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Arbitration Provisions

By: William L. Coggshall

February 24, 2009

Contracts for design services often require the parties to resolve any dispute through arbitration instead of traditional State court litigation. In fact, the Standard Form Agreement between architect and owner (AIA document B101; formerly B141) as well as the standard form agreement between architect and consultant (AIA document C401; formerly C141) contain a fairly standard arbitration provision. Given the recent California Supreme Court decision in *Cable Connection, Inc. v. DirectTV, Inc.* (2008) 44 Cal. 4th 1334, a prudent design professional practicing in California would revise the arbitration provisions in their contracts to add greater protection for their potential errors and omissions liability.

In *Cable Connection*, the California Supreme Court was presented with two questions to resolve: (1) may the parties structure their agreement to allow for judicial review of legal error in the arbitration award?; and (2) is class-wide arbitration available under an agreement that is silent on the matter? The first issue presented should be of particular interest to design professionals in California.

Traditionally, the courts have been reluctant to overturn, or even review for that matter, an arbitrator's decision. The *California Arbitration Act* (CAA; *Code of Civil Procedure* § 1280 et seq.) provides that arbitration provisions are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." In general, the CAA provides extremely limited grounds for the review of an arbitrator's decision and basically limits those grounds to issues pertaining to the arbitrator and their authority and whether or not the award was procured by corruption, fraud or other undue means.

Completely missing from the CAA is any standard that would allow the court to vacate an arbitration award if the arbitrator simply misapplied California law. In other words, an arbitrator can completely fail to apply California law to their reasoning on an award and there is no right to have that decision reviewed. You have to live with the decision. Although most arbitrators are former judges or currently practicing lawyers, it does not mean that the arbitrator has to follow California law. In fact, it is not uncommon for an arbitrator to forgo following California law and simply try to do "equity."

The Court's decision in *Cable Connection*, however, allows parties to contract to allow for judicial review of an arbitrator's award that is consistent with the terms of the arbitration provision. Given this new reality, a prudent design professional practitioner will incorporate additional language into their arbitration provisions consistent with the court's ruling in *Cable Connection*. By doing so, it will lessen the chance that the arbitrator will step beyond established California law. In the event the arbitrator does take it upon themselves to still forgo following the law, either party can seek judicial review. Most legal defenses benefit the design professional.

Some examples of issues of law that could help protect design professionals, but which an arbitrator is not bound to follow without the proper arbitration language, are the following:

- Limit of liability provision in the contract
- Statute of limitations defenses
- Indemnity provisions



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The above examples are certainly not supposed to be an exclusive list, but are clear examples where a broader arbitration provision could help define the role of the arbitrator when dealing with critically important legal defenses. Such defenses can often be the deciding factors in claims against design professionals.

Standard AIA arbitration provisions should be revised to broaden the scope of judicial review in the event the arbitrator fails to apply substantive California law. The contract at-issue in the *Cable Connection* matter as set forth in the decision, is useful in determining potential language to include in an arbitration provision. In addition to the standard AIA arbitration provision language, the following could be added:

“The arbitrator[s] shall apply California substantive law to the proceedings, except to the extent Federal substantive law would apply to any claim. The arbitrator[s] shall prepare in writing and provide to the parties an award including actual findings and the reasons on which their decision is based. The arbitrator 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.”

In the case of the above examples of legal defenses, the addition of the above language to the arbitration provision could provide the necessary protections to ensure that California law is followed. For example, California recognizes that Limitations on Liability provisions in contracts such as ones that are often in design services contracts are fully enforceable. (*Markborough California Inc. v. Superior Court* (1991) 227 Cal.App.3d 705.) Without the requirement that the arbitrator cannot commit errors of law or legal reasoning, a design professional can fall victim to an overzealous arbitrator who decides not to enforce a valid and enforceable Limit of Liability provision.

About the Author

William L. Cogshall is a litigator with the Archer Norris professional liability and construction practice groups, specializing in the representation of architects and engineers in complex commercial litigation. The lawyers in our Design Professionals Liability practice group provide advice and litigation support to architects, engineers and other design professionals. For more information, please contact Will, email: wcogshall@archernorris.com

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