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Often, not much attention is given to the language of arbitration provisions in contracts, especially California real estate purchase and sale contracts or leases, least of all by consumers. A recent group of California decisions point out that rather than just initialing the paragraph, contracting parties should consider what the provision provides for.

Under the California Arbitration Act, an arbitrator could make a blatant legal error, and normally there is no recourse for the victim through appeal. The statutes provide that an arbitration award may be set aside only in the case of fraud, misconduct, or conduct that substantially prejudiced the rights of a party. In 2008, the California Supreme Court reviewed an arbitration agreement, governed by the California Act, which provided 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."

In this case the losing party appealed on the grounds that the arbitrator made a mistake of law. Earlier in the year, the U.S. Supreme Court held that no such review was available under the Federal Arbitration Act. However, the California court ruled that, given the language used, under the California act an arbitration agreement *can* provide for review of errors of law by arbitrators. (*Cable Connection* 44 Cal.4th 13334.)

Subsequently, a court of appeal considered a case involving a California residential purchase contract that required binding arbitration would be governed by the Federal Arbitration Act ("FAA"). The FAA is commonly required on California Association of Realtor (C.A.R.) Purchase forms. In this case, the property was on an island and had two docks. After the buyers moved in, a neighbor tore out one dock and relocated to his own property-apparently he had this right. The buyer sued because the right to move the dock was not disclosed- apparently the Broker did know about it.

The arbitrator ruled that the Seller failed to disclose and awarded the Buyer damages. The Seller went to court to throw out the arbitration award, arguing that the arbitrator committed an error of law by failing to impute the knowledge of the

Broker, a dual agent, to the Buyer. In this case, the agreement provided that the arbitrator "shall render an award in accordance with substantive California Law."

The court of appeal found this language was not enough; the provision "requiring arbitrators to apply the law leaves open the possibility that they are empowered to apply it 'wrongly as well as rightly.'" Additionally, the court found that the *Cable Connection* case did not apply here, because here the agreement provided that the FAA would apply- not California Arbitration law. It refused to vacate the award, finding that the FAA and arbitration agreement did not provide for court review of the award for errors of law. (*Christensen v. Smith* (2009) 171 Cal.App.4th 931)

Lastly, a real estate agent submitted a commission dispute to binding arbitration. In the course of discovery some privileged documents were accidently produced to the Company Attorney. That attorney improperly copied them before returning them. The arbitrator resolved the agent's claim, and also ordered the Company's attorney to pay over $7,000 sanctions for copying the documents. The Attorney appealed, arguing that the arbitrator had no authority for the sanction, as he was not a party to the arbitration agreement- his client signed the agreement. The Court of Appeal did not care, holding that the attorneys subjected himself to the authority of the arbitrator by volunteering in the in the arbitration proceedings. In its reasoning it described attorneys as *agents* of their clients (*Bak v. MCL Financial Group* (2009) 170 Cal.App.4th 1118.

What these cases point out is that it is that the language of the Arbitration Agreement, (seldom considered by non-attorneys) can be vitally important to the parties. First off, does the Federal or California act apply? The California Act allows the ability to appeal for errors of law, *if* it is properly worded. The Federal Act allows no such flexibility. And finally, just showing up to represent a client can result in sanctions against the attorney, which could be *an unappealable error of law*. Given the reasoning of the court, this rule could be stretched to other professionals involved in the arbitration- the party's C.P.A. or Doctor, for example, who may be key witnesses. This author will never argue that arbitration is faster or cheaper than litigation, and with these decisions, it is becoming more onerous.