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# REPORT

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## ESCAPING THE COVID-19 BACKLOG: ARBITRATION



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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>> last visited December 15, 2020. 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>

<[http://www.lacourt.org/newsmedia/uploads/14202011231739220\\_NR\\_GO\\_FINAL-withOrder.pdf](http://www.lacourt.org/newsmedia/uploads/14202011231739220_NR_GO_FINAL-withOrder.pdf)> last visited December 15, 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](http://www.lacourt.org/newsmedia/uploads/14202011231739220_NR_GO_FINAL-withOrder.pdf)> last visited December 15, 2020.

Given these significant impediments to getting civil cases to trial and the potential difficulties in conducting 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 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 of 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 Assocs., 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.” *Comedy 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 (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 arbitration. 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 was 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 arbitrator 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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