed here, is really modern in the state-of-the-art sense, is an important question by no means unrelated to the questions addressed here; it is, however, beyond the scope of this article.

91. Uniform Arbitration Act, 7 U.L.A. 5 (1985).

92. See generally Recommendation Relating to Arbitration (Dec. 1960), 3 Cal. Law Revision Com.; Feldman, *Arbitration Modernized--The New California Arbitration Act*, 34 S. CAL. L. REV. 413 (1961); *Pacific Gas & Electric Co. v. Superior Court*, 227 Cal.App.3d 51, 277 Cal.Rptr. (1991), *supra* note 89.

changes have been accommodated smoothly.

That careful, comprehensive process does not appear, however, to have been characteristic of most subsequent amendments of the California Arbitration Act. With the exception of the provisions of the extraordinarily comprehensive Title added in 1988 dealing with arbitration and conciliation of international commercial disputes,⁹³ the amendments to the Act since 1961 appear to have been made essentially piecemeal.⁹⁴ Some are wor-

93. CAL. CODE CIV. PROC. §§ 1297.11-.432. Except as to §§ 1297.341-.432 dealing with conciliation, this enactment is based substantially upon the Model Law, 24 I.L.M. 1302 (1985), promulgated by the United Nations Commission on International Trade Law, an organization ordinarily identified by the acronym UNCITRAL. See generally Golbert and Kolkey, *California's New International Arbitration and Conciliation Code*, L.A. LAW., November 1988 at 46. But see Garvey & Heffelfinger, *Toward Federalizing U.S. International Commercial Arbitration Law*, 25 INT'L LAW. 209 (1991), for the view that state by state adoption of versions of the UNCITRAL Model Law threatens to undermine the uniformity and predictability upon which users of international arbitration depend. In a striking parallel to the view expressed herein (discovered on the eve of the press deadline, which coincided with publication of the Garvey & Heffelfinger article), these authors conclude, *id.* at 220-21, that this "Balkanization" of the UNCITRAL Model Law may discourage, rather than encourage, the use of arbitration in international commercial transactions. See *supra* p. 336. See also Spalding, *When Federal and State Measures Clash*, S.F. BANNER DAILY J., June 27, 1989 at 4, col. 1, where the notion of "Balkanization" is advanced. This was the last of a series of five articles on the enactment of §§ 1298-1298.8 that appeared in this newspaper between June 21 and 27, 1989, in which some of the ideas in this article were first presented.

Oddly, presumably because both were added in the 1988 session of the Legislature, both the international arbitration and conciliation article, §§ 1297.11-.432, and the real estate contract arbitration article, §§ 1298-1298.8, are identified as "Title 9.3" of CAL. CODE CIV. PROC.

94. Additions to, and amendments of, the 1961 Arbitration Act have included:

§ 1280.1, providing quasi-judicial immunity to arbitrators, added in 1985 and reenacted in 1990 to extend a "sunshine" provision that originally called for the provision to expire in 1991. See *infra* note 97.

§ 1281.3, providing for consolidation of separate arbitrations, added in 1978. See *supra* note 55.

§ 1281.5, allowing for judicial enforcement of a mechanic's lien without waiver of the right to arbitrate, added in 1977 and further amended in 1989. See *supra* note 4.

§ 1281.7, allowing for filing a petition to compel arbitration in lieu of an answer to a complaint, added in 1987.

§ 1281.8, affording several provisional judicial remedies without waiver of the right to arbitrate, added in 1989. See *supra* note 4 and p. 329-31.

§ 1282.6, providing for subpoenas in arbitration, an original section amended in 1982 to provide for issuance of subpoenas "as of course, signed but otherwise in blank . . ." §§ 1283.05 and 1283.1, providing for discovery in arbitrations involving

thy beyond doubt;⁹⁵ others are well intended, if not models of draftsmanship;⁹⁶ at least one, Section 1280.1 dealing with arbitrator immunity, was a specific response to an unexpected judicial holding;⁹⁷ and one, Section 1282.6 dealing with subpoenas in arbitration, boldly cuts away, as to arbitration, much of the

personal injury (and permitting parties in other classes of cases to incorporate these provisions by agreement), added in 1970. See *supra* p. 333 and *infra* pp. 343-44 and note 101.

§ 1291, providing for a statement of decision on a petition, on request, an original section amended in 1983 to add cross reference to the statement of decision provisions of CAL. CODE CIV. PROC. § 632.

§ 1292.2, providing venue for a petition after commencement of an arbitration, an original section amended in 1978 to provide for arbitrations held outside the State.

§ 1296, providing that parties to a public construction contract may agree to have the arbitrator's award conform to the law and be supported by substantial evidence, added in 1979. See *infra* note 99 and p. 346.

Section 1295, added in 1975, is discussed *supra* in note 20 and *passim* herein; §§ 1297.11-.432, added in 1988, are discussed *supra* in note 93; §§ 1298-1298.8, also added in 1988, are, of course, the principal subject of this article.

95. Sections 1281.5 -.8, outlined *supra* in note 94, are examples that seem to fall fairly into this category. Cf. § 1298(e), discussed *supra* at p. 328 and § 1298.5, discussed *supra* at pp. 329-31. As to § 1281.5, see also pp. 331-32.

96. Sections 1283.05-.1, outlined *supra* in note 94, certainly claims the prize for prolixity within the Arbitration Act, if not within the whole of the Code of Civil Procedure—and perhaps would be a contender even in the entire body of California statutory law.

97. The case is *Baar v. Tigerman*, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (1983), in which the parties to an arbitration sought to sue the arbitrator for his failure to issue an award in the seven months following submission of the case to him after the close of 43 days of hearings that had extended over more than three years. The trial court sustained the defendant's demurrer; the appellate court reversed on the ground that in these circumstances the arbitrator could not claim the quasi-judicial immunity that had generally been supposed to insulate arbitrators from virtually all claims arising out of their service as arbitrators.

As originally enacted in 1985, Section 1280.1 included a "sunshine" provision calling for its automatic repeal, unless later reenacted, in 1991. Perhaps such provisions are sensible in statutes that enact programs or create bureaucracies that are or may be a significant ongoing burden on government, or on some definable constituency; they are, however, mindless in the case of a provision such as this, which could be repealed, without fiscal or bureaucratic impact, on any day that suited the Legislature. Apparently the sunshine clause was included here only because such clauses were fashionable at the time. Sadly, when the effort made necessary by the sunshine clause to bring about the reenactment of § 1280.1 (this time without a sunshine provision), was put forth in 1990, it became entangled with another proposal to extend immunity to *mediators*—perhaps a good idea but a very different proposition and wholly new to the statutes. The result, in S. B. No. 1951, was the reenactment of § 1280.1 with *another* sunshine clause, this time expiring on January 1, 1996—by which time a commission created by the Bill is to have studied and reported on the wisdom of mediator immunity.

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freight of a long and complex series of statutory provisions applicable to subpoenas in judicial proceedings.⁹⁸ But all except for the international Title have been conceived through a more or less narrow lens.

Some, such as the real estate provisions of Sections 1298-1298.8 and the medical malpractice provisions of Section 1295, have been sponsored by groups or entities having special interests, however legitimate. And as noted,⁹⁹ these two portions of the Arbitration Act remain the only two that are subject-matter specific.

So far, nothing that has been done to the Act, either by way of narrow incremental change or by more comprehensive amendment, has proved to be the stick that broke the spokes, or the grime that froze the bearings, of the arbitration process; but there remains such a potential. The foregoing discussion of the provisions of Sections 1298-1298.8¹⁰⁰ suggests one class of possibilities, and there may be other examples. For instance, although it is useful and convenient to be able to import essentially the full panoply of civil discovery¹⁰¹ into arbitrations, where the parties have so agreed, simply by reference to Section 1283.05,¹⁰² and although some trial lawyers maintain as an article of faith that it is impossible fairly and efficiently to adjudicate any case without full discovery rights, if every arbitration

98. Section 1282.6, outlined *supra* in note 94, eliminates in arbitration the requirement of an affidavit showing "good cause" accompanying a subpoena duces tecum under § 1985(b); a subpoena in arbitration need not be issued by a judge, clerk of court or attorney at law, as under §§ 1985(c) and 1986 (although it must be issued by "a neutral agency . . . or by the neutral arbitrator"); there is no provision for motions or orders to quash, as in § 1987.1; and so on. Section 1286.2 does invoke the machinery of §§ 1985-97 as to service and enforcement (perhaps including the potential for a judicial order to quash or to require a "good cause" affidavit); and it applies only to appearance or production at an arbitration hearing, unless an evidentiary deposition is ordered by the arbitrator under § 1283, or unless §§ 1283.05 and 1283.1 (see *supra* p. 333 and note 94 and *infra* p. 343-44 and note 101) apply or have been invoked by the parties.

99. See *supra* p. 308. Section 1296 does apply only to public construction contracts, but, as discussed *infra* at p. 346, this section appears to add little or nothing of substance to the law governing such contracts. See also *supra* note 94.

100. See *supra* pp. 334-338.

101. Although no one may ever know all that lurks in the prolixity of § 1283.1 (see *supra* note 96), to all superficial appearances it embraces the substance of CAL. CODE CIV. PROC. §§ 2016-34. Section 1283.1(e), however, does depart from these sections in requiring approval of the arbitrator for the taking of any deposition.

102. CAL. CODE CIV. PROC. § 1283.1 authorizes this. See *supra* pp. 333 and notes 94 and 101.

agreement incorporated Section 1283.1 by reference, arbitration would look and act that much more like civil litigation than it now does; and lawyers who believe that omitting or sharply curtailing discovery can be advantageous in some—or even many—instances would be deprived of the valuable alternative that arbitration now affords them in this respect. Indeed, while each move toward “judicialization” of arbitration may increase the comfort level of trial lawyers unfamiliar with the alternative process, any such gain is inevitably achieved at the cost of a loss, *pro tanto*, of a genuine, and sometimes a clearly preferable, alternative.

More worrisome is what may be to come. Scarcely a bar association worth its dues now lacks a committee that looks into arbitration matters, and some have more than one.¹⁰³ The work of each is known to its active participants, but cross contact occurs largely by chance and joint effort is largely unknown, at least until a proposal makes its way before the Conference of Delegates of the State Bar. Each such committee presumably has what some certainly have: well-meaning members, often relatively newly interested in the fine points of arbitration, who have become deeply concerned about some particular aspect of the process—typically an aspect in which arbitration differs materially from the familiar litigation process. Shouldn't there be discovery in *every* arbitration—after all, how is it possible to try a case—at least the kind of cases *I* do—without discovery? Isn't it troubling that the arbitrator is not bound to follow the law—shouldn't *that* be required? If the arbitrator can ignore the rules of evidence, the award may be based on just anything—how can you put up with that? How about appeal on the merits—should parties ever be obliged to accept the crap shoot of just one bite at the substantive apple? And so on.

From such well-intentioned sources, from individuals or from interest groups may come suggestions whose proponents

103. The author, for example, is a member or officer of three committees of the Bar Association of San Francisco that have some concern with arbitration, the Arbitration Committee, the Alternative Dispute Resolution Committee and the Committee on Arbitration of Fee Disputes; and of the Alternative Dispute Resolution Committee of the Litigation Section of the State Bar. There are at least two other committees within the State Bar that are concerned with arbitration, one the Committee on Mandatory Arbitration of Fee Disputes and the other the ADR Subcommittee of the Standing Committee on Legal Services for Middle Income Persons.

have not bothered to think through the full impact of their proposal upon the rest of the Act, or, worse, who do not yet really sufficiently understand the process they seek to alter. It has been suggested throughout this article that Sections 1298-1298.8 may be an example of an amendment idea that belongs in one of these categories.

A proposal made to, but not adopted by, the 1990 Conference of Delegates of the State Bar of California provides another example. In effect it would have made the provisions of Section 1296,¹⁰⁴ now limited in terms to public construction contracts, applicable to all arbitrations under the California Act. All that Section 1296 now says is that parties to a public construction contract may expressly agree that the arbitrator's award must be supported by law and substantial evidence. Since the parties to any contract including an arbitration clause are at absolute liberty to bind themselves to an arbitration subject to such rules; and since, under Section 1286.2(d), one of the sharply limited number of grounds upon which a court may overturn an award is that the "arbitrators exceeded their powers"—powers that, by one of the most venerable and best-respected rules in the law, come solely from the parties' arbitration agreement;¹⁰⁵ to all appearances this is a result, that could have been achieved with equal ease with or without Section 1296. And of course the Arbitration Act already provides fully for appeal of any final trial court disposition of an arbitration award, whether by confirmation or by vacatur.¹⁰⁶

These are the risks posed by the friends of arbitration; the risks posed by its enemies are more insidious. Almost no one attacks arbitration frontally¹⁰⁷—whether for lack of courage or wit to take it on; or for fear of defeat on the merits, or of a judicial or public relations backlash because of arbitration's good press in judicial opinions¹⁰⁸ and elsewhere; or for other reasons. But there is some evidence in the history of Sections 1298-1298.8 of

104. *See supra* notes 94 and 99.

105. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

106. CAL. CODE CIV. PROC. §§ 1294-1294.2.

107. *See supra* note 13.

108. There are exceptions that may prove the rule. *See, e.g., Shapiro, Arbitration May Not Be Best Option in Franchise Disputes*, S.F. Daily J., October 12, 1990, at 5, col. 1.

the kind of opportunity that may be presented to arbitration's detractors. Among the spiky shards of verbal mandate in Sections 1298(a)-(c) there are not only far too many opportunities for ingenious counsel to unearth just the no-nothing technicality that will defeat the fair agreement to arbitrate that the parties had reached;¹⁰⁹ but also far too accessible a pattern for slowing or stopping the engine of arbitration in other fields.¹¹⁰ In the obscurity of Section 1298.7¹¹¹ lie far too many opportunities not only to drag into court, in order to keep them out of arbitration, particular cases that heretofore would have gone smoothly through the alternative process; but also to claim a precedent for irrational curtailment of the freedom of contract that has heretofore allowed willing parties to virtually any kind of dispute to make a binding agreement to resolve it by arbitration.

Legislation is important business—too important, some would no doubt say, to be left to legislators,¹¹² but certainly too important to be taken up as a hobby or on an ego trip. Most emphatically, it is too important to be undertaken by those, in the Legislature or out, who fail or refuse to understand the import or effect of what they set out to do; or to be abandoned to the devices whose real purpose is to undercut the process they claim to perfect.

Unfortunately, arbitration statutes seem a particularly attractive target for the interloper. Perhaps because of the long-time promotion of the notion of the citizen-arbitrator as an ideal, arbitration, including the making of statute law governing arbitration, is too often regarded a kind of amateur undertaking, at which any number of novices can play.

Moreover, in many of its aspects arbitration seems simple. It is often billed as simpler than the judicial process, and in many ways it is.¹¹³ Indeed, one of the geniuses of arbitration

109. *See supra* pp. 310-14.

110. *See supra* pp. 334-38.

111. *See supra* pp. 332-33.

112. *See Prop. 140 Fallout May Harm State Law*, S.F. Daily J., February 5, 1991, at 1, col. 2, suggesting, under the subhead, "Some Fear Departure of Experienced Staff Members Will Result in Sloppy Statutes," that legislative draftsmanship is not likely to improve in the immediate future.

113. The American Arbitration Association, for example, administers thousands of cases each year (*see supra* note 11) under rules that can be printed comfortably in a

may be that it can seem so simple to those involved in individual cases as arbitrators or advocates. Yet despite such appearances, as an article on so simple an arbitration topic as this one may suffice to illustrate, arbitration is, in many of its dimensions, a process of very considerable subtlety and complexity. And when, out of an excess of subtlety or complexity or otherwise, an arbitration goes wrong, the whole rationale for it is likely to be substantially defeated; for an arbitration gone wrong is almost certainly an arbitration headed for the courts—an outcome that it was the very purpose of the parties' arbitration promise to avoid.

Although the great bulk of arbitrated cases pass through the channels of the process without difficulty or delay, a party or counsel committed to frustrating the process can find a thousand snags on which to try to catch the case. An arbitrator well schooled in the process and fully familiar with the scope of his or her powers, practical as well as legal,¹¹⁴ can thwart most such attempts, particularly if supported by an able administrator from a neutral administrative organization;¹¹⁵ but each new trap laid, deliberately or inadvertently, in the Arbitration Act creates new opportunities to detour the process, and some proportion of such attempts inevitably will succeed. Where the new trap is one that invokes, or provides an opening for, judicial intervention, the problem may be much magnified; for by definition the arbitrator cannot resolve it alone, and the judge to whom it comes, even if understanding of and sympathetic to arbitration, may know or learn little of the history or background of the case. A case suspended or ensnared in the nether world between court and arbitrator may all too easily suffer the worst that each of these processes has to offer.

Although trouble can often be avoided when an arbitration matter can be kept out of court, the inevitable tradeoff is that arbitration is carried on for the most part out of range of close supervision by the judiciary. This fact not only makes room for the occasional judge who can defeat arbitration out of ignorance

pocket-sized pamphlet of 28 pages. AAA Rules, *supra* note 39. Even the somewhat more complex NAT'L ASS'N OF SECURITIES DEALERS, A CODE OF ARBITRATION PROCEDURE (as amended June 18, 1990) fits onto 40 pocket-sized pages.

114. See Spalding, *Avoiding Delay in Arbitration: Counsel's Role*, ALTERNATIVE DISPUTE RESOLUTION NEWSALERT, CALIFORNIA EDITION 1, 2 (March 1991).

115. *Id.* at 3-4.

or hostility, but it also denies to arbitration many of the powerful built-in process protections enjoyed, and regularly used, by the courts. Because so much of what is done in arbitration never finds its way into court, and because its first-hand participants, arbitrators and advocates, are not in a position themselves to keep the process as a whole (as distinct from the case before them) on track, the machinery provided by the statutes *must* be capable of running smoothly and correctly by itself most of the time. The only minders of the process who are always on duty are the administrators, and, vital though their role can be, they are, compared with a judge or even with an arbitrator, largely powerless.¹¹⁶ In the case of arbitration, then, systemic internal consistency is more than an artifact of a process that has survived; it is a day-to-day necessity.

Sadly, Sections 1298-1298.8 stand on the statute books as Exhibit A demonstrating, within a relatively narrow compass, just how far from this necessary goal the positive law of arbitration can be led, and with what apparent ease such a detour can be made. Left to themselves, these Sections may survive, and be survived, with only a modicum of additional useless effort and with only the occasional extravagant financial hemorrhage or outrageous miscarriage of justice to be borne by such poor innocents as fall prey to its traps. Should the California Arbitration Act become much more cluttered with this kind of half-thought-out claptrap, however, arbitration under California law, whatever favored status the courts may say it enjoys, may well grind to a dismal, painful halt. This would be a most unfortunate result, but perhaps no worse than should be expected if "reform" is left to ill-informed or interested tinkering at the margins of what was once, perhaps, the premier state arbitration act.

Thus, if the California Arbitration Act is in fact coming of age, a more suitable observance of its maturity might well be for the Legislature to resolve, whether by statute, rule or custom, to empanel a statewide advisory panel available on call to review, and to comment to the Legislature upon, the *process* implications of any legislative proposal to amend the Act.¹¹⁷ Where nec-

116. *Id.* at 4.

117. A collateral benefit might be that such an advisory group could study, and pro-

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essary in order to evaluate the kind of anecdotal horror stories sometimes marshalled in order to justify some proposed sweeping change, this group could also be made responsible for gathering and interpreting, for the benefit of the Legislature, objective, comprehensive evidence of what problems do in fact exist in the arbitration process and what solutions might be devised to solve them in a way that does not threaten the whole.

Without question it is the role of the Legislature to enact; but at least in this field if not in others, that body should act only with a full and fair understanding of the import and prospective impact of what it proposes to do.

That understanding, it seems fair to conclude, the Legislature could not have had in enacting Sections 1298-1298.8.

pose ways to harmonize, the growing number of references to, and attempts to use, arbitration (or something called arbitration) scattered throughout the Codes. Although a catalogue of such Code references is well beyond the scope of this article, one venerable but probably little-known real-estate-related example may be cited by reference to Cal. Civ. Code § 845(c), providing for non-binding arbitration by a court-appointed "impartial" (not "neutral"; *see supra* note 47) arbitrator. *See also* Healy v. Onstott, 192 Cal. App. 3d 612, 237 Cal. Rptr. 540 (1987).