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Court of Appeal Renders Yet Another Arbitration Provision Unconscionable and Unenforceable

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The Court of Appeal of the State of California, First Appellate District, Division Four, has held that an arbitration clause in an employment agreement was unconscionable because, among other things, the agreement did not attach the AAA's National Rules for the Resolution of Employment Disputes and purported to expand the rights of the employer to recover attorneys' fees. *Trivedi v. Curexo Technology Corp.*, ___ Cal. App. 4th ___ (October 20, 2010).

Trivedi involved a former President and Chief Executive Officer's lawsuit against his former employer for wrongful termination, asserting various causes of action, including age, national origin and race discrimination in violation of the Fair Employment and Housing Act ("FEHA") and breach of the parties' employment agreement. In affirming the trial court's denial of defendant's motion to compel arbitration of plaintiff's employment-related claims, the court held that the trial court's determination that the arbitration clause was procedurally and substantively unconscionable is supported by uncontroverted facts. The court also held that the trial court did not err in refusing to sever the unconscionable provisions.

First, the court found that the arbitration provision was procedurally unconscionable for three reasons: (1) the agreement was prepared by the employer, (2) the arbitration provision was a mandatory part of the agreement, and (3) the plaintiff was not given a copy of the AAA rules. As to this third ground, the court noted that "numerous cases have held that the failure to provide a copy of the arbitration rules to which the employee would be bound, supporting a finding of procedural unconscionability." The court also mentioned in a footnote that "the arbitration clause was in the same typeface and was no more conspicuous than any other provision in the employment agreement."

Next, the court held that the arbitration provision was substantively unconscionable because, contrary to case law under FEHA, the arbitration clause included a mandatory attorney fee and cost provision in favor of the prevailing party. Specifically, the court noted that "in contrast to case law under FEHA, the agreement does not limit Curexo's right to recover to instances where Trivedi's claims are found to be 'frivolous, unreasonable, without foundation, or brought in bad faith.'" The court also found that the arbitration agreement's injunctive relief provision - which was neutral and applied equally to both parties - was substantively unconscionable because of its concern that an employer would be more likely to invoke the remedy of injunctive relief than the employee.

Finally, the court refused to sever the attorneys' fees clause and enforce the arbitration provision, finding that the agreement was "permeated by unconscionability" because at least two provisions were found to be substantively unconscionable.

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In light of this decision, arbitration clauses in employment agreements that purport to expand the employer's rights to attorneys' fees, do not attach the rules of the applicable arbitration forum, or reserve the right of both parties to obtain injunctive relief, run the risk of being struck down as unenforceable. This opinion thus provides additional guidance on how to improve an employer's chances of drafting an enforceable arbitration provision.

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