MILLER & STARR
REAL ESTATE NEWSALERT

Reprinted in part from
Volume 21, Number 1, September 2010
(Article starting on page 3 in the actual issue)

ARTICLE

IS AN ARBITRATION PROVISION IN RECORDED CC&Rs EVER ENFORCEABLE BY THE DEVELOPER?

By Lewis J. Soffer*

Note To Reader: As this article goes to press, the Fourth District Court of Appeal has received the parties' supplemental briefs, and is preparing to rehear *Villa Vicenza Homeowners Association v. Nobel Court Development, LLC*, a case squarely presenting the issue whether a provision in a declaration of covenants, conditions and restrictions ("CC&Rs") recorded by a project developer requiring a yet-to-be-formed homeowners association to arbitrate any future construction defect claims against the developer is enforceable as an agreement to arbitrate. Prior to granting rehearing, the Court of Appeal had issued a decision (no longer citable) holding that such a provision is not enforceable.[1] Moreover, the same division of the same District Court of Appeal has just issued another decision, *Pinnacle Museum Town Ass'n v. Pinnacle Market Dev. (US)* ("*Pinnacle*"),[2] in which it decided both that a binding arbitration provision in recorded CC&Rs is not enforceable by the developer/declarant against a subsequently-formed homeowners association, and that if it were, the provision under consideration would still be unenforceable because it is unconscionable.

This article will address the issues presented in *Villa Vicenza* and *Pinnacle*, the arguments advanced by the parties, and the practical consequences of the resolution of this controversy.

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CATEGORICAL UNENFORCEABILITY VS. CASE-BY-CASE DETERMINATION

As in many areas of jurisprudence, judicial enforcement of arbitration provisions experiences periods of fashionability, and periods of decline. At present, the latter condition prevails. Many courts seem not to favor the enforcement of arbitration agreements, despite unequivocal authority under both the Federal Arbitration Act ("FAA") and the California Arbitration Act ("CAA") stating that they must do so.[3] The FAA dictates that in resolving a motion to compel arbitration, all courts must apply state law governing formation and enforcement of contracts generally,[4] but forbids application of any state law that disfavors in any way the enforcement of arbitration agreements.[5] A California court disinclined to enforce a purported agreement to arbitrate on account of the adhesive nature of that agreement may either perform the balancing act required under California law governing unconscionability (which requires ad hoc and highly subjective rulings, frequently on undisputed facts), or it may conclude that no agreement to arbitrate was actually formed (an analysis better suited to categorical pronouncements of unenforceability).

The *Villa Vicenza* and *Pinnacle* courts could have followed *Villa Milano v. Il Davorge* ("*Villa Milano*"),[6] a 2000 decision in which a different division in the Fourth District held that arbitration provisions in recorded CC&Rs were agreements to arbitrate binding on homeowner associations and "downstream" unit purchasers, but found the arbitration agreement before it to be unconscionable, and therefore unenforceable. Alternatively, the *Villa Vicenza* court could have decided to follow its own decision in *Treo @ Kettner Homeowners Association* ("*Treo*"),[7] a 2008 case which held that judicial reference provisions in CC&Rs are impermissible pre-dispute waivers of the right to a jury trial. In its now-depublished *Villa Vicenza* decision, the court chose the latter course, and reached the conclusion that developer-drafted arbitration provisions in recorded CC&Rs are never enforceable against successor owners or the homeowners association, because no agreement to arbitrate can be formed in that manner.

If on rehearing the *Villa Vicenza* court reaches the same conclusion (as it has in *Pinnacle*), a conflict will exist between two Fourth District cases, and the issue can be expected to arise in other districts. A categorical declaration of non-enforceability by the California Supreme Court would have one distinct advantage – it would cut down on the number of published decisions on unconscionability of arbitration

provisions that reflect more the reviewing courts' predilections than any comprehensive and predictable rule. On the other hand, there is little question that arbitration agreements in adhesive contracts *are* enforceable, unless unconscionable,[8] and the conclusion that CC&Rs are contracts for some purposes and not for others smacks of dissembling. It may be that the intellectually honest thing to do would be to follow *Villa Milano*, and do an individualized unconscionability analysis of each arbitration provision in recorded CC&Rs, even if this results in unenforceability 100% of the time.

FACTS OF *VILLA VICENZA*

In 2004, Nobel Court Development, LLC ("Nobel") purchased an apartment complex in San Diego. In 2005, Nobel completed the conversion of that property into a common interest development by recording CC&Rs and conveying the first condominium sold by recording a grant deed to the purchaser. Nobel also transferred ownership of the common areas to the Association by recording a deed, whereupon as a matter of law the Association became responsible for the maintenance of those common areas, but (as is typical) the Association never executed any contract or agreement with Nobel.

The CC&Rs contained an arbitration provision, reading as follows:

> **17.4.3(a). Agreement to Arbitrate.** The Association, each Owner and Declarant shall resolve any Dispute…through binding arbitration in the county in which the Property is located. This arbitration provision shall apply to Disputes of any kind or nature regardless of when the Dispute first arose or the nature of the relief sought.

According to the Association, the "Disputes" subject to the arbitration provision were limited to "[A]ny claims, disputes and disagreements which may arise between (i) Owner and/or the Association and (ii) Declarant after the close of escrow or other conveyance of any portion of the Property by Declarant concerning the Property or the Third Party Warranty."[9]

According to Nobel, the section of the CC&Rs describing arbitration "ends with a bold, all-capitals notice that arbitration involves waiver of the right to a jury trial," and recites that all unit owners, and the Association, "agree to be bound by the provisions of this section."[10] Moreover, every purchase agreement between Nobel and a first-generation

condominium purchaser prominently referred to and incorporated the CC&Rs and the arbitration provision.

Some early condominium buyers noticed defects in common area facilities, and believing that Nobel had not established a sufficient reserve to fund repairs, commenced a derivative action against Nobel in the name of the Association. A litigation committee of the Association also cross-complained against Nobel. Nobel moved to compel arbitration, which motion the trial court granted as to express warranty claims, but denied as to claims for breach of implied warranty, strict liability and negligence. Nobel appealed.[11]

FACTS OF *PINNACLE*

The material facts in *Pinnacle* appear to be virtually identical to those of *Villa Vicenza*, except that the precise language of the binding arbitration provision is different, and expressly states that it cannot be altered without the consent of the developer.

CAN THE LATER-FORMED HOMEOWNERS ASSOCIATION OR SUBSEQUENT UNIT PURCHASERS BE BOUND BY AN AGREEMENT TO ARBITRATE DISPUTES WITH THE DEVELOPER, DESPITE THE ABSENCE OF PRIVITY OF CONTRACT?—THE "NO AGREEMENT" RATIONALE

While both the FAA and the CAA strongly favor enforcement of agreements to arbitrate, neither one sanctions requiring arbitration in the absence of a written agreement binding upon the party resisting arbitration.[12] Although the *Villa Vicenza* court's initial decision wove into its analysis some special requirements applicable to agreements for pre-dispute waivers of the right to a jury, the decision's actual rationale was simply that no agreement to arbitrate construction defect claims was ever *formed* between Nobel and the Association. The majority in *Pinnacle* reached the same conclusion.

CC&RS FORM NO CONTRACT BETWEEN DEVELOPER AND HOA

When a developer records CC&Rs for a condominium project or other common-interest development,[13] *and* conveys a first unit to an independent purchaser, the condominium project springs into existence, [14] as does the homeowners association, though the association will continue to be dominated by the developer until a majority of the units are sold to others.[15] Because the homeowners association does not exist when the developer records the declaration of CC&Rs, it cannot be a party to

the declaration. Although the first condominium purchaser may be said to have "entered into" the CC&Rs with the developer, to the extent that the CC&Rs are incorporated into that first purchase contract, a distinction may be drawn between that buyer and all other purchasers from the developer, in that once the first purchase closes, the CC&Rs control the project, so that all other first-generation buyers are faced with a take-it-or-leave-it proposition. Any subsequent buyers of units will not be in direct privity of contract with the developer.

In *Villa Vicenza* (and *Pinnacle*), the Association takes the position that as to the Association itself and any second-or-later generation buyers, there is no privity of contract with the developer, and therefore no "agreement to arbitrate" can have been formed. Even as to first-generation buyers, the Association argues that no independent waiver of the right to jury can have occurred, due to the adhesive nature of CC&Rs. That issue is discussed separately below. The developer, on the other hand, emphasizes that the contract formed between itself and its first buyer did incorporate the CC&Rs, including the arbitration provision, and that all subsequent purchasers and the Association are intended third-party beneficiaries of that contract, and therefore bound by the arbitration agreement. Both sides may be criticized for an understandable skirting of issues.

NO ENFORCEMENT AS COVENANTS RUNNING WITH THE LAND?

The Association, emphasizing that neither the FAA nor the CAA requires, or even allows, enforcement of arbitration agreements absent a written contract, insists that the absence of privity of contract precludes enforcement here. The developer argues first that California courts have consistently held that CC&Rs governing common interest developments are contracts,[16] second that all owners and the Association are third party beneficiaries of the contract between the developer and the first unit buyer[17] and third that the arbitration provision is enforceable as an equitable servitude.[18]

In *Pinnacle*, and in its now depublished opinion in *Villa Vicenza*, the court of appeal agreed with the Association, stating that although CC&Rs have been interpreted and enforced by application of contract principles,[19] all those cases involved disputes between individual homeowners or between such homeowners and their association. In *Villa Vicenza*, the court offered two rationales for enforcement in such circumstances – first, that CC&Rs may be enforced as contracts as "a practical and necessary means of governing the ongoing relationship

between owners of common interest developments or adjoining property," and second, that CC&Rs have historically been enforced as covenants running with the land.[20]

For the court to say that independent of their enforceability as covenants running with the land CC&Rs may be enforced as contracts between unit owners or between such owners and their association despite absence of privity of contract because it is practical or necessary to do so, while refusing to extend the same analysis to covenants between the owners and their predecessor, the developer, seems to denigrate legal theory to the role of mere rationalization, to be abandoned as the need arises. This increases the magnification under which the alternative rationale, enforcement of covenants running with the land, must be viewed.

In its initial decision, the *Villa Vicenza* court observed that only persons in privity of estate may enforce a covenant running with the land, and that this rule is related to the requirement that a covenant running with the land "be for the direct benefit of the property, or some part of it then in existence."[21] This led the court to conclude that such a covenant must benefit an estate or interest in the land held by the covenantee at the time enforcement is sought,[22] and therefore a binding arbitration provision in CC&Rs cannot be enforced by the developer as a covenant running with the land once the developer has sold all the condominium units and parted with ownership of the common areas, by deeding them to the Association.

While CC&Rs are enforceable by owners of units in a common interest subdivision, and by the homeowners associations for the benefit of the owners,[23] a covenantee ordinarily is not entitled to enforce the covenant following his or her transfer of the benefited property, *absent a showing that the original covenanting parties intended to allow enforcement by one who is not a landowner*.[24] In particular, after a subdivider has conveyed away all ownership of property within the subdivision, that general principle deprives the subdivider of standing to enforce the CC&Rs unless it retains ownership of some benefitted land.[25] Although there is some authority for a contrary result where the restrictions themselves evidence a clear intent to permit enforcement by the declarant and its successors even after they hold no such property interest,[26] nothing in the Davis-Stirling Act[27] expressly grants such continuing enforcement rights to the developer. On the other hand, the CC&Rs themselves clearly evidence the developer's intent that it be permitted to enforce the covenant even after parting with ownership.

The cases on enforcement of CC&Rs by and against downstream owners rely primarily on section 1354 of the Civil Code, declaring covenants in CC&Rs to be equitable servitudes, which states that either separate interest owners or the association may seek such enforcement, "unless the declaration states otherwise."[28] The *Villa Vicenza* initial decision observed that the CC&Rs recorded by Nobel are consistent with section 1354, because they do not express an intention to allow Nobel any right of enforcement other than as the owner of unsold units. While section 1354 could be read as allowing only further *limitations* on the right of enforcement (e.g. by the association, but not the owners), the court is suggesting that CC&Rs expanding the right of enforcement would be effective. If so, the explicit references in this arbitration provision to disputes involving Declarant, including those arising "after … conveyance of any Portion of the Property by Declarant" arguably had that effect.

The statute governing covenants running with the land imposes requirements that the covenant must benefit the land of the covenantee,[29] that the property to be benefitted must be particularly described,[30] and that the instrument containing the covenant must expressly state that the covenant benefits the land owned by, granted by or granted to the covenantee.[31] This suggests that whether an arbitration provision in CC&Rs encompassing construction defect claims against the developer is analyzed as an equitable servitude or as a covenant running with the land, the developer's standing to enforce is questionable once that developer has conveyed away all ownership.

Before concluding that the issue is thus settled, however, one should note that our state Supreme Court has adopted a description of the law of covenants running with the land and equitable servitudes as a nearly impenetrable "legal thicket," and "an unspeakable quagmire."[32] Having surveyed the history of those legal concepts, that court held that after a subdivider has recorded CC&Rs, all purchasers from that subdivider are contractually bound to abide by those covenants, regardless of whether the CC&Rs were incorporated by reference in any of the deeds of the subdivided parcels.[33] However, the court also explicitly noted that the precise issue before it was not whether the restrictions run with the land, so as to bind successors as well as original grantees,[34] and no homeowners association was involved in this case. Thus, while Nobel is correct that the cases treat CC&Rs as contracts (or at least "agreements"), this only begs the questions (1) who are the parties to those contracts, and (2) who can enforce them? *Villa Milano*

addressed this issue directly, and concluded that recorded CC&Rs are a contract to which the unit owners are deemed to have agreed,[35] but that court admitted in a footnote that the cases upon which it relied did not provide an analytical framework on the question why the homeowners association is bound contractually,[36] and concluded (without analysis of its own) that the unit owners "cannot be permitted to use the Association as a shell to avoid the application of the arbitration clause." Not even mentioned in *Villa Milano* was the issue whether the developer defendant, which had lost all ownership interest in the project by foreclosure before the first unit was sold[37] had any standing to enforce the CC&Rs.[38] Nonetheless, a pithy dissent in *Pinnacle* agrees with *Villa Milano* and would enforce the arbitration clause.[39]

DOES THE FACT THAT THE CC&RS ARE THE ASSOCIATION'S FORMATION DOCUMENT SUBSTITUTE FOR CONTRACT FORMATION?

The decisions under examination all concede that the homeowners association "springs into existence" upon recordation of the CC&Rs, and a first deed out by the developer to a unit owner. Presumably, the court would concede that the CC&Rs define the duties of the Association, as a matter of statute and because, absent a properly-enacted amendment, the Association is governed by the CC&Rs as a formational document. While it is true that both the FAA and the CAA make reference to "agreements" to arbitrate disputes, and while the court adopts a salient contract formation analysis in *Villa Vicenza* and *Pinnacle*, there is a sense of unreality about its conclusion that a developer can never devise an enforceable arbitration provision covering construction defect disputes.[40] Perhaps the *Villa Milano* approach, that the association is bound as representative of the owners, whose purchase agreements incorporate the arbitration provision, is the best the developer can do; but perhaps the fact that the association owes its existence to the CC&Rs should suffice as an agreement to arbitrate.

WHAT DOES THE WAIVER OF JURY TRIAL ANALYSIS UNDER *GRAFTON* AND *TREO* ADD TO THE "NO AGREEMENT" RATIONALE?

In *Villa Vicenza*, the Association attacks *Villa Milano*'s conclusion that an arbitration provision in CC&Rs may be enforced by a developer if it is not unconscionable, both as poorly reasoned and as having predated *Grafton Partners v. Superior Court* ("*Grafton*")[41] in which the

Supreme Court held that a pre-dispute jury waiver contained in an accounting firm's retainer agreement was unenforceable, because it was not among the statutorily-authorized mechanisms for waiver of this important, constitutionally-protected right. *Grafton*, however, explicitly noted that both arbitration agreements and reference agreements are statutorily-allowed pre-dispute jury waiver mechanisms.[42] Nonetheless, in *Villa Vicenza* the Association relies heavily on the argument that the right to a jury is sacred, and any waiver of it must be carefully hedged about by procedural safeguards absent in recorded CC&Rs. Given that *Grafton* explicitly commented that arbitration provisions are enforceable jury waivers, it is fair to ask, how can *Grafton* support a categorical ban on provisions in CC&Rs requiring arbitration of construction defect claims?

In *Treo*, the court held that a judicial reference provision in CC&Rs is categorically not enforceable by a developer faced with a construction defect claim asserted by a homeowner association. In reaching this conclusion, the *Treo* court acknowledged that *Grafton* did not deal with prelitigation judicial reference agreements, but it insisted that *Grafton*'s discussion of policy considerations applicable to contractual jury waivers was "useful" in reviewing the issues before it.[43] The alternative view, that because *Grafton* carved out both reference and arbitration agreements as statutorily authorized jury waivers, its holding was simply irrelevant, is not mentioned in *Treo*. The *Treo* court quoted language from *Grafton* to the effect that in other jurisdictions, where jury waivers are allowed, safeguards exist, including placing the burden on the party seeking to enforce the waiver to prove that it was given "knowingly and voluntarily."[44] Relying on this *dictum* in a case that explicitly disavowed consideration of judicial reference agreements, the *Treo* court held that reference provisions in recorded CC&Rs were adhesive as to all unit purchasers other than the first, and all their successors, and that in light of the fact that the inviolate constitutional right to trial by jury is being waived, this cannot be the sort of agreement contemplated by the Legislature when it enacted the reference statutes.[45]

One response to *Treo* might be that an agreement is an agreement, and that if the Legislature had wanted to say that something more than an agreement is required to make a reference agreement actually enforceable, it could have said so. Another response would be that the *Treo* court actually performed an unconscionability analysis, but paid

no attention to substantive unconscionability, and achieved a categorical ban unavailable through unconscionability analysis.

In *Villa Vicenza*, the developer did not have the luxury of arguing to the court of appeal that its own decision in *Treo* was badly reasoned, but it did urge the court to follow *Villa Milano* instead of *Treo*, on the basis that the strong policy favoring arbitration has no parallel in the law applicable to judicial reference. That distinction, argued to the same court that decided *Treo*, whose policy concerns revolve around the sanctity of the right to jury trial, developed no traction.

In the initial decision in *Villa Vicenza*, and in *Pinnacle*, the court followed the logic of *Treo*, and reached the same conclusion. The court rejected the developers' argument that the FAA preempted any state law treating arbitration agreements as less enforceable than other agreements, on the basis that it was deciding that the existence of an arbitration provision in recorded CC&Rs does not form a contract to arbitrate as between the developer and subsequent unit purchasers or the homeowners association, which is an altogether different question from enforceability of an arbitration agreement once formed.

Treo's imposition of a higher-than-normal standard for the formation of a reference agreement, if extended to the formation of an arbitration provision, could be viewed as state law treating arbitration agreements differently from contracts generally. If so, where the FAA controls, that standard cannot apply.[46] More directly, one might observe that applying *Grafton* where that case says that it does not apply, in order to add gloss to state legislation that *Grafton* explicitly considered, is not strictly logical.

By the same token, if the CC&Rs do not form a contract between the developer and the homeowners association or subsequent unit purchasers, and they are not enforceable by the developer as equitable servitudes once the developer parts with ownership of all interest in the project, then any discussion of procedural protections surrounding jury trial waivers merely distracts, and the question of third-party beneficiary status under the purchase agreement for the sale of the first unit should assume center stage. Nobel's reply brief in *Villa Vicenza* correctly pointed out that the Association had skirted the issue whether all parties were bound by the arbitration provision as incorporated by the first buyer's purchase contract, and its petition for rehearing correctly observed that the court's initial decision ignored that argument. In *Pinnacle*, however, the court did take on the developer's third-party beneficiary argument, and concluded that it failed. The *Pinnacle* majority observed that al-

though an intended third-party beneficiary may sometimes sue to enforce a contract to which it was not a signatory, including an agreement to arbitrate, there is no authority that a third-party beneficiary that is resisting an attempt to compel arbitration may be forced to arbitrate.[47]

Assuming for the sake of discussion that on rehearing the *Villa Vicenza* court were to recognize the homeowners association and subsequent purchasers as third party beneficiaries of the first purchase contract, against whom the developer could enforce an arbitration agreement in recorded CC&Rs, the inquiry would be far from over. The trial court would then need to do a complete an unconscionability analysis based upon the unique facts before it. Since all CC&Rs are adhesive contracts, at least as to all but the first buyers, and arguably as them as well, procedural unconscionability is a given, and the unconscionability question will boil down to substantive unconscionability, focusing on the fairness of the arbitration procedure that would apply.[48] Under the seesaw standard for determining unconscionability,[49] very little evidence of unfairness would be necessary for any court, following *Villa Milano*, to find substantive unconscionability, and to declare the arbitration provision unenforceable. The *Pinnacle* court, adopting a belt-and-suspenders approach, found both categorical unenforceability and unconscionability.

POLICY CONSIDERATIONS

Construction defect cases brought by owners and associations against common interest development developers almost invariably involve claims and cross-claims against multiple contractors, subcontractors, and material suppliers, none of whom are parties to recorded CC&Rs. If an arbitration provision in CC&Rs is enforceable by the developer, the trial court will usually be required to choose among the alternatives offered by Code of Civil Procedure section 1281.2 (order arbitration/stay litigation, order litigation/stay arbitration, etc.). The result may be multi-track dispute resolution, one instance (among many) of the fact that arbitration often is not more efficient, more expeditious, or cheaper than litigation. This is neither relevant to whether an arbitration agreement exists nor a factor likely to be weighed in an unconscionability analysis, but it certainly could affect judicial attitudes towards arbitration provisions in CC&Rs.

The *Pinnacle* majority pointed out that the Legislature has adopted extensive alternative dispute resolution procedures applicable to common interest developments generally,[50] and more specifically to construction

defect claims by homeowners associations and unit owners.[51] This does not render moot the issue addressed here, since there will be situations in which a developer has "opted out" of the latter statutory scheme, or that process has reached its conclusion without resolving the construction defect dispute.

Both explicitly and implicitly, many courts have expressed antipathy towards the development of a "shadow" system of civil adjudication, available only to wealthier disputants. This tendency is especially observable in the context of consumer contracts, adhesion contracts, and arbitration provisions which as a practical matter will only be invoked by "corporate" defendants. That antipathy may be increased now that the Supreme Court has made it clear that properly framed arbitration provisions will entitle the disputants to arbitrate privately and then burden the trial and appellate courts with the task of reviewing arbitrator's awards for errors of law.[52] Jurists offended by such things may be inclined towards establishing categorical unenforceability of arbitration provisions.

CONCLUSION

A case-by-case unconscionability analysis might justifiably take into account the discussion in *Treo* of the need for safeguards appropriate to jury waiver, but using the jury waiver aspect of arbitration agreements to impose an artificial barrier to contract formation never mentioned by the Legislature is not intellectually honest. On the other hand, judicial economy would be served by a categorical rule of unenforceability. Whether a court would stretch third party beneficiary concepts in order to find the formation of an arbitration agreement enforceable by the developer, and whether that same court would then find the particular agreement before it to be enforceable or unconscionable, will both be heavily influenced by that court's general attitude towards arbitration, as the Fourth District cases discussed here amply demonstrate.

NOTES

1. *Villa Vicenza Homeowners Ass'n v. Nobel Court Development, LLC*, 110 Cal. Rptr. 3d 149 (Cal. App. 4th Dist. 2010), reh'g granted, opinion not citeable, (June 25, 2010). Discussion of the facts of the case and the parties' respective arguments are taken from this now-depublished opinion, as well as the briefs on file in the Court of Appeal.
2. *Pinnacle Museum Tower Ass'n v. Pinnacle Market Development (US), LLC*, 187 Cal. App. 4th 24 (4th Dist. 2010), issued July 30, 2010.
3. Section 2 of the FAA, 9 U.S.C.A. §2, states: "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."

Cal. Code Civ. Proc., §1281 reads: "A *written agreement* to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."

Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1074-1075, 90 Cal. Rptr. 2d 334, 988 P.2d 67 (1999); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996), as amended, (July 5, 1996); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987).

4. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995); *Marsch v. Williams*, 23 Cal. App. 4th 250, 254-255, 28 Cal. Rptr. 2d 398 (4th Dist. 1994).
5. 9 U.S.C.A. §2.
6. *Villa Milano Homeowners Ass'n v. Il Davorge*, 84 Cal. App. 4th 819, 102 Cal. Rptr. 2d 1 (4th Dist. 2000), as modified on denial of reh'g, (Nov. 27, 2000).
7. *Treo @ Kettner Homeowners Ass'n v. Superior Court*, 166 Cal. App. 4th 1055, 83 Cal. Rptr. 3d 318 (4th Dist. 2008), review denied, (Dec. 10, 2008).
8. *Madden v. Kaiser Foundation Hospitals*, 17 Cal. 3d 699, 712, 131 Cal. Rptr. 882, 552 P.2d 1178 (1976); *24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199, 1212-1213, 78 Cal. Rptr. 2d 533 (1st Dist. 1998).
9. Respondent's Brief, pp. 3-4.
10. Appellant's Opening Brief, p. 3.
11. Denial of a motion to compel arbitration is directly appealable. Code Civ. Proc., §1294.
12. 12 Miller & Starr, Cal. Real Estate 3d, §35:25; *Villa Milano, supra*, 84 Cal. App. 4th 819, 824; *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 1069, 70 Cal. Rptr. 3d 605 (1st Dist. 2008); *EFund Capital Partners v. Pless*, 150 Cal. App. 4th 1311, 1320, 59 Cal. Rptr. 3d 340 (2d Dist. 2007).
13. Civ. Code, §1351, subds. (c), (f).
14. Civ. Code, §1352. *Citizens for Covenant Compliance v. Anderson*, 12 Cal. 4th 345, 365, 47 Cal. Rptr. 2d 898, 906 P.2d 1314 (1995); *Treo @ Kettner HOA v. Superior Court, supra*, 166 Cal. App. 4th 1055, 1061-1062.
15. Civ. Code, §1363. See Hanna and Van Atta, *On California Common Interest Developments* (Thomson West, 2008) Chapter 18, "Formation And Governance of Owners Associations."
16. Appellant's Opening Brief, pp. 13-14.
17. Appellant's Opening Brief, pp. 13-14.
18. Appellant's Opening Brief, pp. 16-20.
19. *Citizens for Covenant Compliance v. Anderson*, 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P.2d 1314 (1995); *Frances T. v. Village Green Owners Assn.*, 42 Cal. 3d 490, 512-513, 229 Cal. Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447 (1986); *Barrett v. Dawson*, 61 Cal. App. 4th 1048, 1054, 71 Cal. Rptr. 2d 899 (4th Dist. 1998); *Franklin v. Marie Antoinette Condominium Owners Assn.*, 19 Cal. App. 4th 824, 828, 833-834, 23 Cal. Rptr. 2d 744 (2d Dist. 1993), and see *Fourth La Costa Condominium Owners Ass'n v. Seith*, 159 Cal. App. 4th 563, 575, 71 Cal. Rptr. 3d 299 (4th Dist. 2008); *Share v. Casiano Bel-Air Homeowners Assn.*, 215 Cal. App. 3d 515, 263 Cal. Rptr. 753 (2d Dist. 1989); *Nahrstedt v. Lakeside Village Condominium Assn.*, 8 Cal. 4th 361, 380-381, 33 Cal. Rptr. 2d 63, 878 P.2d 1275 (1994).
20. Citing *Kelly v. Tri-Cities Broadcasting, Inc.*, 147 Cal. App. 3d 666, 678-679, 195 Cal. Rptr. 303 (4th Dist. 1983).
21. Civ. Code, §1462.
22. *Sacramento Suburban Fruit Lands Co. v. Whaley*, 50 Cal. App. 125, 130, 194 P. 1054 (3d Dist. 1920).
23. 9 Miller & Starr, Cal. Real Estate 3d, §25B:101.

24. 8 Miller & Starr, Cal. Real Estate 3d, §24:25; *La Mancha Dev. Corp. v. Sheegog*, 78 Cal. App. 3d 9, 14, 144 Cal. Rptr. 59 (4th Dist. 1978); *Maron v. Howard*, 258 Cal. App. 2d 473, 484-485, 66 Cal. Rptr. 70 (2d Dist. 1968); *Farber v. Bay View Terrace Homeowners Ass'n*, 141 Cal. App. 4th 1007, 1011, 46 Cal. Rptr. 3d 425 (4th Dist. 2006); *B.C.E. Development, Inc. v. Smith*, 215 Cal. App. 3d 1142, 1147-1148, 264 Cal. Rptr. 55 (4th Dist. 1989).
25. *Bramwell v. Kuble*, 183 Cal. App. 2d 767, 775-776, 6 Cal. Rptr. 839 (4th Dist. 1960); *Kent v. Koch*, 166 Cal. App. 2d 579, 588, 333 P.2d 411 (1st Dist. 1958); *Townsend v. Allen*, 114 Cal. App. 2d 291, 297, 250 P.2d 292, 39 A.L.R.2d 1108 (1st Dist. 1952).
26. *B.C.E. Development, Inc. v. Smith*, 215 Cal. App. 3d 1142, 1146-1148, 264 Cal. Rptr. 55 (4th Dist. 1989); *Trahms v. Starrett*, 34 Cal. App. 3d 766, 771, 110 Cal. Rptr. 239 (1st Dist. 1973) (disapproved of on other grounds by, Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345, 47 Cal. Rptr. 2d 898, 906 P.2d 1314 (1995)).
27. Civ. Code, §§1350 et seq., effective 1985.
28. Civ. Code, §1354, subd. (a): "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both."
29. Civ. Code, §1468.
30. Civ. Code, §1468, subd. (c).
31. Civ. Code, §1468, subd. (b).
32. *Citizens for Covenant Compliance, supra*, 12 Cal. 4th 345, 352.
33. *Id.* at p. 363: "In essence, if the restrictions are recorded before the sale, the later purchaser is deemed to agree to them." And at p. 367: "The rule is consistent with the rationale that a covenant requires an agreement between buyer and seller, and not a unilateral action by the developer. We merely reject the unexamined assumption that the intent of the purchaser, and therefore the agreement itself, must be expressed in the deed rather than be implied from the purchase with knowledge of the recorded restrictions."
34. *Id.* at p. 366.
35. *Villa Milano, supra*, 84 Cal. App. 4th 819, 825.
36. *Id.* at p. 826, fn. 4.
37. *Id.* at p. 823.
38. After the enactment of Civil Code sections 1354, 1368.4 and 1375, the Department of Real Estate relented somewhat from its traditional position that binding arbitration provisions should not be included in CC&Rs, a position grounded in the same concern voiced in *Treo* and *Villa Vicenza*, that an association not in existence when the CC&Rs were recorded cannot have voluntarily consented to binding arbitration.

    A noted treatise, Hanna and Van Atta, *On Common Interest Developments*, §21:108, p. 1304, observes that the Department of Real Estate's antipathy towards the inclusion of ADR provisions in CC&Rs was based in part on cases "cited by interests opposing mandatory arbitration clauses as support for the proposition that a binding arbitration clause (without possibility of trial *de novo*) is a deprivation of due process, because the declaration provision was prepared by the subdivider before the association was even incorporated, so no consent by the Association can be implied. (See *Hebert v. Harn*, 133 Cal. App. 3d 465, 469, 184 Cal. Rptr. 83 (4th Dist. 1982); *Healy v. Onstott*, 192 Cal. App. 3d 612, 616, 237 Cal. Rptr. 540 (6th Dist. 1987); *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal. App. 4th 119, 129-135, 18 Cal. Rptr. 2d 626 (4th Dist. 1993).)" The cases cited, however, all dealt with binding arbitration requirements imposed by statute, as opposed to private agreements to arbitrate being allowed by a regulatory agency.

    The *Pinnacle* majority explain that in their view DRE approval of proposed CC&Rs is irrelevant to the questions of contract formation and enforcement or arbitration provisions.

39. Although the same division of the Fourth District has decided both *Villa Vicenza* and *Pinnacle*, the composition of the panel differs. Justice Benke, who authored the initial decision in *Villa Vicenza*, is replaced by Justice O'Rourke, who dissents in *Pinnacle*. Thus the significance of the perspective of the observer is highlighted. Given that these decisions are limited to issues of law, it is specifically the perspective of the observer as to enforcement of arbitration provisions that matters here.
40. The majority in *Pinnacle* suggests that the homeowners association could "via the amendment process" ratify an arbitration provision placed in the CC&Rs by the developer. This is the sort of unreality mentioned in the text of this article.
41. *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944, 32 Cal. Rptr. 3d 5, 116 P.3d 479 (2005).
42. *Id.* at pp. 950, 955, 960.
43. *Treo @ Kettner Homeowners Assn. v. Superior Court, supra*, 166 Cal. App. 4th 1055, 1064.
44. *Id.* at p. 1065, quoting *Grafton Partners v. Superior Court, supra*, 36 Cal.4th 944, 965-966.
45. *Treo @ Kettner Homeowners Assn. v. Superior Court, supra*, 166 Cal. App. 4th 1055, 1067.
46. The *Villa Vicenza* CC&Rs explicitly recited that the FAA would apply to resolution of any disputes, and this was incorporated into the first generation purchase contracts. The fact that development projects can involve interstate commerce has been held to justify application of the FAA. (*Shepard v. Edward Mackay Enterprises, Inc.*, 148 Cal. App. 4th 1092, 1097-1098, 56 Cal. Rptr. 3d 326 (3d Dist. 2007) citing *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) ("states may not decide that a contract is fair enough to enforce its basic terms, but not fair enough to enforce its arbitration clause"); *Basura v. U.S. Home Corp.*, 98 Cal. App. 4th 1205, 1212-1215, 120 Cal. Rptr. 2d 328 (2d Dist. 2002), as modified, (June 27, 2002).) An election to resolve disputes under the FAA would be enforceable with respect to most developments, so long as a factual basis demonstrating an "involvement" with interstate commerce appears in the record. In *Villa Vicenza*, the Association argues that no such record was made in the trial court, a point developers' counsel should note.
47. *Benasra v. Marciano*, 92 Cal. App. 4th 987, 981, 112 Cal. Rptr. 2d 358 (2d Dist. 2001); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102, 36 Employee Benefits Cas. (BNA) 2377 (9th Cir. 2006).
48. 12 Miller & Starr, Cal. Real Estate 3d, §35:53.
49. The rule that says the greater the procedural unconscionability the lower the threshold for substantive unconscionability, and vice versa, is uniformly referred to as a "sliding scale" test. This is wrong. In a "sliding scale" situation more of one means more of another. (E.g., wealthier patron pays more for admission.) The model for unconscionability is better visualized by imagining a teeter-totter.
50. Civ. Code, §§1375, 1363.810 et seq.
51. Civ. Code, §§895 et seq., the "Right to Repair Act," sometimes known as "SB 800."
52. *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1340, 82 Cal. Rptr. 3d 229, 190 P.3d 586 (2008).

Miller & Starr Real Estate Newsalert

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Miller & Starr Real Estate Newsalert (USPS # pending) is issued six times per year, published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at periodic rate is pending as St. Paul, MN. POSTMASTER: Send address changes to: Miller & Starr Real Estate Newsalert, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

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