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PERSPECTIVE

Ruling emphasizes need to clarify who decides arbitrability questions

By Robert S. Amador

If your clients rely on the enforceability of arbitration clauses in their contracts I strongly suggest you read the recent 3rd District Court of Appeal case of *Anna Sandoval-Ryan v. Oleander Holdings LLC, et al.*, 2020 DJDAR 13040 (Cal. App. 3rd Dist., Dec. 7, 2020). That case emphasizes the importance of proper drafting of arbitration clauses in order to ensure the likelihood an arbitrator and not a court will decide the threshold issues of arbitrability and enforceability.

Sandoval involved a case for elder abuse, wrongful death and other causes of action against a skilled nursing facility on behalf of Anna Sandoval's brother, who was a resident at the facility, and herself. Anna, who was her brother's conservator, had signed two binding mandatory arbitration agreements (one for malpractice and one for all other disputes) upon admission of her brother to the facility. She also signed a separate admission agreement.

Jesus Sandoval had been transferred to the facility after surgery for rehabilitation. While at the facility Jesus' condition deteriorated and he developed multiple serious health complications and was transferred to a hospital. At the hospital he was found to have multiple pressure ulcers, infection, distended bowel and fecal impaction.

The nursing facility defendant petitioned to compel arbitration after Sandoval sued in superior court. The trial court denied the petition because it found the existence of undue influence which made the arbitration agreements unenforceable. The defendant argued on appeal the arbitration agreement gave an arbitrator the power to decide enforceability, not the courts.

The appellate court disagreed with defendant and affirmed. In so doing it performed some instructive contract interpretation and word parsing. The arbitration clause stated: "The parties understand that, except as provided below, any claim other than a claim for medical malpractice, arising out of the provision of services by the Facility, the admission agreement, the validity, interpretation, construction, performance and enforcement thereof, or which allege wrongful death or violations of the elder Abuse and Dependent Adult Civil Protection Act, or the Unfair Competition Act, or which seek an award of punitive damages or attorneys' fees, will be determined by submission to neutral arbitration as provided by California law, and not by a lawsuit or court process." The court interpreted "thereof" to refer to the admission agreement and not the arbitration agreements themselves. (The court pointed out in footnote 4 that the arbitration agreements were not part of the admission agreement and "appear in pages" following the admission agreement, but were not referenced in the table of contents of the admission agreement and thus not deemed by the court to be a part thereof.)

The language in the above, though not the most artfully drafted, would appear to evince an unmistakable intent to grant an arbitrator the power to decide whether the arbitration agreement is enforceable. Yet the court found that this "delegation" clause did not meet the required "heightened standard" for such clauses, citing *Aanderud v. Superior Court*, 13 Cal. App. 5th 880, 890 (2017), which held delegation clauses must be clear and unmistakable. The heightened standard, the *Sandoval* court stated, "reverses the typical presumption in favor of arbitration of disputes." (*Aanderud* also is mandatory reading on the issues addressed in this article. *Aanderud* is a consumer case like *Sandoval*, but one that reached the opposite conclusion, albeit based on a stronger delegation clause than in *Sandoval*).

So when is a "delegation clause" giving an arbitrator the power to decide arbitrability and enforceability needed? Based on my experience as both advocate and arbitrator there is no real standard or consistency in dispute resolution clauses. Most well-drafted clauses specify the rules of the organization under which they want the arbitration to be held. The rules of most large arbitration organizations clearly specify in their rules that the arbitrator will have the power to rule on his or her own jurisdiction, and on any objections regarding the existence, scope or validity of the arbitration agreement and on the arbitration clause itself. Some organizations do not have such broad rules language, however, and some contractual arbitration clauses do not specify the organization to be used, nor reference any rules.

Is it sufficient to provide that a dispute will be resolved through binding arbitration in accordance with the rules of a specified organization and rely on those rules for the delegated powers? *Aanderud* specifically addressed this issue and noted in footnote 2 that mere incorporation of the rules is not sufficient. To be safe, therefore, an arbitration clause would expressly state the arbitrator's powers instead of simply referencing to the rules, taking care not to bungle or contradict those stated in the rules. Otherwise a clever lawyer for an unsophisticated plaintiff could argue the plaintiff was not familiar with the rules and no one explained them or provided a copy such that there was no agreement as to who would decide arbitrability and enforceability (similar challenges of unconscionability were made in *Aanderud*).

Lesson from *Sandoval*? State the delegated arbitral powers in the agreement, and remember they must be "clear and unmistakable" to survive the heightened standard. It is likely a court will strictly apply that standard when construing an arbitration clause in a strong consumer case like *Sandoval*. ■

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