

President's Message
By Maria Z. Stearns

I am honored to serve as the 2021 President for ABTL's Orange County chapter. Having been a member of ABTL Orange County for over 15 years, I can easily say that the best part of membership is the opportunity to meaningfully engage with judges and leading attorneys at the top of their field through a variety of educational, social and networking events.

Although 2020 forced us to hit pause on in-person events, outgoing President Todd Friedland seamlessly transitioned our organization to hold virtual events, engage and educate members, and stay true to ABTL's mission to "promote competence,

-Continued on page 4-

**Turning the Tables: Using Public Policy
Against Arbitration**
By Jeffrey E. Raskin

Countless published cases invoke California's public policy in favor of arbitration to justify everything from expansive interpretation of arbitration agreements to the extremely narrow scope of judicial review of arbitration awards. Less well-known are two doctrines that allow parties to use public policy against arbitration, either to avoid arbitration altogether or to empower courts to review awards for errors of fact or law.

These twin public-policy doctrines are powerful tools to escape arbitration's grip. But each doctrine is governed by its own set of rules, and each is so rarely addressed in published opinions that it is easy for counsel and courts to get tripped up. This is all the more true because different rules apply depending on whether the California Arbitration Act or the Federal Arbitration Act governs the analysis. In fact, just a couple of years ago, the California Supreme Court again clarified the distinction between the two doctrines—a distinction that the Court had made plain in the early 1990s.

(*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 73-80 (*Sheppard Mullin*).)

**Arbitration Awards That Violate Legislative
Expressions of Public Policy.**

The first doctrine is known as the "public policy exception" to the general rule of limited judicial review of arbitration awards. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*) held that awards are generally not reviewable for errors of fact or law, but also recognized that "there may be some limited and exceptional circumstances" justifying judicial review, such as when

-Continued on page 5-

- IN THIS ISSUE -

- ◆ President's Message by Maria Z. Stearns Pg. 1
- ◆ Turning the Tables: Using Public Policy
Against Arbitration by Jeffrey E. Raskin Pg. 1
- ◆ "It's a Wrap": Using CCP Section 664.6
to Bolster Your Settlement by Philip E. Cook Pg. 2
- ◆ Escaping the COVID Backlog: Judicial Reference
by Robin Meadow Pg. 3
- ◆ Virtual Mediation—Lessons Learned from a Pandemic
by Hon. Suzanne Segal (Ret.) & Mark Loeterman ... Pg. 3
- ◆ Escaping the COVID Backlog: Arbitration
By Phillip Shaverdian & Jeremy Rosen Pg. 3
- ◆ Thank You to Our ADR Sponsors Pg. 15

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**It's a Wrap": Using Code of Civil Procedure
Section 664.6 to Bolster Your Settlement**
By Philip E. Cook

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

—Abraham Lincoln

Your client has agreed to compromise and settle the case. Given the effort and expense required to litigate to a point where settlement is reached, the last thing your client wants to hear is that more litigation will be required if the other party fails to perform their side of the settlement agreement—whether you amend your pleadings to add a breach of contract cause of action or file a new lawsuit. California Code of Civil Procedure section 664.6 provides an alternative, summary procedure to enforce the settlement agreement and have judgment entered on its terms. (See *Hernandez v. Board of Education* (2004) 126 Cal.App.4th 1161, 1175-1176.) Section 664.6 provides as follows:



If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

A court considering a motion under section 664.6 must determine whether the parties have entered into a valid and binding settlement. (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182.) However, "[a]lthough a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment [citations], nothing in section 664.6 authorizes a judge to create

-Continued on page 8-

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Escaping the COVID-19 Backlog: Judicial References By Robin Meadow



As we wait for in-court trials to recommence in the wake of the COVID-19 pandemic, speedier alternatives begin to look more and more attractive, especially for civil litigants in cases that have no calendar preference or other urgency.

Those who are prepared to waive a jury—but are not prepared to risk the uncertainties of arbitration (see *Escaping the COVID-19 Backlog: Arbitration* in this issue (*Arbitration*))—should consider a judicial reference. In essence, this is a bench trial governed by the Code of Civil Procedure and Rules of Court, with full rights of appeal—but conducted by a privately-retained referee whom the parties can choose. While this procedure contains several traps for the unwary, at least some of its uncertainties have recently been resolved in *Michael S. Yu, A Law Corp. v. Superior Court of Los Angeles County* (2020) 56 Cal.App.5th 636 (*Yu*), discussed below. As with agreements to send a pending lawsuit to arbitration (see *Arbitration*), alert counsel can avoid problems that can arise when parties must rely on form clauses in pre-dispute transactional documents.

This article recommends ways to frame the reference proceeding that will help ensure smooth transitions back to the superior court and, if necessary, to the Court of Appeal. The time to address these points is at the outset, when neither side knows who will prevail or who may end up appealing. This uncertainty promotes cooperation, for which there may be much less incentive after the referee's decision.

Basics

The key statute is Code of Civil Procedure section 638:

A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:

-Continued on page 10-

Virtual Mediation: Lesson Learned from a Pandemic By Hon. Suzanne H. Segal (Ret.) and Mark Loeterman

While we endure the challenges of the COVID-19 pandemic, many ask, “How will this experience change our world?” Commentators speculate that broad acceptance of remote work will remain universal. Virtual meetings, depositions, and hearings are now more comfortable and familiar for lawyers and judges. But what about virtual mediation?



The pandemic did not abate the need for mediation—if anything, it created a greater demand. Even those lawyers who initially resisted virtual mediation eventually acquiesced, as government orders and safety concerns prevented in-person mediations from going forward. This article discusses lessons learned from months of virtual mediation and proposes that virtual mediation, at least as an option for parties who want it, is here to stay.

When the world went virtual in March 2020, some lawyers embraced virtual mediation with enthusiasm. Others were skeptical. One hesitation might have been rooted in the fear that virtual mediation is too difficult or cumbersome for the technologically challenged. Fortunately, thanks to Zoom and similar technologies, this fear has proven unwarranted. Zoom created a simple, user-friendly interface for even the most tech-challenged individuals. Mediation providers also provided easy-to-use Zoom guides and extra IT support. And when problems inevitably arose, such as compromised bandwidth or internet failure, patience and creative planning enabled the parties to work through the problem and continue the mediation.

We have also worked with clients who were unfamiliar with Zoom or who lacked access to a device. We learned to address this problem through additional pre-mediation preparation with the client or by having the client in a room with counsel, albeit in a socially distanced and safe manner.

Parties have expressed concerns about the security

-Continued on page 13-



Escaping the COVID-19 Backlog: Arbitration By Phillip Shaverdian and Jeremy Rosen



In response to the COVID-19 pandemic, trial courts across California are implementing a variety of measures to curtail public activity within courthouses. The result has been a virtual standstill in civil litigation and a substantial backlog of cases ready for trial. Once the courts do reopen in some fashion, the backlog of criminal trials will take priority over the backlog of civil trials. See Kevin C. Brazile, *When Will Civil Litigation Return to Normal?*, DAILY J. (Apr. 21, 2020), <https://www.dailyjournal.com/articles/357292-when-will-civil-litigation-return-to-normal>.



[will-civil-litigation-return-to-normal](https://www.dailyjournal.com/articles/357292-when-will-civil-litigation-return-to-normal). These criminal matters will consume much of the courts' resources for many months after reopening, increasing the backlog of civil cases. This backlog will be especially magnified in courts like the Los Angeles Superior Court and the District Court for the Central District of California, which already had large backlogs prior to the pandemic. Moreover, even when courts do reopen, there will be numerous logistical challenges to conducting jury trials given the need for continued social distancing. Early predictions that most civil trials scheduled for 2020 would be rescheduled for 2021 have proven correct. See Rob Shwarts & Diana Fassbender, *Civil Jury Trials and COVID-19: How Civil Litigants Can Reach Resolution in the Wake of a Global Pandemic*, LAW.COM (Apr. 22, 2020), <https://www.law.com/therecorder/2020/04/22/civil-jury-trials-and-covid-19-how-civil-litigants-can-reach-resolution-in-the-wake-of-a-global-pandemic/>, last visited November 30, 2020. Indeed, the November 2020 surge has only complicated matters. See, e.g., Los Angeles Supreme Court Order filed November 23, 2020, http://www.lacourt.org/newsmedia/uploads/14202011231739220_NR_GO_FINAL-withOrder.pdf, last visited November 30, 2020.

Given these significant impediments to getting civil cases to trial and the potential difficulties in con-

-Continued on page 16-

-President's Message: Continued from page 1-

ethics, professionalism, and civility in the legal profession and to encourage and facilitate communication between members of the Orange County bar and the County's federal and state judges on matters affecting business litigation and the civil justice system." Let's all thank Todd for his extraordinary leadership.

I would be lying though if I said that virtual ABTL is just as good as in-person ABTL. It isn't; not even close. I truly miss all of our candid conversations of shared experiences, lessons learned and inspirational advocacy. Although we will continue to deliver impactful virtual programming for the first half of 2021 (thank you Past President Michele Johnson for the engaging program on U.S. Soccer & Fair Pay, February 10, 2021), we are hoping to return to in-person events by mid-year.

I am especially excited for our 47th Annual Seminar at the Mauna Lani – Aulani Resort on the Big Island of Hawaii. Please mark your calendar for October 20-24, 2021 for our themed conference on the *Evolution of Business Litigation: Adapting and Overcoming*. With our new appreciation for human connection, travel, and the remarkable beauty of the outdoors, I invite you to reset from the stress of the past year by joining us in Hawaii for a Zoom free opportunity to learn from the best while reconnecting with friends and making new ones.

A big shout out to my dedicated Executive Committee: Matthew Sonne, Vice-President; William O'Neill, Treasurer; and Kenneth Parker, Secretary. Welcome to our newest board members: Hon. Erick Larsh, Presiding Judge, Orange County Superior Court; Hon. Cormac Carney, United States District Court, Central District; Shane Criqui, Stuart Kane LLP; and Chahira Solh, Crowell & Moring LLP. And saving the most critical for last, is Linda Sampson, our Executive Director who helps make it all happen.

While 2020 was not the year we expected it to be, it has given me a new appreciation for rubber chicken dinners; bring them on! I have great optimism that we will be able to gather together again in 2021. I look forward to seeing everyone at both the virtual and in-person 2021 ABTL events and especially in Hawaii for our Annual Seminar.

Mahalo.

♦ Maria Stearns is a partner and Chair of the Employment Law Department at Rutan & Tucker, LLP and is the 2021 ABTL Orange County Chapter President.

- Turning the Tables: Continued from page 1-

“granting finality to the arbitrator’s decision would be inconsistent with the protection of a party’s *statutory* rights” or a “clear” and “explicit *legislative* expression of public policy.” (*Id.* at p. 32, italics added.)

The requirement that the public policy be found in a legislative enactment is key. Because the Legislature has expressed a strong public policy in favor of the finality of arbitration awards, it takes a counter-vailing legislative expression of public policy to justify judicial review for factual and legal errors.

Cases involving public policy and statutory rights can be divided into two easily describable categories and a more debatable catch-all category:

1) The California Supreme Court has applied the exception and allowed judicial review for errors of fact or law where the arbitrator violated a statutory right or legislatively-expressed public policy that impacts the “propriety of the arbitration itself.” (*SingerLewak LLP v. Gantman* (2015) 241 Cal.App.4th 610, 676-677.) For instance:

- The Supreme Court vacated an arbitration award that ordered a school district to comply with collectively bargained terms for the discharge of probationary teachers because the award conflicted with a statute (a) excluding these issues from the scope of collective bargaining and (b) giving school districts the right to discharge probationary teachers without cause or due process. The Court held that the Legislature expressed a public policy that probationary-teacher discipline “not be subject to arbitration.” (*Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 277.)

- *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 979, 982-983 similarly applied the public policy exception in holding that the Mandatory Fee Arbitration Act conflicts with enforcement of an award that the parties agreed would be binding (although it found that the client had waived his rights under the statute).

2) The California Supreme Court has held that the public policy exception applies where granting finality to the arbitrator’s error would bar the plaintiff from receiving a hearing on the merits of an unwaivable statutory claim. In *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 669, 680, the Court held that the arbitrator “clearly erred”

in determining that a Fair Employment and Housing Act claim was time-barred and that public policy required a hearing on the merits. The Court characterized the arbitrator’s error as affecting the “procedural framework under which the parties agreed the arbitration was to be conducted.” (*Id.* at pp. 679-680.)

3) California Courts of Appeal have occasionally applied the public policy exception to cases in which the arbitrator erroneously applied the substantive law governing the claim. A few examples demonstrate both the breadth of this catch-all category of cases and the robustness of judicial review to protect express legislative public policies:

- In *Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 28, arbitrators found that the defendant had not acted as a general contractor and therefore was not required to disgorge profits under California’s contractor licensing statutes. Rather than deferring to the arbitral determination, the Court of Appeal held that the trial court must “independently consider” the issue to vindicate the licensing law’s public policy of protecting the public from incompetent and dishonest contractors and discouraging unlicensed contractors from charging for their services. (*Id.* at pp. 39-40.) The appellate court directed the trial court to make its de novo determination based on “all of the admissible evidence submitted to [the court] regardless of whether that evidence was before the arbitrator.” (*Ibid.*)

- In *Brown v. TGS Management Company, LLC* (2020) 57 Cal.App.5th 303, the Court of Appeal vacated an award that denied a declaratory relief claim that presented a facial challenge to an employment agreement’s confidentiality provision. The court held that the provision was so broad that it violated the public policy—expressed in Business and Professions Code section 16600—against restraints on competition. (*Id.* At p. 307.) In considering that legal issue de novo, the Court of Appeal rejected the arbitrator’s alternative conclusions that the claim was (1) nonjusticiable as unripe and (2) barred by the unclean hands defense. (*Id.* at pp. 313-319.)

- The Court of Appeal took a somewhat more deferential approach in *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327 (*City of Palo Alto*). The court recognized that various statutes, taken together, express a public policy requir-

-Continued on page 6-

-Turning the Tables: Continued from page 5-

ing employers to take reasonable steps to provide a safe workplace. (*Id.* at pp. 334-337.) However, the court also acknowledged that that public policy is not so broad as to prohibit reinstatement when an employee makes a threat that he does not actually intend to carry out. (*Id.* at p. 337.) Deferring to the arbitrator's conclusion that the employee did not pose an actual risk, the court thus refused to vacate the award. (*Id.* at pp. 337-338.) The court explained that a "different result might well obtain if the arbitrator had found, or there was uncontroverted evidence" that the employee's threats were genuine "or if the arbitrator failed to reach that substantive question." (*Ibid.*)

Courts will vacate an arbitration award that reinstates an employee if reinstatement necessarily entails violation of an existing court injunction that bars the employee from the workplace. (*City of Palo Alto, supra*, 77 Cal.App.4th at pp. 338-340.) This is because California's contempt laws constitute a clear legislative expression of public policy in favor of obedience to court orders. (*Ibid.*)

In an arbitration against a state entity, the arbitrator awarded the plaintiff attorney's fees in such high amounts that the court deemed the award to be an "[in]appropriate" gift of public funds, thus violating the public policy against such gifts as expressed in the California Constitution. (*Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 452.)

Arbitration Clauses Contained In Contracts That Are Entirely Illegal For Violation Of Public Policy.

The second of California's two public policy doctrines is fundamentally different. It does not focus on errors in the arbitration award. Rather, it questions whether the arbitration *agreement* itself is illegal for violation of public policy. This analysis looks beyond legislative expressions of public policy and can include any applicable body of law invalidating the contract at issue.

Illegal arbitration agreements. Under California law, courts—not arbitrators—determine whether an arbitration agreement is void for violation of public policy. (See *Sheppard Mullin, supra*, 6 Cal.5th at pp. 74-77.) If the arbitration agreement is illegal and thus unenforceable, a party "may avoid arbitration altogether," and the trial court should deny a motion to compel arbitration. (*Moncharsh, supra*, 3 Cal.4th at p. 29.) Similarly, when the arbitration agreement is illegal and

unenforceable, the arbitrator lacks the power to decide anything at all, so any award—right or wrong—must be vacated.

Entirely illegal agreements containing arbitration clauses. The same is true when an *entirely illegal* contract includes an arbitration clause, even if the arbitration clause is unobjectionable standing alone. If an otherwise enforceable arbitration clause is "contained in an [entirely] illegal contract," the arbitration agreement falls along with the rest of the contract. (*Sheppard Mullin, supra*, 6 Cal.5th at pp. 74-76; see *Moncharsh, supra*, 3 Cal.4th at p. 29.) This issue is also reserved for the courts based on the "'evidence presented to the trial court, and any preliminary determination of legality by the arbitrator . . . should not be held to be binding upon the trial court.'" (*Sheppard Mullin*, at p. 75.)

This rule has a limited reach: Courts decide *only* challenges to the legality of *the* entire contract. If a party challenges the legality of only *a provision* of the contract, the arbitrator determines that illegality issue subject to ordinary rules for judicial review of arbitration awards. (*Sheppard Mullin, supra*, 6 Cal.5th at pp. 75-77; *Moncharsh, supra*, 3 Cal.4th at pp. 30-33.)

Scope of public policy review. When considering whether a contract is entirely illegal, the analysis goes far beyond a search for a *legislative* expression of public policy. Rather, the contract "may be found contrary to public policy even if the Legislature has not yet spoken to the issue." (*Sheppard Mullin, supra*, 6 Cal.5th at p. 73; see *id.* at pp. 77-80.) Sources of public policy rendering contracts or arbitration clauses illegal can include administrative regulations and common law. In other words, California law requires the same broad public policy analysis that courts would ordinarily employ in deciding whether a contract is void for violation of public policy outside the arbitration context—no "different, more restrictive rule" applies just because arbitrability is at issue. (*Id.* at pp. 74-75.)

For instance, in *Sheppard Mullin*, the Supreme Court held that a law firm's engagement agreement violated the public policy against undertaking a representation without disclosing an existing conflict of interest. (*Sheppard Mullin, supra*, 6 Cal.5th at pp. 80-81.) That violation went to the heart of the attorney-client relationship that was the subject of the agreement and thus, rendered the agreement entirely illegal.

-Continued on page 7-

-Turning the Tables Continued from page 6-

(*Id.* at pp. 86-87.) The law firm argued that this did not suffice to vacate the arbitration award because the public policy was expressed in the Rules of Professional Conduct—not any *legislative* expression of public policy. (*Id.* at p. 73.) The Court rejected that argument, explaining that the limitations on the “public policy exception” do not apply when courts consider the more fundamental arbitrability question about the entire illegality of the contract that contains the arbitration clause. (*Id.* at pp. 77-79.)

The Federal Approach.

Critical differences, however, apply when the case is governed by federal arbitration law.

The Public Policy Exception. Like California law, federal law recognizes that an award exceeds the arbitrator’s powers if it violates “‘explicit,’ ‘well defined,’ and ‘dominant’ ” public policies. (*Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17* (2000) 531 U.S. 57, 62-63 [121 S.Ct. 462, 148 L.Ed.2d 354].) But it need not be a legislative expression of public policy. Instead, federal law requires that the public policy be ascertained by reference to “positive law,” which includes not just statutes, but also regulations, codes, and judicial decisions that interpret those enacted laws. (*Ibid.*; see *Southern Regional Council of Carpenters v. Drywall Dynamics, Inc.* (9th Cir. 2016) 823 F.3d 524, 534, fn. 2; *Virginia Mason Hosp. v. Washington State Nurses Ass’n* (9th Cir. 2007) 511 F.3d 908, 916-917 [analyzing asserted conflict with public policy found in state and federal regulations].) This still confines the possible sources of public policy warranting heightened judicial review of arbitration awards; courts cannot look to “general considerations of supposed public interests.” (*Eastern Associated Coal Corp.*, at p. 63.) But it is broader than California’s public policy exception.

Entire Contract Illegality. Under federal law, the only threshold issue the court is allowed to decide in lieu of the arbitrator is a public-policy challenge specifically to the legality of the *arbitration* clause itself—not to the agreement as a whole. (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 70-71 [130 S.Ct. 2772, 2778, 177 L.Ed.2d 403].) Unlike California law, the Federal Arbitration Act (FAA) treats public-policy challenges to the entire agreement containing an arbitration clause as a question for the arbitrator. (E.g., *Phillips v. Sprint PCS* (2012) 209

Cal.App.4th 758, 774 [applying FAA]; see *Sheppard Mullin, supra*, 6 Cal.5th at pp. 71, 72, fn. 2 [California law is “unlike federal law” in this regard; case involved only application of California law].) In that circumstance, the court (either a federal court or a California court) merely severs and enforces the arbitration clause and sends the illegality dispute regarding the entire contract to the arbitrator. The consequence: Like any other arbitral determination of an arbitrable issue, under federal law the arbitrator’s determination is not ordinarily reviewable for errors of fact or law.

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-It's A Wrap: Continued from page 2-

the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously agreed upon.' ” (*Machado v. Myers* (2019) 39 Cal.App.5th 779, 790.)

What is required for enforcement under section 664.6?

Although courts deciding motions to enforce settlements under section 664.6 initially focused on the strong public policy in favor of settling litigation and liberal enforcement of settlement agreements (e.g., *Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 Cal.App.3d 1182, 1190 [relying upon the “public policy of this state” which “supports pretrial settlement of lawsuits and enforcement of judicially supervised settlements” to affirm judgment entered pursuant to section 664.6]), more recent cases emphasize the importance of compliance with the statute’s requirements and whether settlement agreements are binding and enforceable. A few of the more important requirements, with some practical suggestions for counsel, are discussed below.

• **For now, all parties must sign the settlement agreement.** In *Levy v. Superior Court* (1995) 10 Cal.4th 578, the California Supreme Court considered whether a court could enter judgment under section 664.6 where a written stipulation to settle had been signed by a litigant’s attorney but not by the litigant personally. Because section 664.6 expressly “requires the ‘parties’ to stipulate in writing . . . that they have settled the case[,]” the Court concluded that “the term ‘parties’ as used in section 664.6 . . . means the litigants themselves, and does not include their attorneys of record.” (*Id.* at pp. 585-586.) Traditional agency analysis has been rejected as a means of satisfying the party signature requirement of section 664.6. (See *Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110, 1119; *Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 716.)

However, the Legislature recently changed that. On September 29, 2020, Governor Newsom signed Assembly Bill No. 2723 (2019-2020 Reg. Sess.) § 1, amending section 664.6 to provide that a written settlement agreement may also be signed by an attorney who represents a party, or, if the party is an insurer, by an agent who is authorized in writing by the insurer to sign on the insurer’s behalf. The amendment takes effect on January 1, 2021; until then, for a written settlement agreement to be enforceable under section 664.6,

all parties must sign it.

• **A settlement must contain all material terms, even if you contemplate a more formal settlement agreement.** As a general proposition, a settlement agreement, like any other contract, cannot be enforced if the parties fail to agree on a material term or if a material term is not reasonably certain. (See Civ. Code, § 3390, subd. (e).) What constitutes a “material term” of any specific settlement agreement will vary from case to case. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 813, citing 1 Williston on Contracts (4th ed. 1990) § 4:28, pp. 602-605 [analyzing circumstances in which “‘minor matters’ ” in elaborate contracts are left for future agreement and analyzing requirements for inclusion of all material terms in order to give rise to an enforceable contract].) You should consider preparing a draft agreement that includes all material settlement terms and bringing it to the mediation.

Even where the parties contemplate and express an intent to enter into a more formal agreement to document their settlement, an initial settlement agreement or term sheet can itself be the basis of a motion to enter judgment enforcing the settlement under Code of Civil Procedure section 664.6, as long as it: (i) reflects an intent to be bound, and (ii) includes all material terms of the settlement. (See, e.g., *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 48 [“When parties intend that an agreement be binding, the fact that a more formal agreement must be prepared and executed does not alter the validity of the agreement”].) And to avoid having an agreement deemed unenforceable because of mediation confidentiality imposed by Evidence Code section 1119 (e.g., *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 578-582), you should include a statement like the following in order to have the agreement qualify for a statutory exception to confidentiality (Evid. Code, § 1123, subds. (a) & (b)): “This agreement is intended by the parties to be admissible and subject to disclosure, and to be binding and enforceable.”

Where future performance is contemplated, how do you ensure the trial court will keep jurisdiction to enforce the settlement agreement under section 664.6?

Where a settlement agreement states that it may be enforced under section 664.6, the court may retain jurisdiction and, in the event of a breach, enforce the agreement by entering it as a judgment. However, as

-Continued on page 9-

-It's A Wrap: Continued from page 8-

the court in *Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913, 917 (*Mesa*) makes clear, the statute includes certain requirements you must follow if you want the court to retain jurisdiction.

- **The parties must stipulate that the court will retain jurisdiction before dismissal.** In *Sayta v. Chu* (2017) 17 Cal.App.5th 960, 963, the parties resolved their dispute in a confidential settlement agreement, and the litigation was dismissed on that basis. Ten months later, after one of the parties breached the agreement, the nonbreaching party filed a motion to enforce the agreement under section 664.6. (*Ibid.*) On appeal from the trial court's ruling on the motion, the Court of Appeal noted that although the settlement expressly provided that the parties would ask the trial court to retain jurisdiction to enforce the settlement under section 664.6, neither party did so. (*Id.* at pp. 964-965.) As a result, "the court lost subject matter jurisdiction when the parties filed a voluntary dismissal of the entire cause. Since subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel, the court cannot 'retain' jurisdiction it has lost." (*Id.* at p. 966, quoting *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 206-207.)

- **You must follow the statute.** In *Mesa*, the parties agreed in their settlements that the "Court shall retain jurisdiction pursuant to Code of Civil Procedure section 664.6 to enforce the terms of the Settlement Agreement." (*Mesa, supra*, 33 Cal.App.5th at pp. 915-916.) Plaintiffs' counsel filed requests for dismissal and inserted in the dismissals that the "Court shall retain jurisdiction to enforce settlement per C.C.P. § 664.6." (*Id.* at p. 916.) The clerk entered the dismissals "as requested." (*Ibid.*)

When the plaintiffs tried to enforce the settlements by filing motions under section 664.6 years later, the Court of Appeal held that the trial court lost jurisdiction to enforce the settlements because **the parties** did not sign the requests for retention of jurisdiction, as required by section 664.6. Where parties strictly comply with section 664.6, the court can retain jurisdiction to enforce a settlement, even after an action has been dismissed. (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 439 ["We construe the second sentence of section 664.6 to mean, and we so hold, that even though a settlement may call for a case to be dismissed, or the plaintiff may dismiss the suit of its own accord, the court may nevertheless retain jurisdiction

to enforce the terms of the settlement, until such time as all of its terms have been performed by the parties, if the parties have requested this specific retention of jurisdiction"].)

The *Mesa* court offered two ways that parties could invoke section 664.6: (i) where the settlement agreement is not confidential, file a stipulation and proposed order attaching a copy of the settlement agreement (which presumably is **signed by the parties**), requesting that the trial court retain jurisdiction under section 664.6; or (ii) where the settlement agreement is confidential (or you would rather not file it publicly), file a stipulation and proposed order **signed by the parties** noting the settlement and requesting that the trial court retain jurisdiction under section 664.6. (See *Mesa, supra*, 33 Cal.App.5th at p. 918.) Another option might simply be to have all of the parties sign the Request for Dismissal form, requesting that the trial court retain jurisdiction under section 664.6.

Assembly Bill No. 2723 does not appear to change the *Mesa* rule, as the statute allows continuing jurisdiction to enforce the settlement where "requested by the parties" while the statutory amendment adding subdivisions (b) through (d) to section 664.6 appear to affect only the statute's requirement of "a writing signed by the parties." Without case law clarifying this issue, the safest approach will be to continue to follow *Mesa*.

A Few Practical Suggestions

When settling pending litigation, do not leave your client exposed to further litigation in the event another party fails to perform its obligations under a settlement agreement. **First**, include an enforcement clause allowing access to section 664.6's summary procedure for entry of judgment on the terms of the agreement if it is breached. **Second**, make sure all of the parties to the settlement sign the agreement, including officers for corporate litigants. **Third**, expressly state in the settlement agreement the parties' intent that it be admissible and subject to disclosure, as well as binding and enforceable, even where you are contemplating a more formal agreement. **Fourth**, make sure the settlement agreement includes all necessary material terms. **Finally**, if future performance is to take place after dismissal, ensure that the court retains jurisdiction to supervise such performance by submitting a request in writing to the court before dismissal, signed by all of the settling parties.

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-Judicial References: Continued from page 3-

(a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.

(b) To ascertain a fact necessary to enable the court to determine an action or proceeding.

This article concerns subdivision (a), under which the referee functions as an all-purpose judge until rendition of a decision. There are some exceptions: Motions to seal records or to file a complaint in intervention must be filed with the court in the first instance. (See Cal. Rules of Court, rule 3.932; further undesignated rule citations are to the California Rules of Court.) Otherwise, the referee's decision "must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court." (Code Civ. Proc., § 644, subd. (a); further undesignated code citations are to the Code of Civil Procedure.)

Some general points to be aware of:

- References are governed by rules 2.400 and 3.900 et seq. and, in Los Angeles, by Superior Court of Los Angeles County (LASC), Local Rules, rules 2.24 and 3.9.
- Although referees are almost always retired judges, the statute doesn't require judicial experience. (See §§ 641, 642 [grounds of objection]; rule 3.903 ["If the proposed referee is a former judicial officer, he or she must be an active or an inactive member of the State Bar"].)
- Unlike the confidentiality of an arbitration or a mediation, a judicial reference must be open to the public, and a person must be designated for public contact. (Rule 3.931(b)(1) ["In each case in which he or she is appointed, a referee must file a statement that provides the name, telephone number, e-mail address, and mailing address of a person who may be contacted to obtain information about the date, time, location, and general nature of all hearings scheduled in matters pending before the referee that would be open to the public if held before a judge"]; LASC, Local Rules, rule 2.24(b) ["The stipulation for appointment of temporary judge or agreement for a reference must set forth the name and telephone number

of a person for any member of the public to contact in order to attend a proceeding that would be open to the public if held in a courthouse. A notice containing such name and address shall be posted by the clerk as required by California Rules of Court, rules 2.831 and 3.900 et seq."].)

- Agreeing to use the judicial reference procedure, even in a pre-dispute agreement, waives the right to a jury trial. (*O'Donoghue v. Superior Court* (2013) 219 Cal.App.4th 245, 256; see *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944 [pre-dispute jury waivers with respect to ordinary trials are unenforceable].)

- The trial court has discretion to refuse to appoint a referee despite the parties' agreement. (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 545.)

Pre-Trial and Trial

Because the referee effectively serves as a trial judge, pre-trial and trial proceedings closely resemble what would happen in court, except that—like arbitrations and mediations—the parties have far more control over scheduling and communications, and the proceedings can be less formal.

But parties must be alert to the risks of informality. In particular, they must ensure that the informality doesn't come at the price of an inadequate record on appeal. Since neither side knows who will win or who will appeal, this is a joint responsibility that both sides should be motivated to implement.

The easiest starting point is rules 3.930-3.932, "Rules Applicable to References Under Code of Civil Procedure Section 638 or 639."

Filings. The Rules of Court require that "[a]ll original documents in a case pending before a temporary judge or referee must be filed with the clerk in the same manner as would be required if the case were being heard by a judge, including filing within any time limits specified by law and paying any required fees." (Rule 2.400(b)(1); see rule 3.930 [requiring compliance with rule 2.400 in judicial reference proceedings]; LASC, Local Rules, rule 2.24 (l).) And the referee "must keep all exhibits and deliver them, properly marked, to the clerk at the conclusion of the proceedings, unless the parties file, and the court approves, a written stipulation provid-

-Continued on page 11-

-Judicial References: Continued from page 10-

ing for a different disposition of the exhibits.” (Rule 2.400(c)(2).) Rule 2.400 has multiple other requirements for filings, including provisions for public access.

The referee’s orders present a special situation. No Rule of Court expressly requires the referee to file orders with the court. And while one would think that “original documents” includes “orders,” LASC, Local Rules, rule 2.24(l) arguably draws a distinction. Titled “Filing of Original Papers and Orders,” it states: “*All original papers* must be filed with the court, and all applicable fees paid, within the same time and in the same manner as would be required if the court were trying the case. *Signed orders of the temporary judge* must be presented for filing to the clerk in Department 1, or Department 2 for Family Law cases, of the Stanley Mosk Courthouse.” (*Ibid.*, italics added.) Arguably, the second sentence is merely a separate direction to temporary judges (not referees) about where to file their orders, but the language could certainly be clearer.

In any case, the reality is that parties and referees do not always file documents as the rules require, and may not even be aware of the requirements. The result is that when the case moves back to court, even cooperative counsel must resort to cumbersome and time-consuming workarounds—such as lengthy compendia of unfiled documents, and correspondence with the referee in the hope that he has maintained and can belatedly file his orders—to put everything before the court for purposes of getting judgment entered and pursuing an appeal. With uncooperative counsel, there can be extensive motion practice to accomplish that result, which may require resolving disputes about the contents of the actual record.

Counsel should not expect help from the referee’s neutral-provider organization, if any. They often have little infrastructure for maintaining filings, and little motive to expend staff time doing so.

The easiest solution is to follow the Rules of Court from the outset; to insist that the referee and/or neutral provider do so, too; to specifically require the referee to file all orders with the court; and to follow up to ensure compliance. The parties’ reference agreement and the court order should explicitly cite and require compliance with the relevant rules of court and local rules, or even quote them.

Court reporter. Just as in court, there should be a

court reporter at every hearing, regardless of topic or length. With so much happening remotely by video, it’s easy to forget this simple rule. The parties’ agreement should reflect that all proceedings will be reported, and counsel should agree on a mechanism to make this happen.

A distinct problem exists when the court reporter must prepare the record on appeal, because there is no statute or rule of court that creates any interface between the reference’s private court reporter and the superior court clerk. In court, private reporters must agree to adhere to the protocols that govern court-employed reporters, and while record preparation can be bumpy, at least the court clerk is nominally in charge of it. One solution to this problem is to include language in the original reference order to the effect that each private reporter must sign a similar document and that the court clerk shall accept transcripts prepared by the private reporters. Another workaround in the Second District Court of Appeal is to take advantage of that court’s local rule permitting counsel to file a certified copy of the reporter’s transcript directly with the Court of Appeal. To do this, one should use the Second District’s form for designating the record on appeal (available at <https://www.courts.ca.gov/documents/app-003-2DCA.pdf>), checking box A.4 on the third page:

4. ☐ A certified transcript under rule 8.130(b)(3).
(To be lodged directly with the Court of Appeal, Second Appellate District.)

Regardless of how the reporter’s transcript gets filed, it must comply with the format requirements of rule 8.144 (indexes, pagination, etc.). The private reporting firm should receive instructions on these requirements at the outset of the reference proceeding so the reporters can comply with them as soon as they start generating transcripts.

Exhibits. As noted earlier, absent a court-approved stipulation, exhibits must be transmitted to the court. But particularly with remote trials, paper exhibits will be rare. And in any case, it’s been many years since trial courts routinely retained exhibits.

A complete set of exhibits is just as important to an appeal as the reporter’s transcript. Parties should agree in advance how to handle exhibit identification, admission/exclusion of exhibits, and exhibit preservation. Ideally, at the conclusion of evidence,

-Continued on page 12-

-Judicial References: Continued from page 11-

the parties, with the referee's assistance and an appropriate order, will compile a set of exhibits and file them with the court, where they will be readily accessible for post-reference proceedings in the trial court and on appeal.

Emails. The relative informality of a reference proceeding—which, especially when administered by a neutral provider, operates much like an arbitration or mediation in terms of communication among counsel, the neutral and the neutral provider—means that email communications are likely to be far more common than in regular court proceedings. But that doesn't make it any less important to ensure that they become part of the record of the proceeding. Certainly any email to or from the referee should be treated as an official record of the court, no less than any other kind of communication between the court and parties. The importance of a particular statement by counsel or the referee may not become evident until well into the case. And unlike courts, which have a central email system that is presumably part of the court's permanent records, a neutral provider—much less an individual neutral—generally undertakes no record-keeping obligation at all.

The parties should therefore agree to use some mechanism to compile all emails involving the referee or provider at the end of the case. The compilation can then be filed with the court.

The Statement of Decision

The trial before a referee culminates in a statement of decision that the referee "report[s]" to the court. (Code Civ. Proc., § 638, subd. (a).) The statute doesn't make clear whether the referee must follow the normal statement of decision process, but *Yu*, citing a treatise, suggests this possibility. (*Yu, supra*, 56 Cal.App.5th at p. 647, fn. 5.) Counsel should assume that the process will unfold as it would in court, since there are serious waiver risks if the process isn't followed. And counsel should act immediately: Once the referee files the statement of decision with the court, the game is over. (*Ibid.* ["Objections are made to the referee before the decision is filed because once a general referee files a decision with the trial court, the decision 'must stand as the decision of the court' (§ 644, subd. (a), italics added) and is 'conclusive' (*Lewis v. Grunberg* (1928) 205 Cal. 158, 162)].) For more information about the statement of decision process, see Segal & Meadow, *Statements of*

Decision: Your Chance to Tell and Preserve the Story, ABTL Report: Los Angeles (Winter 2019) and Segal & Meadow, *Statements of Decision Part Deux*, ABTL Report: Los Angeles (Winter 2020).

Back in the Trial Court

Regardless of how the statement of decision gets finalized before the referee, the next stop is the trial court. Theoretically, the trial court could enter judgment on its own as soon as the referee files the statement of decision, but typically the prevailing party makes a motion for entry of judgment. (See LASC, Local Rules, rule 3.9(c) [requiring the prevailing party to make such a motion].)

Yu, supra, 56 Cal.App.5th 636 resolved some uncertainties in this process. In *Yu*, after the referee submitted his decision to the trial court but before the trial court entered judgment, the losing party moved the trial court to set aside the decision, arguing that the referee had made erroneous conclusions of law based on the facts he found. (*Yu, supra*, 56 Cal.App.5th at p. 643.) In response, the prevailing party argued that the trial court must first enter judgment before it could review the judgment, and that any new trial or retrial must take place before the same referee. (*Ibid.*) The trial court found errors in the referee's conclusions of law, but was uncertain about the proper sequence of events—judgment first, followed by new trial motion, or new trial motion first? Concluding that either approach would yield the same result, the trial court ruled that "'based upon the record at this time, it is the clear intent of this Court to not adopt the Referee's findings and awards in all respects, and to simply order a new trial on all issues.'" (*Ibid.*, italics omitted.) The court then ordered that the new trial would be conducted before it, not the referee. (*Ibid.*) The prevailing party filed a writ petition challenging this procedure.

After a detailed examination of the history of the reference procedure, the Court of Appeal made three important holdings. *First*, because under section 643 the referee's decision "'must stand as the decision of the court,'" the trial court was required to enter judgment immediately and had no discretion to do otherwise. (*Yu, supra*, 56 Cal.App.5th at p. 646, italics omitted.) *Second*, the trial court had the power by way of a motion for new trial to set aside the judgment entered on the referee's report for legal error—though it must defer to the referee's factual findings.

-Continued on page 13-

-Judicial References: Continued from page 12-

(*Id.* at p. 654.) *Third*, the trial court—not the referee—was the proper forum for the new trial. (*Id.* at pp. 654-655.)

This last point is particularly important because the Court of Appeal based its holding on the parties' reference agreement: "Under the parties' agreement here, the referee's powers were exhausted when he filed his decisions with the trial court. Real parties sought a new trial by the court, effectively objecting to the reference. In the absence of mutual consent for a new reference, therefore, the trial court properly ruled that the new trial be conducted before the court." (*Yu, supra*, 56 Cal.App.5th at p. 655.) Presumably, the parties could agree in advance, with the court's approval, to refer post-judgment matters—even including a new trial after an appellate reversal—to the same referee, or at least to some unnamed referee rather than the court. But since only the winning party would typically want the same referee, advance agreement to do this could prove unwise.

Other post-trial matters raise similar issues. For example, how are costs and attorney's fees to be decided? Motions to award fees and to tax costs are typically filed after entry of judgment—long after "the referee's powers were exhausted" if the statement of decision has already been reported to the trial court. Yet the referee is in the best position to rule on fees and costs motions, and even the losing party might prefer a knowledgeable decisionmaker over a stranger to the case. (See *Long Beach City Employers Ass'n v. City of Long Beach* (1981) 120 Cal.App.3d 950, 961 [suggesting a greater evidentiary burden when these motions are presented to a judge who didn't try the case].) Here, too, the reference agreement can dictate in advance that the referee will decide these issues, either by way of rulings made before submission of a statement of decision to the court or by an agreed reference to the same referee after entry of judgment.



The availability of a prompt trial before an agreed judge with a full right of appeal can be an attractive alternative to waiting in the growing backlog of COVID-delayed superior court cases. But counsel should look before they leap by paying close attention to the proposed agreement's details.

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-Virtual Mediation: Continued from page 3-

issues, particularly after press coverage of "Zoom bombing" events where uninvited parties crashed a Zoom meeting. Fortunately, Zoom has added significant security protocols, including password requirements, "waiting rooms" and host control of admission to the mediation. Zoom has an option of multi-factor authentication for parties that seek even greater security protection. Parties and mediators should use the latest version of Zoom software to take advantage of security upgrades. (While other platforms are available and may have more desirable features, Zoom's advantage lies in its widespread use and familiarity. These decrease the chance that technical problems will interfere with a mediation..)

Parties have also expressed concerns about confidentiality—for example, does the use of a virtual format create a risk that mediation discussions could be recorded? We are unaware of any evidence of an increase in secret recordings of mediations since the pandemic began—and it's not as though secret recordings weren't possible before. Furthermore, California law prohibits the admission of any such recording in civil proceedings, so the value of such a recording would be extremely limited. California Evidence Code Section 1119 prohibits the admission of any statement or writing made "for the purpose of a mediation." (*Cassel v. Superior Court* (2011) 51 Cal. 4th 113, 117.) Even statements made outside the presence of the mediator are excluded. (*Eisendrath v. Superior Court* (2003) 109 Cal. App. 4th 351, 358.) Zoom allows a host to disable the recording feature, and when that is done a recording could only be created through use of a phone or similar device—which, again, could happen during an in-person mediation as well. If parties are genuinely concerned about confidentiality issues, they should consider a pre-mediation agreement that expressly addresses confidentiality. Courts have upheld such agreements. (*Facebook, Inc. v. Pacific Northwest Software, Inc.* (9th Cir. 2011) 640 F.3d 1034, 1040-41 [confidentiality agreement precluded admission of statements made during mediation].)

Many lawyers have expressed the view that virtual mediation simply does not work as well as in-person mediation. This view is consistent with traditional mediation training, including ours. Traditional mediation training teaches that having the decisionmaker physically present is critical to the success

-Continued on page 14-

-Virtual Mediation: Continued from page 13-

of the mediation. As one lawyer commented when objecting to the virtual mediation format, “you gotta have skin in the game”—a decisionmaker must be physically present to fully appreciate the mediation experience. Parties want a mediator to “twist the other side’s arm,” and some lawyers believe that this cannot happen virtually. That’s what we thought, too, at the outset of the pandemic

However, the success rate of virtual mediation has undermined this view—it’s essentially the same as in-person mediations. How is that possible? Perhaps the assumption of “physical presence” as the critical factor oversimplified what is truly essential for a successful mediation. The critical factor may not be so much physical presence as a strong, sincere commitment to the mediation process, regardless of whether that process is virtual or in-person. We have seen success in virtual mediations even when parties started the mediation doubting that they could settle, where participants on all sides were nevertheless genuinely committed to seeking resolution. After all, nothing forces parties to stay in the room, regardless of whether the room is real or virtual—they can walk out of an in-person mediation or turn off their computers. The critical factor to success is how deeply parties wish to resolve their dispute.

It is possible that some of the other benefits of virtual mediation are contributing to the high success rate. Virtual mediations are easier to convene and travel costs are eliminated, making it easier for decisionmakers in distant locations to participate. When the mediator is working with another party, lawyers and clients can work in their offices and be productive on other matters during the inevitable downtime, making for a more efficient workday. Parties and lawyers may be more comfortable participating from their home offices. Personal relationships can be improved by seeing parties in a more relaxed setting, such as with family photos next to them or with their pets wandering into the room.

We have also learned some virtual mediation “best practices” for increasing the likelihood of success. Among these are (1) extensive pre-mediation preparation and information-sharing with client and mediator; (2) a practice session with the client to review technology, lighting, sound, etc.; (3) an exchange of documents electronically in advance of the mediation with mediator and opponent; (4) the use of pre-mediation agreements regarding security, confi-

dentiality, participation details and other critical factors.

But we cannot lose sight how the pandemic has highlighted this fact: We desperately need our courts. Without rulings on critical motions, deadlines to create pressure points in litigation, or the threat of an ultimate ruling from judge or jury, parties may lack motivation to engage in meaningful settlement discussions. The mediator can try to persuade parties of the advantages of settlement, but functioning courts clearly assist the parties in focusing on the benefits of a voluntary resolution.

John Adams supposedly said that “every problem is an opportunity in disguise.” In the midst of these difficult times, we have learned that technology, combined with preparation and commitment, provides the opportunity for successful virtual mediation. We believe that the benefits of virtual mediation are substantial enough that they will persist long after the pandemic recedes. We hope to take the lessons learned from these challenging times and continue to expand our ability to resolve disputes by using the virtual option.

♦ **Hon. Suzanne H. Segal (Ret.)**, is a mediator, arbitrator, Special Master and Discovery Referee at Signature Resolution. She served as a Magistrate Judge in the Central District for 18 years, including 4 years as Chief Magistrate Judge.

♦ **Mark Loeterman** is a mediator at Signature Resolution.

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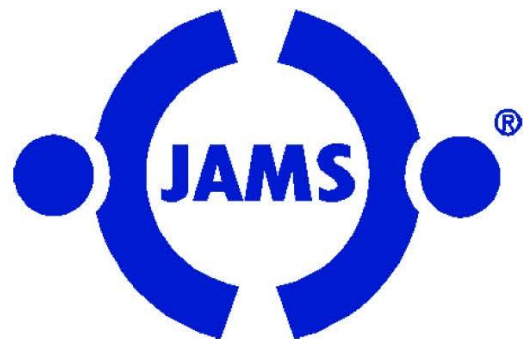
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RESOLUTION



-Arbitration: Continued from page 4-

ducting any jury trials, litigants should consider options that would allow their cases to be heard sooner. This article focuses on arbitration—but with particular safeguards in place.

Arbitration with Safeguards

Arbitration is an appealing alternative method to resolve disputes and offers benefits such as speed, efficiency, affordability, and informality. The speed and efficiency benefits of arbitration are especially significant during times that the court system is suffering from additional burdens and delays in holding civil trials.

Agreeing to arbitrate in the middle of a case provides opportunities that counsel do not have when the arbitration is dictated, as it often is, by a brief form clause in a transactional document drafted by transactional lawyers. Seizing these opportunities requires knowing the limits of arbitration and, if appropriate, contracting around them.

For example, an arbitration award cannot be overturned merely because the arbitrator commits legal error. Under the Federal Arbitration Act (“FAA”) and California Arbitration Act (“CAA”), courts can vacate an arbitration award only if it (1) was procured by corruption, fraud, or undue means; (2) was issued by corrupt arbitrators; (3) was affected by prejudicial misconduct on the part of the arbitrators; or (4) exceeded the arbitrators’ powers. 9 U.S.C. § 10(a) (2018); CAL. CIV. PROC. CODE § 1286.2(a)(1)-(4). The deference to the arbitrator’s decision is so strong that the Ninth Circuit affirmed an award in an insurance bad faith action even where the award vastly exceeded the policy value and was “shocking or unsupported by the record.” *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 640-41 (9th Cir. 2010). In California courts, an award that on its face exceeds the statutory limit for noneconomic losses may also be confirmed even though it is plainly wrong as a matter of law. See *Nogueiro v. Kaiser Found. Hosps.*, 203 Cal. App. 1192, 1196 (1988).

But at least in California, you *can* get appellate review if you build it into the arbitration agreement. In *Cable Connection, Inc. v. DIRECTV, Inc.*, the California Supreme Court, applying the CAA, gave effect to the parties’ agreement that “[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any

such error.” 44 Cal. 4th 1334, 1340 (2008). In order for parties “to take themselves out of the general rule that the merits of the award are not subject to judicial review,” the court held, “the parties must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts.” *Id.* at 1361. The arbitration agreement in *Cable Connection* expressly deprived the arbitrators of the power to commit legal error and provided for judicial review of any such error. *Id.* While the court did not decide whether one or the other of these clauses would alone be sufficient to invoke an expanded scope of review, it did hold that the general rule of limited review is displaced by the agreement when the “parties constrain the arbitrators’ authority by requiring a dispute to be decided according to the rule of law, *and* make plain their intention that the award is reviewable for legal error.” *Id.* at 1355; *see also Harshad & Nasir Corp. v. Global Sign Systems, Inc.*, 14 Cal. App. 5th 523, 293-94 (2017) (holding that the parties “unambiguously require[d] the arbitrator to act in conformity with rules of law” by requiring the arbitrator to “apply California law as though he were obligated by applicable statutes and precedents and case law” and also “plainly expressed their intention that the merits of the award be subject to review” by providing that “the decision of the [a]rbitrator . . . shall be reviewed on appeal to the trial court and thereafter to the appellate courts”); *cf. Gravillis v. Coldwell Banker Residential Brokerage Co.*, 182 Cal. App. 4th 503, 518 (2010) (concluding that “the parties in this case did not agree to an expanded scope of review by merely requiring the arbitrator to render an award in accordance with California substantive law”).

In addition to ensuring the *availability* of judicial review, your agreement should account for the fact that an adequate record is indispensable to *meaningful* review. Although the CAA gives parties the right to have a certified shorthand reporter transcribe any proceeding, CAL. CIV. PROC. CODE § 1282.5, it would be better to agree to this in advance to avoid any possible dispute or oversight. And it wouldn’t hurt to provide for some means to ensuring the completeness of the record of pleadings and exhibits, since, unlike courts, neutral providers won’t do that for you.

For cases subject to the FAA, the United States Supreme Court has held that parties cannot consent to judicial review for legal error. *See Hall Street As-*

-Continued on page 17-

-Arbitration: Continued from page 16-

socs., *L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585-86 (2008). In those situations, parties would have to consider whether the other benefits of arbitration outweigh the risk of a legal error by the arbitrator that is not reviewable in court. However, “contracting parties may agree that the FAA will not govern their arbitration even if the contract involves interstate commerce.” *Mastick v. TD Ameritrade, Inc.*, 209 Cal. App. 4th 1258, 1263 (2012). If the parties agree that California law governs the contract, the CAA applies. *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989); *Cronus Invs., Inc. v. Concierge Servs.*, 35 Cal. 4th 376, 387 (2005).

Additionally, for cases under the FAA, the federal courts of appeals are divided as to whether the arbitrator’s manifest disregard of the law remains a basis for vacating an arbitration award in federal court. An arbitrator manifestly disregards the law where it is “clear from the record that the arbitrator [] recognized the applicable law and then ignored it.” *Come-dy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009). The Second and Ninth Circuits have held that an arbitrator exceeds his or her powers under the FAA where the award he or she issues is completely irrational or exhibits a manifest disregard of the law. *See, e.g., Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *rev’d on other grounds*, 559 U.S. 662 (2010); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003); *see also Affinity Fin. Corp. v. AARP Fin., Inc.*, 468 F. App’x 4, 5 (D.C. Cir. 2012) (“[a]ssuming without deciding that the ‘manifest disregard of the law’ standard still exists” but finding that the standard was not met). The Fifth and Eighth Circuits have abandoned this concept. *See, e.g., Med. Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (holding that “an arbitral award may be vacated only for the reasons enumerated in the FAA”); *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (holding that “to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA”). While California courts applying the CAA also do not recognize the concept, *see Comerica Bank v. Howsam*, 208 Cal. App. 4th 790, 830 (Ct. App. 2012) (holding that “defendants may not raise the issue of whether the award was secured in manifest disregard of the law”), California courts have adopted and applied this “manifest disregard” standard where the parties chose the FAA to govern the procedural aspects of their ar-

bitration. *See, e.g., Countrywide Fin. Corp. v. Bundy*, 187 Cal. App. 4th 234, 253-54 (2010) (applying manifest disregard of law standard to determine whether arbitration award should be vacated).

Under both the FAA and CAA, parties should be aware of their ability to expand the scope of the arbitrator’s power to compel discovery from third parties. In *Aixtron, Inc. v. Veeco Instruments Inc.*, 52 Cal. App. 5th 360, 369-70 (2020)—a breach of confidentiality dispute between an employee and former employer—the arbitrator granted the former employer’s motion to compel discovery from a third party, the competitor that hired the employee. The Court of Appeal reversed and held that an arbitrator does not have the authority to issue a discovery subpoena to a third party under either the FAA or CAA. *Id.* The court agreed with federal case law indicating that there is no right to pre-hearing discovery under the FAA. *Id.* There is also no right under Code of Civil Procedure section 1282.61—the statute governing the issuance of subpoenas—“since the parties to the arbitration did not provide for full discovery rights in their arbitration agreement.” *Id.*

Litigants who decide to proceed with arbitration should also be aware of their ability to delegate to the arbitrator the question of whether a particular dispute is arbitrable. For example, what if, after signing the arbitration agreement, one of the parties raises an entirely new claim or defense? The agreement should make the parties’ decision on this point clear. It is indispensable to study the neutral provider’s rules, which are typically treated as part of the parties’ agreement. Courts regularly refer to such rules to resolve disputes over whether the arbitration is empowered to decide arbitrability. In California, courts have found that an arbitration agreement clearly and unmistakably delegated the arbitrability issue to the arbitrator where the arbitration agreement incorporated an American Arbitration Association (“AAA”) rule that gave the arbitrator “the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” *Rodriguez v. Am. Techs., Inc.*, 136 Cal. App. 4th 1110, 1123 (2006) (emphasis omitted). The Ninth Circuit has also found an enforceable delegation of arbitrability in similar circumstances. *See Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981, 985 (9th Cir. 2017) (finding that incorporating an International Chamber of Commerce rule that allows the arbi-

-Continued on page 18-

-Arbitration: Continued from page 17-

trator to decide the scope of the arbitration agreement “makes clear that the arbitrators are vested with the authority to determine questions of arbitrability”); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (holding that “incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability”); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1072-75 (9th Cir. 2013) (holding that incorporating United Nations Commission on International Trade Law rules, which give the arbitrator the authority to decide its own jurisdiction, constitutes clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to the arbitrator).

Courts defer to neutral providers’ rules on other subjects, too—and to the arbitrator’s interpretation of the rules. E.g., *Greenspan v. LADT, LLC*, 185 Cal. App. 4th 1413, 1449-56 (2010) (deferring to arbitrator’s interpretation of provider’s rules on timeliness of award). Parties should study the rules carefully, and ensure that their agreement clarifies ambiguities or eliminates rules they do not want to have govern their arbitration. See *id.* at 502 (“by agreeing to arbitration under the auspices of JAMS, LADT did not become hostage to JAMS Rules. As stated in Rule 2: ‘The Parties may agree on any procedures . . . in lieu of these Rules that are consistent with the applicable law and JAMS policies’” (original ellipsis)).

Conclusion

No one knows exactly what our court system will look like in the coming months and years or how much of an impact COVID-19 will continue to have on the ability of trial courts to set civil cases for jury trials. One thing is certain though: civil litigants in state and federal court should be prepared to endure long delays before their cases can be tried to a jury. Litigants wishing to avoid such delays should therefore consider tailored arbitration as an option to short-circuit the backlog of civil cases and secure a quicker disposition of their disputes. In addition, in California courts parties can use a private reference under Code of Civil Procedure section 638 to try their case before a retired judge. See *Escaping the COVID-19 Backlog: Judicial Reference* in this issue.

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