

## The Changing Face of Binding Arbitration

By Jay B. Freedman

As many developers have learned when moving to enforce their arbitration provisions in residential sales agreements, California courts strictly scrutinize these provisions and often hold them to be invalid. A recent decision by the California Supreme Court, however, may remove one of the most frequently cited impediments to enforcing arbitration provisions, namely, the right to an appeal. At the same time, an unrelated decision by the Court of Appeal may hinder a party's ability to enforce arbitration provisions by discouraging counsel from participating in arbitration proceedings.

### Cable Connection: Allows for judicial review of arbitration awards

In *Cable Connection, Inc. v. Direct TV, Inc.* (2008) 44 Cal.4th 1334 [82 Cal.Rptr.3d 229], the California Supreme Court expanded the scope of appellate review of arbitration awards, and in doing so, may have increased the ability of residential builders to enforce arbitration provisions. Until *Cable Connection*, it was almost a truism that parties who elected binding arbitration waived the right to appeal the arbitrator's award in all but exceptional circumstances. As observed by the Supreme Court, "no Court of Appeal has enforced a contract clause calling for judicial review of an arbitration award on its merits."

The courts' hostility towards judicial review of arbitration awards was then transferred, intentionally or otherwise, towards arbitration provisions in sales contracts. Both trial courts and appellate courts often cited the homeowners' lack of appellate rights as a factor when invalidating arbitration provisions. With its decision, the Supreme Court provided builders and developers with the ability to modify their arbitration provisions to include the right to appellate review and eliminate one basis used by the courts to attack the provisions.

The *Cable Connection* court held that the parties to an arbitration provision "must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts." The Supreme Court then found that the provision at issue, which stated 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," complied with this standard and therefore created a right to judicial review in the arbitration provision. As a result, developers can now choose to include appellate rights within their arbitration provisions, make binding arbitration a little less binding, and increase their chances of enforcing the provisions.

### Bak: Lets arbitrators sanction counsel without appeal

Ironically, a decision by the Court of Appeal may make it more difficult for parties to enforce otherwise valid arbitration provisions. In *Bak v. MCL Financial Group, Inc.* (2009) 170 Cal.App.4th 1118, the Court of Appeal held that attorneys representing parties in arbitration proceedings are subject to the same burdens as the parties they represent. An attorney for MCL was sanctioned by the arbitrators for a pre-hearing discovery violation. The trial court confirmed the arbitration award, including the imposition of sanctions, and the attorney appealed.

The Court of Appeal affirmed the trial court's ruling, stating as follows: "We conclude that, by voluntarily appearing for defendants in the arbitration proceedings, which included conducting prehearing discovery, . . . objector [attorney] subjected himself to the jurisdiction of the arbitration panel and was subject to its rulings." As a result, the attorney did not have a right to appeal the sanctions award as the arbitration clause did not provide appellate rights to the parties.

While not a direct barrier to enforcing arbitration provisions, *Bak* may as a practical matter nonetheless have a chilling effect. Under *Bak*, a party's business decision to arbitrate is now imposed on that party's attorney. While there are many sound reasons to submit an action to arbitration, those benefits are often designed for the parties rather than the attorneys. The *Bak* decision may now create a conflict between a party that desires to enforce an arbitration provision and the party's counsel who does not want to waive its right to appeal discovery sanctions and other adverse awards. As such, parties may now find it harder to enforce arbitration provisions because their attorneys may not want to participate.

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