

Email Alert – Beware: Recent Appellate Decisions Can Affect the Interpretation of Arbitration Clauses

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Recent appellate decisions indicate that it may be desirable to include an express contractual provision regarding the choice of law that governs any arbitration issues. Contracts often provide for arbitration of disputes. However, those contracts may not specify whether they are governed by the Federal Arbitration Act or state law.

In *Rent-A-Center West, Inc. v. Jackson*, 2010 WL 2471058 (June 21, 2010), the U.S. Supreme Court demonstrated that the Federal Arbitration Act restricts courts from interfering with some aspects of the arbitration process. One of the parties asked a court to hold that the entire agreement was unconscionable. But the Supreme Court held since the agreement gave the arbitrator the “exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of [the] Agreement,” this challenge had to be decided by the arbitrator, not by a judge. *Rent-A-Center West* comes on the heels of the recent California Supreme Court decision in *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.45th 665, where the Court stated that a judge could review an arbitration award that deprives a plaintiff of a hearing on the merits of an “unwaivable statutory claim.”

These cases demonstrate the differences between federal and state law regarding judicial review of arbitrations. Federal law tends to disfavor judicial interference, while state law may (as in California) give judges more power to review arbitration proceedings. Parties seeking “finality” through arbitration may want to include a contractual provision that expressly provides that the substantive and procedural issues of all disputes be governed by the Federal Arbitration Act. Parties that desire more leeway for judicial review may want to include a provision to have such issues governed by state law. In light of these differences, parties that enter into a contract with an arbitration provision may wish to determine whether state or federal law governs prior to executing the contract, and may wish to seek legal guidance concerning the language in the arbitration provision.

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