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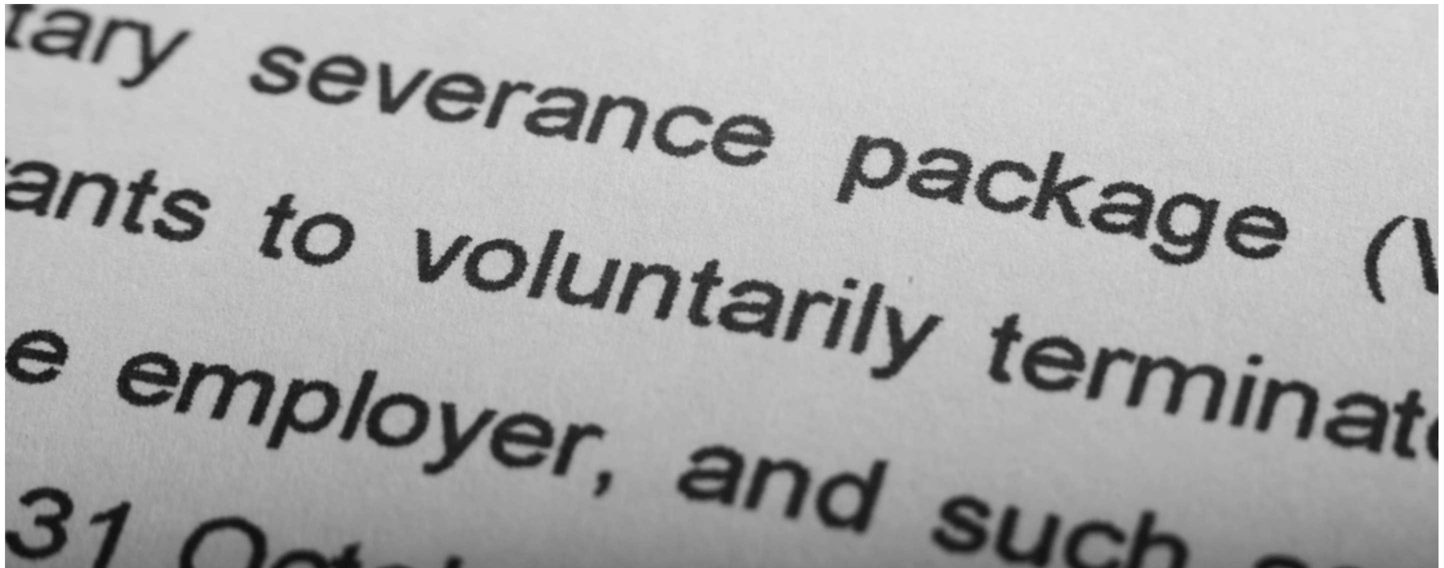
Joseph M. Lovretovich
JML LAW, APLC

Andrew S. Pletcher
JML LAW, APLC



Arbitrating employment claims

DON'T JUST TURN AND RUN FROM AN ARBITRATION CLAUSE; SOME CAN BE USED TO YOUR ADVANTAGE

"Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion."

— Samuel Gompers

A new client has just come into your office with a great claim for wrongful termination and you can't wait to file suit. You send your first letter of representation demanding the client's personnel file and you get back a letter from defense counsel with that dreaded reference to an arbitration agreement:

> *Arbitration: Upon written request by either party that is submitted according to the applicable rules for arbitration, any claim demand or cause of action, which arises out of or is related to this Agreement (collectively "Claims"), shall be resolved by binding arbitration in the State of Colorado, in according with (i) the Federal Arbitration Act; (ii) the Code of Procedure ("Code") of the National Arbitration Forum ("Administrator" or "NAF") and (iii) this Agreement which shall control any inconsistency between it and the Code. The decision of an arbitrator on any Claims submitted to arbitration shall follow applicable substantive law and be in writing setting forth the findings of fact and law and the reasons supporting the decision. Such decision shall be final and binding upon the parties, subject to the right of appeal described below. Judgment upon any arbitration award may be entered in any court having jurisdiction. The arbitrator has exclusive authority to resolve any dispute relating to the applicability or enforceability of this Agreement, including the provisions of this section. Either party shall have the right to appeal to the appropriate court any errors of law in the decision rendered by the arbitrator.*

There are a fair number of very competent lawyers who will decline the case on that basis. After all, with the ever-increasing number of arbitration agreements withstanding legal challenges, the bias issues from the "repeat players" in arbitration, and the limitations of the appeals process, it's understandable why most attorneys would see an arbitration agreement as a large stop sign.

However, we believe with a little more knowledge about the process – from fighting the arbitration agreement (it's possible!) to selecting an arbitrator and conducting discovery – you can feel confident in accepting cases with an attached arbitration agreement.

Factors to consider in challenging an arbitration agreement

The first consideration you need to make is whether your case is one that should be arbitrated. Realizing that the defendant/employer will likely have to pay for the arbitrator (which could cost $25,000 or more in some cases), you should be analyzing the potential value of your case. If the case has an overall value of around $50,000 or less in total damages, you should probably go ahead and arbitrate the case with the goal of effectuating an early settlement based on the additional fees and costs the defendant will be required to pay.

While these low-value cases may normally not be something a contingency-fee lawyer would be quick to take, the fact that

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they may go to arbitration gives us an additional avenue to provide justice to an underserved community.

The second consideration in determining whether your case is one that should be arbitrated is whether your client has jury appeal. There are a few things to consider here: (1) Does your case have technical violations like failure to engage in the interactive process or failure to accommodate? (2) Does your client have prior lawsuits against his/her former employer or a criminal history (especially crimes of moral turpitude) that would potentially impair his credibility? (3) Was your client a very good employee?

In those cases, you may consider stipulating to the arbitration process because an arbitrator will be more likely to understand the technical rules and be able to look past your client's prior lawsuits or criminal history. And while they may not give you a "runaway verdict" in the end, they will (in all probability) give you at least a fair attorney's fee award.

The third consideration is whether or not there is an option of challenging the arbitration agreement so that your case (or even certain causes of action) can remain in court. As we will discuss below, this consideration has many facets that will depend largely on the wording of the arbitration agreement in question.

Does the Federal Arbitration Act ("FAA") apply?

In 1920, New York passed an arbitration act that made agreements to arbitrate existing and future disputes enforceable and binding. Five years later, the federal equivalent was passed which created the nationwide mechanism for the specific enforcement of arbitration agreements and awards that we know today. (See, 9 U.S.C. §§ 1-16.) In general, the Federal Arbitration Act governs contractual arbitration in written contracts involving interstate or foreign commerce or maritime transactions under the Commerce Clause:

> A written provision in any maritime transaction or a contract evidencing a *transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(9 U.S.C. § 2.)

In California, courts have made clear that *unless* the contract at issue (i.e., the arbitration agreement) involves interstate commerce, the FAA does not apply. (*Woolls v. Sup. Ct.* (2005) 127 Cal.App.4th 197, 211.) Thus, to establish FAA preemption, the defendant/employer "must show that the subject matter of the agreement involves interstate commerce." (*Lane v. Francis Capital Management, LLC* (2014) 224 Cal.App.4th 676, 687.) This requires the submission of "declarations and other evidence." (*Hoover v. American Life Ins. Co.* (2006) 206 Cal.App.4th 1193, 1207.)

In practice, the FAA can sneak into your arbitration agreement in many different ways. Using our example above, the FAA is listed as one of the ways the dispute arising under the arbitration agreement will be resolved. Other arbitration agreements may only mention the FAA in passing and some won't mention the FAA at all until you see the moving papers attempting to compel arbitration. But in every case, the defendant/employer must meet the evidentiary burden discussed in *Hoover* and show that the contract at issue involves interstate commerce.

Upon reviewing the moving papers, if you don't see any declarations or other evidence in support of the FAA, you should be in good shape to fight the applicability with the argument that the defendant has failed to meet its burden of showing the arbitration agreement involves interstate commerce. Of course, you should then be on the lookout for the "missing" evidence in defendant's reply papers… if you see new evidence upon reply then *immediately* file an objection with the court. (See *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 241 [stating, in part, "[t]he general rule of motion practice, which applies here, is that new *evidence* is not permitted with *reply* papers.... '[T]he inclusion of additional evidentiary matter with the *reply* should only be allowed in the exceptional case ...' and if permitted, the other party should be given the opportunity to respond"].)

The second part of fighting the FAA requires you to submit a declaration from your client describing his/her job duties so that the court can determine whether your client's former job required her to use a "channel" (e.g., travel by air, sea, rail, or road), "instrumentality" (e.g., use of the telephone or internet), or be involved in an activity that had a "substantial relation" to interstate commerce (e.g., involved in the transportation or logistics). (See, *U.S. v. Lopez* (1995) 514 U.S. 549, 558-59.) Using our example above, we submitted a declaration that described our client's job duties (originating loans in California) and stated that at no time was our client involved in originating loans out of the state of California or was asked by her employer to travel outside the state of California (including Colorado) to conduct the business of originating loans. Between the lack of evidence from the defendant/employer and your client's declaration, this should be enough for most courts to conclude the FAA does not apply to the particular arbitration agreement.

California Labor Code sections 200-229 claims

One of the best reasons to fight FAA preemption is if you are bringing wage-and-hour claims under California Labor Code sections 200-229. As a matter of right, California Labor Code section 229 statutorily exempts certain wage-and-hour claims from arbitration that are brought under sections 200 through 244. (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 686; *Hoover v. American Life Ins. Co.* (2006) 206 Cal.App.4th 1193, 1207; see also *Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 450 U.S. 728, 737 [stating that in considering arbitral claims, an employee's claim that is based on rights arising out of a statute

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designed to provide minimum substantive guarantees to an employee should be considered differently than other private claims].) However, if the FAA applies, it preempts state law and that California statutory right gives way to FAA applicability.

The doctrine of unconscionability

In general, California courts are empowered to invalidate an arbitration agreement based on grounds that exist in law or equity for the revocation of any contract. (*Garcia v. Sup. Ct.* (2015) 236 Cal.App.4th 1138, 1144.) One of the methods of rescission of a contract includes the doctrine of unconscionability, which "consists of both procedural and substantive elements." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 246.)

When analyzing whether your arbitration agreement contains both procedural and substantive elements, remember that these elements need not be present in the same degree and are evaluated by California courts on a sliding scale. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th at 247.)

Procedural unconscionability focuses on two factors: oppression and surprise. "Oppression" arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. (See, e.g., *A & M Produce Co.* v. *FMC Corp.* (1982) 135 Cal.App.3d 473, 486; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 713.)

An arbitration agreement that an employee is required to execute as part of an employee application is procedurally unconscionable in the absence of evidence indicating the employee had an opportunity to negotiate the agreement. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244; *Roman v. Sup. Ct.* (2009) 172 Cal.App.4th 1462, 1470 ["The Supreme Court has acknowledged that adhesion contracts in the employment context typically contain some measure of procedural unconscionability."]; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114 ["An arbitration agreement that is an essential part of a "take it or leave it" employment condition, without more, is procedurally unconscionable."].) This has proven to be the simplest and most effective method of proving procedural unconscionability.

Substantive unconscionability focuses on the actual terms of the agreement and whether they create an overly harsh or one-sided result. (*Baltazar v. Forever 21, Inc.,* 62 Cal.4th at pp. 1244-45; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 656; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) Substantive unconscionability turns not only on a "one-sided" result, but also on an absence of "justification" for the specific provision. (*Armendariz, supra,* 24 Cal.4th at 117-18.) If an arbitration agreement mandated by the employer is indeed fair, "the employer as well as the employee should be willing to submit claims to arbitration." (*Id.* at 118.) However, if the terms of the arbitration agreement do not create a forum for *neutral* dispute resolution, they are unconscionable.

Improper discovery limitations

Adequate discovery is indispensable for the vindication of statutory claims. (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 715; *Ontiveros v. DHL Exp.* (*USA*), *Inc.,* (2008) 164 Cal.App.4th 494, 512.) Although parties entering into an arbitration agreement may agree to something less than the full panoply of discovery provided in Code of Civil Procedure section 183.05, an arbitration agreement "*must 'ensure minimum standards of fairness' so employees can vindicate their public rights*." (*Fitz v. NCR Corp., supra*, 118 Cal.App.4th at 715-16.) Moreover, in complex employment disputes, where the employee is subject to a mandatory arbitration agreement, courts have expressly held that discovery limitations may fail to ensure the employee is able to adequately arbitrate his claim. (*Fitz v. NCR Corp., supra*, 118 Cal.App.4th at 717.)

In our experience, arbitration agreements that have substantially limited discovery provisions (e.g., a single document request, very limited number of depositions, or an exchange of witnesses to call at arbitration without depositions) have all been found to be substantively unconscionable. So, when you are looking at your particular arbitration agreement, check whether there are specific or numerical limitations to discovery. However, keep in mind that if your arbitration agreement utilizes phrases such as "adequate discovery" or "reasonable discovery," they are not going to be found to be substantively unconscionable as the court will find them to be discretionary and up to the arbitrator to define what they mean.

"Place and manner" limitations

In California, "place and manner" restrictions in an arbitration agreement have been found to be unduly oppressive and unconscionable. (See, e.g., *Aral v. EarthLink, Inc.* (2005) 134 Cal.App.4th 544, 549, 561 ["A forum selection clause that discourages legitimate claims by imposing unreasonable geographic barriers is unenforceable under well-settled California law."]; *Comb v. PayPal, Inc.* (N.D. Cal. 2002) 218 F.Supp.2d 1165, 1177 [stating a forum selection clause may be unconscionable if the "place or matter" in which arbitration is to occur is unreasonable taking into account the respective circumstances of the parties].)

Using our example arbitration agreement above, it is clear that these "place and manner" restrictions (e.g., Colorado arbitration for a former California employee) were enacted to do nothing more than favor the defendant/employer by providing "home court advantage" in arbitration against any prospective claims by their former employees (the defendant's counsel in this particular case confirmed this reason by submitting a declaration from the HR director stating the company is based in Colorado). So, when you are looking at your particular arbitration agreement, check to see where the arbitration is to take place in relation to where your client previously worked. If it requires you to get on a plane to

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arbitrate these claims, it likely is too far and unconscionable.

The "prevailing party" cost provision

Some arbitration agreements have included language that would allow the arbitrator to award the prevailing party his or her expenses and fees of arbitration, including reasonable attorney and witness fees *without limitation*. However, under California law, the employer must pay for the costs of arbitration if the requirement to arbitrate any claim against the company claims is brought as a mandatory condition of employment. (*Armendariz,* 24 Cal.4th at p. 110-11.) This rule ensures that employees bringing claims against their employer "*will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer*." (*Id.* at 111, emphasis added.)

Here, in reviewing your arbitration agreement, look to see if there is any chance your client would have to pay fees if they lost in arbitration. Words granting the arbitrator the right to award the prevailing party his or her expenses and fees of arbitration, including reasonable attorney fees and witness fees without anything more is problematic under California law.

Severance of the "offending" provisions

Finally, in arguing that your arbitration agreement is unconscionable, you should request that the court strike any offending provisions that are unconscionable and contrary to public policy. If you have two or more unconscionable provisions, then you have a good chance that your arbitration agreement will be voided in its entirety as the court will find that the agreement is permeated by unconscionability. (See, *Armendariz.* 24 Cal.4th at p. 125.)

Which provider should you use?

"You have to learn the rules of the game. And then, you have to play better than anyone else."
— **Albert Einstein**

Some employers have specific providers named in the arbitration agreement, but many do not. So, if given the option — which provider should you consider using? The main players are JAMS, ADR Services, Inc., Judicate West, Alternative Resolution Centers ("ARC"), and American Arbitration Association ("AAA"). From our experience, we prefer to stay away from using AAA because their list of potential arbitrators seems skewed toward the defendant/employer. However, others may have a different experience, so you should certainly check with other CAALA members and see if they have any preference.

In many cases, the defendant is willing to go with any provider you want to use even if a provider is identified in the agreement. Usually, if you are willing to stipulate to arbitration and not force the defendant to file a motion to compel, they will agree with whatever provider you want.

However, before you select a provider you will want to examine the rules of each ADR organization. Keep in mind that when viewing these rules, they operate as the "default" for arbitration agreements – so check the terms of your arbitration agreement first. Typically, if your arbitration agreement is shorter, you will see more of these rules come into play.

A short summary is provided below of some of the major providers:

Arbitrator selection

Judicate West – In the selection process for single arbitrator cases involving two parties, Judicate West will provide *a list of five* arbitrators it deems qualified. *Within 20 calendar days* of receiving the list of prospective arbitrators, each party (independently and simultaneously) will strike up to two arbitrators and rank the remaining three by order of preference. Then based on the comparative rankings, the highest ranked arbitrators will be chosen by Judicate West

JAMS – The selection process is much quicker for JAMS than Judicate West. If the parties cannot naturally agree to an arbitrator, JAMS will send the parties a list *of at least five* arbitrator candidates with a brief description of the background and experience of each. *Within seven calendar days* of service by JAMS of the list, each party may strike two names and rank the remaining three by preference. Then based on the comparative rankings, the highest ranked arbitrators will be chosen by JAMS.

AAA – Working more directly with the parties in the arbitration selection process, AAA obtains the parties' input on the necessary qualifications of the arbitrator and then provides a list of prospective arbitrators and biographies for all parties to review. AAA will allow you to strike as many names as you want. However, if you go through two lists, AAA will just assign someone. From there, the parties are encouraged to agree upon an arbitrator, but if they are unable to do so, AAA will establish a deadline for each party to independently state its preferences from those on the list.

ADR Services, Inc. – Selection of an arbitrator begins with the terms of the arbitration agreement and whether it names a specific arbitrator or the method of selection. But, if the arbitration agreement is silent as to selection, ADR Services, Inc. will send to each party an identical list of ten (10) names (at minimum) of persons chosen from the panel. The parties are then encouraged to mutually agree on an arbitrator from that list. But, if the parties cannot reach a mutual agreement, each party will then have fifteen (15) business days to strike up to three names and rank the others in the order of preference and return the list to ADR Services, Inc. Then based on the rankings, the most preferred arbitrator will be selected.

Discovery

Judicate West – At the initial Case Management Conference, the parties should discuss permissible discovery and establish the framework for how discovery is to be conducted. The rules allow for a good-faith exchange of relevant non-privileged information and require a "continuing obligation" to update any exchange of information. Additional discovery may be granted upon a showing of good cause.

JAMS – At the Preliminary Conference (done at the request of a party or direction of the arbitrator) the scheduling of any pre-hearing motions (including any dispositive motions) will

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be discussed. Rule 17 describes the "Exchange of Information" process and is substantively more detailed than the other ADR providers, including providing a continuing obligation to supplement discovery provision. The arbitrator should be notified if there are any discovery disputes.

AAA – At the Preliminary Conference (done as promptly as practicable after selection of the arbitrator), the parties shall address and resolve any outstanding discovery issues and establish discovery parameters. Rule 9 allows for the arbitrator to order any such discovery as necessary to conduct "a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." Additionally, the arbitrator can be notified if there are any pending discovery disputes between the parties.

ADR Services, Inc. – At the Preliminary Hearing (done at the request of any party or at the discretion of the arbitrator or ADR Services), the parties and the arbitrator will discuss such issues as the future conduct of the case, including clarification of the issues, document exchange, and a schedule for hearings and discovery. With respect to employment disputes, the parties are entitled to discovery sufficient to adequately arbitrate their claims, including access to essential documents and witnesses, as determined by the arbitrator.

Motion Practice

Judicate West – To bring a motion in arbitration, the parties are required to engage in a "meaningful meet-and-confer" and Case Management Conference ("CMC") to see if the particular issue can be resolved without requiring a motion. Only if the CMC does not resolve the outstanding issue will a motion and briefing schedule be set by the arbitrator. A hearing for the motion may or may not be required, so be sure to include all of your arguments in the papers!

JAMS – At the Preliminary Conference, the scheduling of any prehearing motions (including any dispositive motions) will be discussed. Rule 18 allows for a Motion for Summary Disposition of a particular claim or issue to be filed.

AAA – The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the "moving party has shown substantial cause" that the motion is likely to succeed and dispose of or narrow the issues in the case. A high standard and certainly worth addressing with the arbitrator if your case has clear factual issues of dispute.

ADR Services, Inc. – The arbitrator may allow the filing of *dispositive* motions to obtain pre-arbitration rulings, including demurrers, motions to strike, and motions for judgment on the pleadings. The rules *stress* the importance of these pre-arbitration motions being *dispositive*. Rule 23 allows for a motion for summary judgment/adjudication of a particular claim or issue to be filed and *unless otherwise specified by the arbitrator will follow the California Code of Civil Procedure section 437c.*

Selection of the arbitrator

There are two ways to select your arbitrator: First, as discussed above, many of the arbitration providers (including JAMS, Judicate West, and AAA) utilize a strike/rank list method. This process requests that you strike two names and rank the others in order of preference.

However, before you accept the strike list you should consider if you will need to challenge an arbitrator for cause. The ADR providers will likely tell you that you should utilize your strikes for this purpose; however, we view the strike list similarly to a Code of Civil Procedure 170.6 challenge. Thus, if you have a challenge for specific cause, you should try to get the ADR provider to remove the name from the strike list *before* serving it to the parties.

Another method of arbitration selection comes through the defense counsel who will suggest that you mutually agree on an arbitrator. If this occurs, you should act with caution as the defense attorney may be attempting to ferret out which arbitrators you want to use only to later strike every arbitration candidate you propose. To combat this, we typically tell the defense counsel to give us a list and then we will pick from their list.

When selecting an arbitrator, keep in mind that in most cases the defense/employer must pay for it. Knowing that – think about how *expensive* an arbitrator can be. Many arbitrators charge by the hour, but some charge by the day. We had a case a few years ago where we agreed to an arbitrator who charged $15,000 per day. We then purposed a twenty-day arbitration. The case quickly settled. *Use the arbitrator rate to your advantage*.

Also, do your homework. Find out how arbitrator candidates have ruled in the past. Usually you will get that information in the arbitrator's disclosures. Also utilize your CAALA Listservs to check out potential arbitrators. They are an important tool and a great resource for every CAALA member. There you can find out some very useful information including which arbitrators are favored by certain defense counsel.

After you receive your arbitration candidate strike list, you may challenge an arbitrator for an appearance of bias. Rule 12(b) of the AAA states that arbitrators "shall have no personal or financial interest in the results of the proceeding in which they are appointed and shall have no relation to the underling dispute or to the parties or their counsel . . ." Proving this may be difficult as any disclosures the arbitrator may make do not necessarily indicate that impartiality or independence would be affected. This is where the "repeat player" issues of arbitration typically arise.

The arbitration timeline and due process

Arbitration in many ways threatens many of the fundamental due process principles of our justice system. As you can see from our discussion above, the language of your arbitration agreement and the particular rules of your provider can limit your ability to litigate in the name of "expediting" the process. And while these limitations on discovery can be hurtful to your case, fighting a dispositive motion (like summary judgment) on an expedited timeline can be fatal.

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One of the easiest things to dismiss in your review of an arbitration agreement is the procedural rules. Does your agreement explicitly reference the Federal Rules of Civil Procedure or the California Code of Civil Procedure? If the agreement is silent on procedural rules, you should *always* be prepared to argue for California law to apply as you move forward and establish an arbitration schedule with your arbitrator. (See, e.g., Code of California Procedure § 437c(a) (requiring a mandatory 75 days' notice for summary judgment motions).) But be sure to take your position *before* the defendant as they will likely "suggest" for the Federal Rules of Civil Procedure to apply.

In making this argument, check your ADR rules for support. For example, the American Arbitration Association's *Employment Arbitration Rules and Mediation Procedures* states "The AAA's policy on employment ADR is guided by the state of existing law, as well as its objection to act in an impartial manner. In following the law, and in the interest of providing an appropriate forum for the resolution of employment disputes, the Association administers dispute resolution programs which meet the due process standards as outlined in its *Employment Arbitration Rules and Mediation Procedures* and the Due Process Protocol." (See, *Employment Arbitration Rules and Mediation Procedures* (AAA's Policy on Employment ADR).)

Conclusion

Arbitration was never meant to reach the employment context. (*Epic Systems Corp. v. Lewis* (2018) 584 U.S. ____ (Ginsburg, J., dissenting) [writing that the legislative history of the Federal Arbitration Act shows that "Congress did not intend [for] the statute to apply to arbitration provisions in employment contracts" and "envisioned application of the Arbitration Act to voluntary, negotiated agreements"].) But until necessary change can be made to the FAA and the mandatory nature of employer/employee arbitration agreements; we must continue to fight the process of arbitration by learning the rules of the game and playing them better than everyone else.

Joseph M. Lovretovich is the president of JML Law, APLC*, a 14-attorney firm specializing in Employment Law and Personal Injury law. He is a member of California Employment Lawyers Association and has practiced for over 40 years. He was the principal attorney in the California Supreme Court case of* Colmenares v. Braemar Country Club*. His firm mediates about 100 cases per year. He is a graduate of the University of Southern California and Southwestern University School of Law.*

Andrew S. Pletcher is an associate with JML Law, APLC*, where he focuses on the law and motion aspects of the firm's employment and personal injury cases, including most recently challenging the "ministerial exception" to the Americans with Disabilities Act against a Catholic elementary school in* Biel v. St. James School (*17-55180*).