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# TAILORING THE ARBITRATION CLAUSE: ACCOMMODATING CLIENT NEEDS IN REAL ESTATE AND OTHER TRANSACTIONS

YAROSLAV SOCHYNSKY\* and MARIAH BAIRD\*\*

## I. INTRODUCTION

Just ten years ago, a typical lawyer would have had difficulty explaining to a client the difference between arbitration and mediation. Now, most major law schools offer courses in alternative dispute resolution, and the acronym "ADR" has become part of every lawyer's vocabulary. The Commercial Arbitration caseload of the American Arbitration Association has increased at the dramatic rate of over 50% between 1980 and 1990.<sup>1</sup> Mediation services provided by the AAA, U.S. Arbitration, Endispute and others, as well as rent-a-judge programs such as Judicial Arbitration & Mediation Services, have also experienced increased demand for their services.

Clients, frustrated with the litigation process and escalating legal fees, are looking for better ways to resolve their disputes. The overloaded judicial system is perceived as incapable of handling the growing volume of civil actions. Clients are also coming to realize that most litigation matters settle on the courthouse

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1. Source: American Arbitration Association, San Francisco office. Note that during the same time period, the Commercial Arbitration caseload for the San Francisco region increased by over 100%.

steps after much time and money has been spent on discovery, motions and trial preparation. On a more optimistic note, perhaps the growing interest in ADR also reflects a subtle shift in society's attitudes toward resolving conflict.

Transactional lawyers cannot afford to bypass ADR. Many standard real estate contract forms now contain an optional arbitration or mediation clause. Recent California legislation,<sup>2</sup> discussed later in this article, specifically addresses arbitration provisions in real estate agreements. Two major California banks include an ADR clause in their standard real estate loan documentation.<sup>3</sup> And the California courts have now confirmed that a valuation or appraisal provision in a real estate agreement or lease will be governed by arbitration procedures.<sup>4</sup>

These and related developments make it crucial for real estate practitioners to have a working knowledge of ADR methods, especially arbitration and mediation. The practitioner must consult carefully with the client to ensure that ADR provisions suit the client's purposes. Simply lifting generic clauses from a form book or an earlier deal is risky and may do the client a severe disservice. The practical and legal issues that practitioners should consider when drafting ADR clauses in their real estate, or any other legal documents, follow.

## II. THE MOST COMMON ADR METHODS

The two most widely used ADR processes, arbitration and mediation, are quite different.

### A. ARBITRATION: PRIVATE AND JUDICIAL

#### 1. *Private Arbitration*

In private arbitration, the dispute is submitted for decision by a private individual or individuals pursuant to an agreement or a statute. The arbitrator resolves the dispute by making an

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2. CAL. CIV. PROC. CODE § 1298 (Supp. 1991).

3. Both Bank of America and Bank of California include arbitration clauses in selected banking agreements.

4. See *Cooper & Lybrand v. Superior Court*, 212 Cal. App. 3d 524, 260 Cal. Rptr. 713 (1989).

award, which, upon confirmation by the court, has the force and effect of a judgment.

## 2. *Judicial Arbitration*

In judicial or court-annexed arbitration programs, selected smaller court cases are diverted to a non-binding arbitration process. The advisory decision of the court-appointed arbitrator is expected to help the parties reach a settlement before trial.

## B. MEDIATION

In mediation the parties seek to resolve the dispute by agreement through the mediator, a neutral third-party facilitator. Unlike the arbitrator, the mediator does not have the power to make a decision for the parties.

## C. MINI-TRIALS; SUMMARY JURY TRIALS

Mini-trials and summary jury trials, while beyond the scope of this article, are additional ADR techniques that are available — typically, for larger cases. Not at all like a trial, in a mini-trial each side presents an abbreviated version of its case to the principals in the presence of a third-party neutral, typically a well-respected lawyer or retired judge. The principals then try to settle the dispute, sometimes with the benefit of an advisory decision by the neutral.

The summary jury trial, pioneered by federal judges,<sup>5</sup> is in fact an abbreviated non-binding trial that is presented to an actual jury, the outcome of which gives the parties a preview of the result if the case were tried.

## III. SIGNIFICANT CHARACTERISTICS OF ARBITRATION

### A. HOW IS ARBITRATION OBTAINED?

Arbitration will occur only if there is an agreement of the parties to arbitrate, unless required by statute.<sup>6</sup> Arbitration

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5. *E.g.*, Lambros, *The Summary Jury Trial - An Alternative method of Resolving Disputes*, 69 JUDICATURE 286 (1986).

6. *E.g.*, the California Worker's Compensation Law includes a system of mandatory

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agreements are either in the form of an "embedded arbitration clause" whereby the parties agree to arbitrate future disputes, or in a "submission agreement" whereby the parties agree to arbitrate a current dispute.

The practitioner may modify the minimal statutory procedural requirements by carefully crafting the agreement to arbitrate. Courts will look to the agreement to determine what and how the parties have agreed to arbitrate.<sup>7</sup> The practitioner thus has broad flexibility and can ensure that the client's specific needs are met.

B. FEDERAL ARBITRATION ACT VS. STATE ARBITRATION STATUTES

The practitioner should be mindful of which court, state or federal, or both, will have jurisdiction in the event of any issue requiring judicial intervention.

The Federal Arbitration Act ("FAA")<sup>8</sup> and state arbitration statutes<sup>9</sup> are patterned after the Uniform Arbitration Act.<sup>10</sup> The FAA applies to all contracts involving maritime transactions and interstate commerce.<sup>11</sup> The rules of the American Arbitration Association (AAA), are designed to supplement state or federal arbitration statutes.<sup>12</sup>

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arbitration for certain issues and voluntary arbitration of all other issues; CAL. LAB. CODE § 5308 (West 1989). CAL. CIV. PROC. CODE § 1295 (West 1982) provides for binding arbitration of medical malpractice claims.

7. See *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962) (arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute he has not agreed to submit); *Pacific Inv. Co. v. Townsend*, 58 Cal. App. 3d 1, 129 Cal. Rptr. 489 (1976).

8. 9 U.S.C §§ 1-14 (1982).

9. *E.g.*, CAL. CIV. PROC. CODE §§ 1280-1294 (West 1982 & Supp. 1991); N.Y. CIV. PROC. L. & R. §§ 7501-7514 (McKinney 1980); N.J. STAT. ANN. §§ 2A:24-1 to 24-11 (West 1987).

10. Uniform Arbitration Act, 7 U.L.A. 1 (1985). The Uniform Arbitration Act in general follows the New York Arbitration Act. Thirty three jurisdictions have adopted the Uniform Act; neither New York nor California have adopted the Uniform Arbitration Act.

11. 9 U.S.C. § 2 states: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable" (emphasis added).

12. Copies of the AAA Commercial Arbitration Rules may be obtained from the local AAA office or American Arbitration Association, 140 West 51st St., New York, N.Y. 10020-1203.

Because of their common origin, there are many similarities between state arbitration statutes and the FAA. Nevertheless, there are certain differences which should be considered when designing the arbitration clause. The California arbitration statute differs from the FAA in several ways, some more significant than others. For example, the FAA and California statutes expressly grant the arbitrator discretionary powers to compel testimony or production of documents.<sup>13</sup> However, the California statute also provides the parties the right to discovery if certain provisions of the statute are incorporated into the arbitration agreement.<sup>14</sup> The FAA has no such provision. The California statute also provides for the consolidation of arbitrations involving common issues,<sup>15</sup> whereas the FAA contains no explicit provisions for consolidation and the federal courts are split over whether to allow consolidation.<sup>16</sup> Another pertinent difference is that under the California statute, the courts will stay arbitration if there is a pending court action arising out of the same transaction and there is a possibility of conflicting rulings.<sup>17</sup> Conversely,

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13. 9 U.S.C. § 7, CAL. CIV. PROC. CODE §1282.6. *See also*, N.Y. CIV. PRAC. L. & R. § 7505.

14. CAL. CIV. PROC. CODE § 1283.05, 1283.1. If the discovery provisions of CAL. CIV. PROC. CODE § 1283.05 are incorporated into the arbitration agreement, the arbitrator may order a deposition under any circumstances.

15. CAL. CIV. PROC. CODE § 1281.3. Other states, such as Massachusetts also provide statutory provisions for consolidation; MASS. GEN. LAWS ANN. ch. 251, § 2A (West 1988).

Some state courts have found a basis for consolidation of arbitrations as part of their judicial power. *See e.g.*, *Chariot Textiles Corp. v. Wannalancit Textile Co.*, 18 N.Y. 2d 793, 221 N.E. 2d 913, 275 N.Y.S. 2d 382 (1966) and *Long Branch Sewerage Auth. v. Molnar Elec. Contractors*, 143 N.J. Super. 492, 363 A.2d 917 (1976).

16. There are no U.S. Supreme Court decisions on consolidation. The 9th Circuit will not compel consolidation of various arbitrations if the parties' agreement does not provide for consolidation: *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984). The Fifth, Eighth and Eleventh Circuits have adopted the Ninth Circuit position: *Del E. Webb Constr. v. Richardson Hosp. Authority*, 823 F.2d 145 (5th Cir. 1987); *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990) and *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Co.*, 873 F.2d 281 (11th Cir. 1989) (federal courts may not read a consolidation provision into an arbitration agreement when such provision is absent from the agreement).

But the Second Circuit will compel consolidation in the proper circumstances; *Compania Espanola de Petroleos V. Nereus Shipping*, 527 F.2d 966 (2nd Cir. 1975) *cert. denied* 426 U.S. 936 (1976). *See also* *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988) (federal courts have the power to order consolidation when the parties agreement is silent on the issue.) *cert. denied* in 489 U.S. 1077 (1989).

On the other hand, the Fourth Circuit takes a hybrid approach; *Maxum Found. v. Salus Corp.*, 817 F.2d 1086 (4th Cir. 1987) (compelled consolidation because each contract had the same broad arbitration clause.)

17. CAL. CIV. PROC. CODE § 1281.2(c).

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the FAA provides for a stay of litigation when the issue is referable to arbitration under the parties agreement.<sup>18</sup>

In the event of a dispute as to who should decide arbitrability, the court or the arbitrator, the outcome may vary depending on whether federal or state arbitration law applies.<sup>19</sup> Furthermore, a client may prefer to be in federal rather than state court, to avoid "home-town" disadvantages. To avoid any issue over applicable law in the event of a later dispute, the real estate practitioner should specify the applicable arbitration statute in the arbitration clause.

Where federal and state arbitration laws conflict, courts have favored the federal policy of enforcing agreements to arbitrate. For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>20</sup> the U.S. Supreme Court stated that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration," and that "any doubts be resolved in favor of arbitration."<sup>21</sup>

18. 9 U.S.C. § 3.

19. Under AAA rules, arbitrability issues are decided by the arbitrator.

The U.S. Supreme Court has stated that questions of procedural arbitrability are for arbitral determination; *John Wiley & Sons v. Livingston*, 376 U.S. 543, 555-559 (1964). However, the U.S. Supreme Court has stated that substantive arbitrability is a question for the court; *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962) (Substantive arbitrability concerns whether the dispute is covered by the parties arbitration clause; procedural arbitrability concerns procedural prerequisites for arbitration -*Ed.*).

The *Atkinson* case involved a narrowly drawn arbitration clause. A companion case involved a broad clause; *Drake Bakeries Inc. v. Local 50, American Bakery & Confectionary Workers International Union*, 370 U.S. 254 (1962). The Court in *Drake* implied that for a broadly drawn clause, summary referral to arbitration by the court was appropriate. The circuits have split on how to interpret these decisions. The Fifth Circuit states that questions of arbitrability are for the arbitrator; *Local 787, Int'l Union of Elec., Radio & Machine Workers v. Collins Radio, Co.*, 317 F.2d 214 (5th Cir. 1963). *But see* *Pacific Northwest Bell Telephone Co. v. Communications Workers Union*, 310 F.2d 244 (9th Cir. 1962), (questions of arbitrability are for the courts).

The California Supreme Court has held that jurisdictional facts must be decided by the arbitrator; *Van Tassel v. Superior Court of Fresno County*, 12 Cal. 3d 624, 526 P.2d 969, 116 Cal. Rptr. 505 (1974). However, in California, it is for the court, not the arbitrator, to decide whether parties have agreed to arbitrate a particular dispute; *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.*, 140 Cal. App. 3d 251, 191 Cal. Rptr. 15 (1983). On the other hand, New York has held that any issue as to the validity of the substantive provisions of the arbitration clause was for the arbitrator; *Matter of Estate of Cassone*, 63 N.Y. 2d 756, 469 N.E. 2d 835, 480 N.Y.S. 2d 317 (1984).

20. 473 U.S. 614, 626 (1985).

21. *See also*, *Perry v. Thomas*, 482 U.S. 483, 493 n. 9 (1987), and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

However, in *Volt Information Sciences, Inc. v. Stanford*,<sup>22</sup> the U.S. Supreme Court held that an arbitration under a contract involving interstate commerce could be stayed under a California statute which permitted the Court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it where "there is a possibility of conflicting rulings on common issue of law or fact."<sup>23</sup> The Supreme Court determined that the parties had incorporated California's arbitration rules in the agreement's choice of law provision,<sup>24</sup> and reasoned that federal preemption was not required under federal policy favoring arbitration since "the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed in the manner provided for in [the parties'] agreement.'"<sup>25</sup>

#### C. COMMONLY PERCEIVED ADVANTAGES OF ARBITRATION: SPEED, EFFICIENCY, ECONOMY AND PRIVACY

Arbitration is typically quicker, more efficient and less expensive than litigation. There are no pleadings. Arbitration under AAA rules is initiated not by a complaint, but by a simple demand in letter form.<sup>26</sup> There are no motions to dismiss or pleading wars. The appropriate response to an arbitration demand is a short letter setting forth the respondent's position and any counter-demands.<sup>27</sup>

Arbitration is also speedier because, unless otherwise provided in the agreement, discovery is minimal. Both the California arbitration statute and the rules of the American Arbitration Association provide for the exchange of basic documents prior to

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22. 489 U.S. 468 (1989).

23. *Id.* at 471. See also, CAL. CIV. PRO. CODE § 1281.2(c).

24. The applicable portion of the *Volt* arbitration clause read "the Contract shall be governed by the law of the place where the Project is located"; *Volt*, 489 U.S. at 470.

25. *Id.* at 474-475.

26. The advantage to incorporating AAA rules is that the arbitration is self-executed since the procedure for initiation is contained in the AAA rules. AAA Rule 7 governs initiation under an embedded Arbitration Provision in a Contract. Rule 9 governs Initiation under a Submission.

On the other hand, if AAA rules are not incorporated, a party may have to file a claim with the court to initiate arbitration; CAL. CIV. PROC. CODE § 1281.2.

27. AAA Rule 7.

the hearing.<sup>28</sup> The arbitrators also have the power to subpoena documents from parties and third parties at the hearing.<sup>29</sup> However, unless the parties agree, there is no right to depose witnesses, request production of documents, or pose interrogatories and requests for admission.<sup>30</sup>

Although the prospect of trying a case without the benefit of full discovery may give pause to litigators who are accustomed to knowing what a witness has committed him or herself to in a deposition, civil cases are tried quite skillfully every day by British barristers without discovery as we know it. Also, the prehearing conference or preliminary hearing will provide the parties the opportunity to request information through the arbitrator, and often discovery can be arranged in this fashion by informal or cooperative means.<sup>31</sup>

A safe middle position may be to provide in the arbitration agreement that the arbitrators may, at the request of either party and on a showing of good cause, provide for discovery by deposition, but that such discovery should be limited in a way that is consistent with the intent of the parties to achieve efficiency and economy reflected in their decision to use arbitration.

Arbitration is also faster because the rules of evidence do not apply.<sup>32</sup> AAA Commercial Rule 31 states: "The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary."<sup>33</sup> While it is appropriate to make evidentiary objections at an arbitration hearing, typically such objections will be considered by arbitrators only to determine what weight to

28. CAL. CIV. PROC. CODE § 1282.2(a)(2)(A); AAA Rule 10.

29. CAL. CIV. PROC. CODE § 1282.6, 9 U.S.C. § 7. However, enforcement of a subpoena is for the courts, CAL. CIV. PROC. CODE § 1282.6(c).

30. CAL. CIV. PROC. CODE § 1283.1(b). However, under § 1283.1(a), discovery under the provisions of § 1283.05 is required of "every agreement to arbitrate. . . any injury to, or death of, a person caused by the wrongful act or neglect of another."

31. AAA Rule 10.

32. CAL. CIV. PROC. CODE § 1282.2d. See *Frantz v. Inter-Ins. Exchange of the Auto. Club of S. Cal.*, 229 Cal. App. 2d 269, 40 Cal. Rptr. 218 (1964) (not bound by rules of evidence, except as agreement provides). See also *Silverman v. Benmor Coats, Inc.*, 61 N.Y. 2d 299, 461 N.E. 2d 1261, 473 N.Y.S. 2d 774 (1984) (absent provisions in the clause, the arbitrator is not bound by rules of evidence).

33. See also CAL. CIV. PROC. CODE § 1282.2(c).

give to evidence, but not to exclude evidence.<sup>34</sup> The result of this relaxed procedure is that the process of presenting and admitting evidence is less formal than at a trial.

Arbitrations are less formal because they take place in a conference room, rather than a courtroom. This can often have the effect of relaxing the proceedings and engendering cooperation between counsel to streamline the proceedings. Because of the relaxed rules, parties often agree that certain evidence can be presented by declaration or documents, rather than by live testimony.

Arbitration is quicker because there is no right to appeal from an arbitration award, as there is from a judgment in a court case.<sup>35</sup> An appeal can be taken from a court order compelling arbitration or vacating or confirming an award.<sup>36</sup> However, the grounds for challenging and overturning arbitration awards are very narrow and because of the strong policy favoring the non-disturbance of arbitration awards, they are rarely vacated. By statute the grounds for vacating an arbitration award are:

- a. The award was procured by *corruption, fraud or undue means*;
- b. There was *corruption* in any of the arbitrators;
- c. The rights of a party were substantially prejudiced by *misconduct* of a neutral arbitrator;
- d. The arbitrators *exceeded their powers* and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted;
- e. The rights of a party were substantially prejudiced by

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34. In fact, the Arbitrator may be reluctant to exclude any potentially relevant or material evidence since refusal to hear relevant evidence is one of the statutory grounds for vacating an arbitral award; CAL. CIV. PROC. CODE § 1286.2(e).

35. Thus the court held in *Olivera v. Modiano-Schneider, Inc.*, 205 Cal. App. 2d 9, 23 Cal. Rptr. 30 (1962) that an arbitrator's findings on questions of fact were final and conclusive and were not subject to review except for fraud, corruption, misconduct, and where the arbitrator exceeded his powers. (The statutory bases for vacating an arbitrator's award.)

36. CAL. CIV. PROC. CODE § 1294.

the *refusal* of the arbitrators to *postpone* the hearing upon sufficient cause being shown therefor or by the *refusal* of the arbitrators to *hear evidence* material to the controversy or by other conduct of the arbitrators contrary to the arbitration law.<sup>37</sup>

The arbitration process can also be more efficient if the arbitrator is an expert in the area which is the subject of the dispute. The selection process for choosing arbitrators affords the parties the opportunity to retain an arbitrator with a specialized background. The American Arbitration Association maintains biographical information for each of its panel of arbitrators. This data is available for each prospective arbitrator on the selection list.

When drafting an arbitration clause, one should consider providing that the panel of arbitrators — even if the AAA procedure is used<sup>38</sup> — should have certain minimal qualifications. For example, in a real estate contract the parties might provide that any arbitrator must have at least 10 years experience in the practice of real estate law.

Another important consideration for clients — often overlooked by lawyers — is that arbitration is private and confidential.<sup>39</sup> There will be no reporters present in the arbitration hearing room, and there will be no newspaper coverage in the morning paper.

#### D. COMMONLY PERCEIVED DISADVANTAGES OF ARBITRATION

##### 1. *Finality of the Award*

Generally, courts will not vacate an award due to an error of law or a lack of supporting evidence for the award. As previously

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37. CAL. CIV. PROC. CODE § 1286.2; 9 U.S.C. § 10. The New York arbitration act does not include the refusal to hear material evidence as a statutory ground for vacating an arbitration award; N.Y. CIV. PRAC. L. & R. § 7511.

38. AAA Rule 13.

39. There is no express provision for privacy in the AAA rules, the California statute or the FAA. The AAA Code of Ethics for Commercial Arbitrators, Canon VI, requires that the arbitrator maintain confidentiality. Thus the parties may want to include a confidentiality agreement in the arbitration clause. Furthermore, parties should consider stating that all information disclosed during arbitration is not to be used for any other purpose.

discussed,<sup>40</sup> the grounds for vacating an award are very narrow. Courts will not pass upon the validity of the arbitrator's reasoning.<sup>41</sup> Nor will courts review the sufficiency of the evidence to support the arbitration award.<sup>42</sup> The courts have consistently enforced an arbitration award even though it may conflict with substantive law.<sup>43</sup>

These holdings, which vest enormous power in the hands of the arbitration panel, cause considerable concern among lawyers and their clients that an arbitration award might result in a miscarriage of justice without the opportunity for any appeal.

There is also the perception that arbitrators may be inclined to avoid difficult legal decisions, and will instead attempt to "do equity" between the parties with a compromise award.<sup>44</sup>

Without confirming or rejecting their legitimacy, such concerns, whether real or perceived, can be addressed in a number of ways.

First, courts have dealt with situations where the arbitrator has made an egregious legal error by vacating it on the grounds that the arbitrator has exceeded his jurisdiction. For example, in the recent California case of *Cobler v. Stanley, Barker, Southard, Brown & Associates*,<sup>45</sup> the court held that the arbitrator's award for emotional distress was in excess of the jurisdiction of

40. See *supra* note 37 and accompanying text.

41. *Grunwald-Marx, Inc. v. Los Angeles Joint Board*, 52 Cal. 2d 568, 343 P.2d 23 (1959); see also *Safeway Stores, Inc. v. Brotherhood of Teamsters*, 83 Cal. App. 3d 430, 147 Cal. Rptr. 835 (1978).

42. *Morris v. Zuckerman*, 69 Cal. 2d 686, 691, 446 P.2d 1000, 72 Cal. Rptr. 880 (1968); *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal. 2d 228, 238, 174 P.2d 441 (1946).

43. See *Lindholm v. Galvin*, 95 Cal. App. 3d 443, 450-452, 157 Cal. Rptr. 167 (1979) (court will not inquire whether arbitrator's decision was based on inadmissible evidence); *Safeway Stores, Inc. v. Brotherhood of Teamsters*, 83 Cal. App. 3d 430, 437-438, 147 Cal. Rptr. 835 (1978) (deference accorded to arbitrator's contract interpretation even though a question of law involved); *Interinsurance Exch. v. Bailes*, 219 Cal. App. 2d 830, 836, 33 Cal. Rptr. 533 (1963) (arbitrator's decision upheld even though arbitrator erroneously refused to apply doctrine of *res judicata*); *Nogueiro v. Kaiser Found. Hosp.*, 203 Cal. App. 3d 1192, 250 Cal. Rptr. 475 (1988) (decision upheld even though arbitrator's award exceeded statutory limits).

44. In fact a recent New York case held that merely because an arbitrator's award is a compromise is not sufficient to support a claim against the rationality of the award. In *re World Trade Diamond Corp.*, 550 N.Y.S. 2d 706 (1990).

45. 217 Cal. App. 3d 518, 265 Cal. Rptr. 868 (1990).

the arbitrator and thus under Cal. Civ. Proc. Code § 1286.2(c) the award ought to be set aside.

Second, the arbitration clause should provide that the arbitrators must set forth in their award findings of fact and conclusions of law supporting their decision, and that their award must be based on applicable law and must be supported by substantial evidence presented at the hearing. Such language would provide a stronger basis for challenging the award if the arbitrators disregarded the law or the great weight of the evidence.<sup>46</sup> Parties should also arrange for a reporter's transcript of the proceeding, because that will become the record of the arbitration and could be used in challenging the award.<sup>47</sup>

Third, it is theoretically possible to include in the arbitration clause a private review procedure before yet another arbitrator, although there seems to be little precedent for this.

## 2. *Compromise Awards*

Another criticism of arbitration procedure is that it does not allow arbitrators to resolve issues by summary judgment. This is of course part of the trade-off that makes arbitration more efficient and less expensive than litigation. While it would somewhat defeat one of the underlying purposes of arbitration to do so, there is nothing to stop parties from including in their arbitration clause a specific procedure which would allow the arbitrators to dispose of purely legal matters by summary adjudication where there are no disputed issues of fact. It is of course important to recognize that there is no appeal from such a summary award as in litigation; a petition to vacate the summary award would be limited to the narrow grounds previously discussed.<sup>48</sup>

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46. Thus, in *Abbott v. Cal. State Auto Ass'n*, 68 Cal. App. 3d 763, 137 Cal. Rptr. 580 (1977), the court held that an award may be vacated when there is an error of law appearing on the face of the award resulting in a substantial injustice.

47. AAA Rule 23 leaves it to the parties to decide whether a transcript of the proceedings is made.

48. See *supra* note 37 and accompanying text.

## E. DESIGNING THE ARBITRATION CLAUSE

### 1. *Standard "Generic" Clause*

The standard arbitration clause suggested by the AAA reads as follows:

"Any controversy or claim arising out of or relating to this contract, or any breach thereof, shall be settled in accordance with the Rules of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof."

This is a perfectly acceptable clause, and will result in the arbitration of all issues related to the agreement, probably including tort claims.<sup>49</sup> However, in designing the arbitration clause, the practitioner should consider the following points and possible additions.

### 2. *What Disputes Will Be Arbitrated?*

There is a growing judicial policy favoring broad construction of arbitration clauses.<sup>50</sup> This means that all issues relating to the contract will be deemed arbitrable, unless an intent to exclude issues from arbitration is evident from the agreement.<sup>51</sup>

Situations exist where the parties to a real estate agreement may find it advantageous to arbitrate certain issues, but not others. For example, a landlord and tenant may want to agree to arbitrate a rent adjustment under a long-term lease, but the landlord may not want to arbitrate an eviction for failure to pay rent. Accordingly, it would be very important in such a situation for the arbitration clause to state very clearly that only the valu-

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49. In *Crofoot v. Blair Holdings Corp.*, 119 Cal. App. 2d 156, 260 P.2d 156 (1953), the court held that the language "any controversy . . . which arises out of or relating to contract" included tort as well as contractual liabilities.

50. Thus in *Lehto v. Underground Constr. Co.*, 69 Cal. App. 3d 933, 939, 138 Cal. Rptr. 419 (1977), the court stated that it is the policy of law to favor arbitration and every "reasonable intendment is indulged to give effect to such proceedings". See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal policy favors arbitration).

51. The U.S. Supreme Court stated that the parties may limit by contract the issues they want to arbitrate and "the parties intentions control but those intentions are generously construed", *Mitsubishi*, 473 U.S. at 626.

ation issue would be arbitrated and that the landlord's remedies on a default were not included in the arbitration clause. Similarly, it might be advisable to exclude from the arbitration clause the right of any party to seek emergency or provisional remedies such as a temporary restraining order, a *lis pendens*, attachment, or a receiver.

### 3. *Tort Claims and Punitive Damages*

An important issue to be considered when drafting the arbitration clause is whether tort claims and claims for punitive damages will be encompassed by the arbitration clause.

The general rule, followed in most states, is that tort claims and claims for punitive damages will be arbitrated if that was the intent of the parties as reflected in their agreement.<sup>52</sup>

The New York court, however, has held in *Garrity v. Lyle Stuart*<sup>53</sup> that it is against public policy for punitive damages to be awarded in an arbitration. *Garrity* involved an author's claim for royalties against his publisher under a contract that contained an arbitration clause. The arbitrators awarded punitive damages, and the New York Court of Appeals reversed, holding that as a matter of policy, the arbitrators did not have the power to award punitive damages. The court reasoned that since punitive damages serve primarily as a "social exemplary remedy," they should not be applied in a private context, such as a private claim for breach of contract.<sup>54</sup>

California and certain federal courts have rejected the *Garrity* court's reasoning and have held that it is appropriate, if the parties agree, for tort claims and, therefore, claims for punitive damages to be awarded in arbitrations. The leading California

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52. However, the First Circuit recently stated that in order to exclude punitive awards, the arbitration clause must explicitly exclude punitive damage claims, *Raytheon v. Automated Business Sys., Inc.*, 882 F. 2d 6 (1st Cir. 1989). In *Tate V. Saratoga Sav. & Loan Ass'n*, 216 Cal. App. 3d 843, 265 Cal. Rptr. 440 (1989), a California appellate court awarded punitives even though the arbitration agreement was silent as to punitive damage claims.

53. 40 N.Y. 2d 354, 353 N.E. 2d 793, 386 N.Y.S. 2d 831 (1976). See also *Shaw v. Kuhnel & Assoc.*, 102 N.M. 607, 698 P.2d 880 (1985) (New Mexico follows the *Garrity* reasoning).

54. *Garrity*, 40 N.Y. 2d at 358.

case is *Baker v. Sadick*.<sup>55</sup> This case involved medical malpractice claims by a patient under a medical care agreement that provided "any dispute" was to be determined by arbitration.<sup>56</sup> The California Court of Appeals rejected *Garrity*<sup>57</sup> and held that the parties, by having contractually agreed to arbitrate tort/malpractice claims, necessarily included claims for punitive damages as those were allowable under California law in intentional tort and malpractice cases.<sup>58</sup>

The award of punitive damages was again upheld in California in the case of *Tate v. Saratoga Savings & Loan Ass'n*,<sup>59</sup> even though the arbitration clause did not expressly allow or preclude such damages.<sup>60</sup>

In the Federal Courts, the First Circuit Court of Appeals, in *Raytheon v. Automated Business Systems, Inc.*,<sup>61</sup> held that the Federal Arbitration Act permits the award of punitive damages, where the parties did not specifically provide for punitive damages, but allowed the arbitrators to make whatever remedy they thought was appropriate. This case goes the furthest of any so far, and signals the trend in favor of allowing arbitrators to award punitive damages.

#### 4. Method for Selection of Arbitrators

The arbitration agreement will govern the selection of the arbitrators. Typically, arbitration clauses will provide that the arbitration panel will be agreed to by the parties or will be appointed under the rules of the American Arbitration Associa-

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55. 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984).

56. The arbitration clause read "[A]ny dispute as to medical malpractice. . . will be determined by submission to arbitration"; *id.* at 622-623.

57. *Baker v. Sadick*, 162 Cal. App. at 630.

58. See also *Willoughby Roofing & Supply Co. v. Kajima Int'l*, 598 F. Supp. 353, 360 (N.D. Ala 1984) (federal policy does not prohibit the award of punitive damages by arbitrators) *aff'd per curiam* 776 F.2d 269 (11th Cir. 1985).

59. 216 Cal. App. 3d 843, 265 Cal. Rptr. 440 (1989).

60. The pertinent clause in *Tate* read "Should any controversy arise between the parties hereto concerning the Joint Venture, construction of said project, or the rights and duties of any party under this Agreement, the controversy shall be settled by arbitration. . ." *id.* at 847.

61. 882 F.2d 6 (1st Cir. 1989). The pertinent clause read "all disputes arising in connection with the Agreement shall be settled by arbitration . . . conducted according to the rules of the American Arbitration Association", *Raytheon*, 882 F.2d at 7.

tion.<sup>62</sup> In most jurisdictions, if the parties do not provide a method for selecting an arbitrator and the parties cannot agree on the appointment, the court with appropriate jurisdiction will select and appoint the arbitrator.<sup>63</sup>

There is another procedure, which is somewhat outdated and can lead to various difficulties, where each party appoints its own arbitrator, and the two party-appointed arbitrators then appoint a third member of the panel. This kind of clause is undesirable because the role of the party-appointed arbitrators is inherently ambiguous; should they be loyal to the party who appointed them, or are they obliged to be neutral and independent? What are the ground rules for communications between a party and its party-appointed arbitrator concerning strategy and the deliberations of the arbitration panel? As anyone who has been involved in such an arbitration can attest, this kind of procedure is fraught with confusion and difficulty. The recommended approach for the unfortunate party who finds him- or herself involved in such an arbitration is to seek a stipulation that the party arbitrators will be deemed to be partisan arbitrators or to have them dismissed after they have completed their selection of the neutral arbitrator. Under California law, the party-appointed arbitrators are deemed to be partisan arbitrators.<sup>64</sup> Unless the partisan arbitrators are dismissed, the arbitration will proceed with each party being represented by two advocates — one the lawyer, and the other the partisan arbitrator. This of course makes the arbitration proceeding much more expensive.

A frequently used method for selection of the panel is to incorporate rules of an arbitration organization, such as the AAA, which provides a procedure for selection of the arbitration panel. AAA Commercial Rule 13 provides for appointment from lists drawn from the AAA Panel. The AAA will provide each party with a list of prospective arbitrators drawn from the AAA

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62. AAA Rule 13 provides for appointment by a panel; Rule 14 provides for appointment by the parties.

63. CAL. CIV. PROC. CODE § 1281.6.

64. In *Good v. Kaiser Found. Hosp.*, 152 Cal. App. 3d 819, 822, 199 Cal. Rptr. 581 (1984) the court said the California Law Revision Commission, in its study and recommendations which were made prior to the adoption of CAL. CIV. PROC. CODE § 1286.2, recognized that party-appointed arbitrators were rarely 'neutral'.

panel. Each party will return the list, indicating in order of preference those candidates who will be acceptable, and those who are under any circumstances not acceptable. The AAA will then proceed to appoint the candidates who most closely match the highest level or preference for both parties. This process may repeat itself once or twice, at which point the AAA will proceed to appoint the panel if the parties are unwilling to accept anyone.

The AAA will typically appoint one arbitrator for cases involving less than \$100,000, and a panel of three arbitrators for disputes in excess of that amount. Parties can, of course, modify this in their arbitration clause, for example to provide that there will only be one arbitrator.

Another advantage of incorporating the AAA rules is that the parties will have the assistance of a tribunal administrator in the selection and scheduling process. Rather than have the arbitrators use their time on these administrative details at the parties' expense, the tribunal administrator will attend to such matters as part of the AAA's administrative services.

The AAA also provides arbitration panels with members who have special expertise in real estate. The most widely used AAA specialized panel is the Construction Panel, whose membership is comprised of lawyers with experience in construction matters, as well as architects, contractors and other non-lawyers involved in the construction industry. The AAA also has a Real Estate Valuation panel, whose members include experienced real estate appraisers, as well as real estate lawyers. Additionally, the AAA has adopted special rules for the resolution of disputes under title policies, and those rules are incorporated in the standard California Land Title Association (CLTA) and American Land Title Association (ALTA) policies.<sup>65</sup>

##### 5. *Location of Arbitration Hearing*

The arbitration clause should specify the place where the

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65. As of June, 1987, ALTA includes a section providing for arbitration of disputes among its standard policy form provisions. The AAA issued its new Title Insurance Arbitration rules also in June, 1987.

arbitration hearing will be held. This will determine not only the location of the hearing, but also the locality from which the arbitrators will be drawn.<sup>66</sup>

## 6. *Choice of Law*

It is also important to review the general choice of law provision in the agreement to make sure it is compatible with the arbitration clause. As indicated by *Volt Information Systems v. Stanford*,<sup>67</sup> tensions may exist as to what procedural law applies when parties seek to enforce in a federal court an arbitration clause containing a local choice of law provision. It is therefore recommended that if the parties intend for the arbitration to proceed under the FAA, the arbitration clause should make it clear that federal arbitration law will apply notwithstanding any conflicting state choice of law provision in the agreement.

## F. HEARING PROCEDURES

### 1. *Preliminary Hearing*

AAA Commercial Rule 10 provides for a preliminary hearing which is analogous to a pretrial conference and may be used to provide for exchange of documents and other limited discovery. It also provides the parties with an opportunity to present to the arbitrators any procedural issues or proposals for simplifying the proceedings by stipulation.

### 2. *Expedited Arbitration Procedures*

The AAA rules provide for expedited procedures for smaller cases.<sup>68</sup> An expedited proceeding is held before one arbitrator and there is no preliminary hearing.<sup>69</sup>

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66. Unless the arbitration agreement provides otherwise, under CAL. CIV. PROC. CODE § 1282.2(a)(1) the neutral arbitrator selects the time and place. Likewise, under AAA Rule 21, the arbitrator sets the time and place.

67. 489 U.S. 468 (1989).

68. Under AAA rules expedited procedures are allowed where the total claim does not exceed \$15,000.

69. Expedited procedures are covered by AAA Rules 54-58.

### 3. *Continuances*

Continuances may be granted by the arbitrators when good cause is shown.<sup>70</sup> Typically, arbitrators will follow a rule of reason in granting continuances.

### 4. *Closure of the Arbitration Hearing*

AAA Commercial Rule 35 specifies the manner of closing the hearing. Under the AAA rules, the arbitrators are required to make their award within thirty days after the closing of the arbitration hearing.<sup>71</sup> Parties concerned about avoiding protracted proceedings should provide in their arbitration clause that the arbitrators must conclude the hearing within a specified number of days, unless the parties agree to extend the time. The time limit should be a reasonable one, because if it expires it will divest the arbitration panel of its jurisdiction.

## G. FORM OF THE AWARD

The typical award will be a "one-liner," simply stating the relief granted, e.g.: "Petitioner is awarded \$20,000 in damages, plus costs of arbitration and attorneys' fees." Unless requested by the parties, arbitrators typically will not state the reasons for their decision in their award. There is no legal requirement for them to do so.<sup>72</sup>

## H. PETITION TO CONFIRM OR VACATE AWARD

Typically, there will be strict time limits for petitioning the court to vacate an award.<sup>73</sup> There is also a limited opportunity

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70. CAL. CIV. PROC. CODE § 1282.2(b); AAA Rule 39. Refusal to grant a continuance may be grounds for overturning an arbitration award under CAL. CIV. PROC. CODE § 1286.2(e).

71. AAA Rule 41.

72. In *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1955), the U.S. Supreme Court stated that arbitrators have no obligation to give reasons for an award. The California Supreme Court has also stated that arbitrators are not required to explain their awards or provide reasons for their conclusions; *Sapp v. Barenfield*, 34 Cal. 2d 515, 522 (1949). CAL. CIV. PROC. CODE § 1283.4 states only that the award shall be in writing and signed.

73. CAL. CIV. PROC. CODE § 1288 - within 100 days after the date of service; 9 U.S.C.

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to move to correct an award if there is an error that is apparent on the face of the award which can be corrected without affecting the substance of the award.<sup>74</sup>

## I. PETITIONS TO COMPEL ARBITRATION OR TO STAY ACTION

Parties to an arbitration clause may sometimes encounter a recalcitrant party who is unwilling to arbitrate. There are a couple of ways of dealing with this situation. If the non-cooperating party proceeds to file a lawsuit raising a matter that should be arbitrated, the appropriate response in most jurisdictions is a motion to stay the action<sup>75</sup> and a petition to compel the other party to arbitrate.<sup>76</sup> The party relying on the arbitration clause also has the option of proceeding with the arbitration without the presence of the recalcitrant party, in which event the arbitrators will proceed with the hearing, take evidence and make their award based on the evidence presented.<sup>77</sup> This latter approach can be somewhat risky if there is a legitimate issue as to whether the submitted issues are arbitrable.

## J. WAIVER OF RIGHT TO ARBITRATE

The right to arbitrate under a contract may be waived by conduct indicating a contrary intent. For example, if a party to an arbitration clause files an action without reserving the right to arbitrate, this can be deemed a waiver.<sup>78</sup> For this reason, parties seeking emergency (temporary restraining order) or provisional relief (a *lis pendens* or a receiver) in a matter which is

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§ 12 - within 3 months after the award is filed or delivered.

74. CAL. CIV. PROC. CODE § 1284 - upon written application not later than 30 days after service.

75. CAL. CIV. PROC. CODE § 1292.8.

76. CAL. CIV. PROC. CODE § 1292.4. *See also* 9 U.S.C. § 3.

77. AAA Rule 30.

78. In *Doers v. Golden Gate Bridge, Highway, & Transp. Dist.*, 23 Cal. 3d 180, 588 P.2d 1261, 151 Cal. Rptr. 837 (1979), the court held that waiver does not occur until the parties have litigated the merits of the arbitrable issues, overruling appellate court cases which had held that the mere filing of a complaint acted as a waiver. Reaffirming *Doers*, the California Supreme Court in *Keating v. Superior Court*, 31 Cal. 3d 584, 605, 645 P.2d 1192, 183 Cal. Rptr. 360, 372 (1982) (*rev'd on other grounds* in *Southland Corp. v. Keating*, 465 U.S. 1 (1984)) set forth three factors that the trial court should consider when determining whether a party has waived the right to arbitrate: 1) whether the party took steps inconsistent with an intent to arbitrate, 2) whether the party unreasonably delayed seeking arbitration, or 3) whether the party acted in "bad faith" or "willful misconduct".

subject to an arbitration clause should make it clear in their application to the court that they are not waiving their right to arbitration, and should request a stay of the judicial action immediately after the requested interim relief has been obtained.<sup>79</sup>

#### K. POWER OF ARBITRATOR

As a general proposition, arbitrators have the same powers as a court of law to award damages and equitable relief, including injunctions and specific performance.<sup>80</sup> Arbitrators also have the power to award provisional remedies or interim relief.<sup>81</sup> The only limitation placed on the power of arbitrators is that which may be contained in the arbitration clause.<sup>82</sup>

#### L. KNOWING CONSENT TO ARBITRATION

An issue which frequently arises is whether the arbitration agreement was unconscionable or procured by fraud. The resolution of such issues will vary depending on the law of the particular state, or whether federal law applies.<sup>83</sup> This becomes less of

79. Under CAL. CIV. PROC. CODE § 1281.5, a party does not waive any right of arbitration by a proceeding to enforce a lien, if at the time the party files its action it also presents an application that such action be stayed pending arbitration. In *Kaneko Ford Design v. Citipark, Inc.*, 202 Cal. App. 3d 1220, 249 Cal. Rptr. 544 (1988), the court held that plaintiff waived its right to arbitration by an unreasonable delay following its filing of a complaint to foreclose a mechanic's lien and application for stay of the foreclosure action pending arbitration.

Under the new CAL. CIV. PROC. CODE § 1281.8(b) either party may file an action for a provisional remedy; the filing is not a waiver as long as the filing is accompanied by statement of whether the party is or not reserving the party's right to arbitrate.

80. CAL. CIV. PROC. CODE § 1283.05(b).

81. AAA Rule 34.

82. See *O'Malley v. Petroleum Maintenance Co.*, 48 Cal. 2d 107, 110, 308 P.2d 9 (1957) (powers of the arbitrator are limited by the agreement or stipulation of submission).

83. In *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967), the U.S. Supreme Court held that arbitration clauses are separable from the contracts in which they are embedded and that a broadly drawn arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.

The majority of states follow the *Prima Paint* approach and say that fraud in the inducement is determined by the arbitrators. California accepts the *Prima Paint* separability approach; *Erickson, Arbuthnot, McCarthy, Kearney and Walsh, Inc. v. 100 Oak Street*, 35 Cal. 3d 312, 323, 673 P.2d 251, 197 Cal. Rptr. 581 (1983) as does New York; *Lido Fabrics Inc. v. Clinton Mills Sales Corp.*, 49 A.D.2d 869, 375 N.Y.S.2d 3 (1975).

The separability approach has been rejected by Louisiana, Minnesota, and New Mexico; in these states fraud in the inducement is an issue for the court: see George

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an issue where the parties are of equal bargaining power and there is less likelihood the arbitration agreement will be deemed a contract of adhesion. In any event, it may be prudent to include in the arbitration clause clear language in which the parties acknowledge that in agreeing to arbitration they are giving up certain rights, including the right to a jury trial. Indeed, in California a bold-type statutory disclaimer is required in "any contract to convey real property, or contemplated to convey real property in the future, including marketing contracts, deposit receipt, 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."<sup>84</sup> The statute also requires parties to indicate their consent to the arbitration clause by placing their initials in the margin.

## M. APPRAISAL AND VALUATION CLAUSES

A common use of arbitration in real estate transactions is to resolve issues of property value or appraisal, such as in a buy-out of a partnership interest or a rental adjustment under a long-term lease. It is important to distinguish what is commonly known as an "appraisal" provision from an arbitration procedure to resolve a dispute as to value. An appraisal provision usually contemplates that the parties will jointly hire an appraiser who will determine the value, or that each will hire its own appraiser and the two appraisers will either attempt to agree on the value, or hire a third to resolve the issue, or there will be some formula in the agreement for resolving the two appraisers' views.

In a recent case, *Coopers & Lybrand v. Superior Court*,<sup>85</sup>

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*Engine Co., Inc. v. Southern Ship Bldg. Corp.*, 350 So. 2d 881 (LA 1977); *Atcas v. Credit Clearing Corp. of America*, 292 Minn. 334, 197 N.W. 2d 448 (1972); *Shaw v. Kuhnel & Assoc., Inc.*, 102 N.M. 607, 698 P.2d 880 (1985).

In California an unconscionable agreement may result in the nonenforceability of the arbitration agreement; *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1983) (an unconscionable arbitration agreement is not enforceable). *But see Hamilton Stone, Inc. v. Nat'l Cash Register Corp.*, 470 N.Y.S. 2d 418 (1984) (New York public policy does not bar arbitration of a dispute arising out of a contract alleged to be unconscionable).

84. CAL. CIV. PROC. CODE § 1298.

85. 212 Cal. App. 3d 524, 260 Cal. Rptr. 713 (1989).

the California Court of Appeals addressed the issue of whether appraisal-type clauses are subject to the various rules applicable under California law to arbitration.

The case involved the acquisition by Atari of a controlling interest in a retail chain known as the Federated Group from its majority shareholder, Schwartz. Under the agreement between Atari and Schwartz, Coopers & Lybrand, the accounting firm, was to examine Federated's balance sheet and to make certain adjustments which would affect the value of the transaction. The agreement stated that Coopers' audit would be a conclusive determination of the matters covered thereby and shall be binding upon the parties and could be reduced to a judgment. Schwartz did not like the result that Coopers & Lybrand came up with, and sued the accounting firm for professional negligence and claimed that Coopers had breached their fiduciary duty by skewing their audit in favor of Atari because they expected to get future business from Atari.

The Court of Appeal reviewed the historical judicial distinction between agreements to arbitrate, on the one hand, and to appraise, on the other hand. The determining factor under the cases appeared to be whether the agreement provided for an adjudicatory-type proceeding or for an independent examination. The court went on to note, however, after an extensive discussion of the relevant case law and legislative history, that the 1960 revisions to the arbitration act had intended to do away with the this kind of distinction between appraisal and arbitration. It further noted that Cal. Civ. Proc. Code § 1280(a) includes under the definition of arbitration agreements "agreements providing for valuations, appraisals and similar proceedings,"<sup>86</sup> and that this was in response to the Recommendation of the 1960 Law Revision Committee that the distinction be eliminated as being out of date. The Committee had observed that the distinction between appraisal and arbitration had evolved in response to the cumbersome procedural obstacles created under old arbitration law. However, since modern arbitration law allowed the parties to delineate the procedures by contract, make them as simple or as cumbersome as they might like, the distinction between appraisal and arbitration was no longer

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86. *Id.* at 534.

important.<sup>87</sup>

The court also concluded that since the valuation procedure was in fact an arbitration, statutory immunity from suit would be available.<sup>88</sup>

#### IV. MEDIATION

Mediation affords an opportunity to resolve disputes in a manner that is far cheaper and more efficient than either litigation or arbitration.

Most mediations occur after the parties have grown tired of the expense and hassle of litigation and have decided to make a serious effort to resolve their disputes. However, the best time to mediate a case and settle it is before a complaint or arbitration demand has been filed. Once litigation has started, parties tend to become more polarized and disputes become more difficult to settle.

Real estate practitioners should therefore consider including an embedded mediation clause in their real estate agreements. While such a clause is no guarantee that the case will settle, it will require the parties to make an effort to mediate their dispute with a third-party neutral before they go to court. If one of the parties does not participate in the mediation in good faith, the mediation will be concluded. There is no requirement that a party provide information in a mediation where the other side is simply looking for free discovery. There are thus very few downside risks to including an embedded mediation clause in an agreement.

To the extent there may be a concern that a mediation clause would inhibit a party requiring emergency or provisional relief from a court, such as a *lis pendens* or a temporary restraining order to prevent irreparable harm, the clause should expressly provide that a party may seek such provisional or emergency relief notwithstanding the mediation clause.

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87. *Id.* at 534.

88. *Id.* at 540.

Weighing these possible disadvantages against the advantages of mediation, there is no question that including a mediation clause is in the best interests of the client. It will afford the parties to the agreement a real and built-in opportunity to settle their dispute and to avoid the expense, inconvenience and uncertainty of litigation.

## V. CONCLUSION

Arbitration clauses may be designed to accommodate a broad range of client concerns, and creative drafting will produce a document which anticipates the majority of pitfalls. Thus, familiarity with the range of available ADR techniques will provide the real estate practitioner with an expanded repertoire of client services, and allow transactions to be structured to provide, in advance, for the most efficient and amicable resolution of possible obstacles.