

Compelling arbitration

Explore the nuts and bolts of compelling a contractual arbitration, with a discussion of some nuances

By Mark D. Kramer

This article covers the fascinating world of compelling arbitration. In short, it may be slightly drier than the script for the movie *Airplane*. However, in view of the uncertainty in this COVID-19 world surrounding how and when civil jury trials will resume, arbitration may be more appealing than ever. Although the provisions for compelling arbitration are relatively straightforward, there are some nuances and potential pitfalls for the unwary. California public policy favors arbitration as a speedy and relatively inexpensive means of dispute resolution. (*Brodke v. Alphatec Spine Inc*. (2008) 160 Cal.App.4th 1569 at 1577.)

There are four main types of arbitration agreements that you may deal with:

1. General Contractual – These can be included in virtually an endless list of possible contractual agreements, ranging from a simple form contract to have a light fixture installed to a complex multimillion-dollar business purchase agreement. Many settlement agreements include arbitration clauses for the enforcement of certain provisions or for the entire settlement.

2. Medical Malpractice – As many of you know, Kaiser has an arbitration provision for their medical care. It is now standard practice for many, if not most, hospitals and medical care providers to include arbitration provisions in their consent for treatment and/or other forms. Medical malpractice arbitrations are covered in Code of Civil Procedure section 1295.

3. Uninsured/Underinsured Motorist – First-party claims for uninsured or underinsured motorists are governed by the arbitration provisions in the policy of insurance and the provisions of Insurance Code section 11580.2, subdivision (f).

4. Construction Contracts – Most construction contracts, whether they be between the general contractor and the owner or one of the numerous subcontracts on a large project, will contain arbitration provisions. Construction contracts with certain government entities are covered by Code of Civil Procedure section 1296.

Petitions to compel arbitration

A party may compel arbitration as long as they have a valid and enforceable written agreement to submit a dispute to arbitration. Arbitration, and specifically the procedures for compelling arbitration, are governed by Code of Civil Procedure section 1280 et seq.

Time guidelines

The time to file a petition to compel arbitration does not begin to run until one party refuses to arbitrate. Then the four-year statute of limitations for a written contract begins to run. (*Spear v. California State Automobile Association* (1992) 2 Cal.App.4th 1035, 1040-1042.)

Notice and service

Notice and service of a petition to compel arbitration are governed by Code of Civil Procedure section 1290.4, subdivision (a) which, in brief, provides that a copy of the petition and notice of the time and place of the hearing and any papers upon which the petition is based shall be served in the manner provided in the arbitration agreement for service and notice. Code of Civil Procedure section 1290.4, subdivision (b) provides requirements for service if the agreement to arbitrate is silent on these issues. Please also see Code of Civil Procedure section 1290.2 which requires a minimum of 10 days' notice before the hearing of the petition.

Jurisdiction and venue

If the amount in controversy is less than $25,000, then file the petition as a limited civil case. (Code Civ. Proc., § 86, subd. (a)(10).) If the amount in controversy exceeds $25,000, then the petition shall be filed as an unlimited matter. (Code Civ. Proc., § 32.5.)

If the contract or agreement is entered into in California and provides for arbitration in California, then the parties are deemed to have consented to personal jurisdiction of the California courts. (Code Civ. Proc., § 1293.) If this is not the case, you must establish jurisdiction as you would in any other matter.

The petition should be filed in the county where the contract or agreement was made. If it was made outside California, then it can be filed in any county where any party resides or has a business location as long as no specific county is set forth in the agreement. If neither of these conditions are present in the petition, it can be filed anywhere in California. (Code Civ. Proc., § 1292.)

If a lawsuit has been filed involving an arbitrable issue, then the petition or motion should be filed in that action. (Code Civ. Proc., § 1292.4.) However, if no lawsuit is pending, then a petition rather than a motion should be filed. (Code Civ. Proc., § 1290.)

Necessary allegations

The petition must allege that there is a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that

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controversy. (Code Civ. Proc., § 1281.2.) Additionally, under California Rules of Court rule 3.1330, the petition must state verbatim the provisions of the written agreement and the paragraph that provides for arbitration or a copy must be physically or electronically attached to the petition and incorporated by reference.

The petitioning party must plead and prove that a prior demand for arbitration under the agreement was made and a refusal to arbitrate. (*Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 640-641.) However, if the responding party has filed suit, that establishes the refusal to arbitrate. (*Hyundai Amco America, Inc. v. S3H, Inc*. (2014) 242 Cal.4th 572, 574, 576-578.)

If the above requirements are met, the court "shall" order the petitioner and respondent to arbitrate the controversy, if it determines an agreement to arbitrate the controversy exists unless it determines that (a) the right to compel arbitration has been waived by the petitioner; or (b) grounds exist for rescission of the agreement; or (c) a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting ruling on a common issue of law or fact (Note this provision does not apply to medical malpractice actions under Code Civ. Proc., § 1295), or (d) the petitioner is a state or federally chartered depository institution that, on or after January 1, 2018, is seeking to apply a written agreement to arbitrate, contained in a fraudulently created agreement. (Code Civ. Proc., § 1281.2.)

It is important to note that "…waiver is not to be lightly inferred and the party seeking to establish it bears a 'heavy burden of proof,' with all doubts resolved in favor of arbitration (citation omitted)." (*Burton v. Cruise* (2010) 190 Cal.4th 939, 945.) Additionally, a court finding a waiver of the right to arbitrate involves a question of fact which is binding on the appellate court if supported by substantial evidence. (*Burton, supra* at 946.)

Tolling

It is worth noting that under Code of Civil Procedure section 1281.12 if the agreement requires that arbitration be demanded or initiated by a party within a certain period of time, the commencement of a civil action by that party based on the controversy acts to toll the applicable time limitations. (See Code Civ. Proc., § 1281.12 for details regarding this limited tolling provision.)

Response or answer

Any person named as a respondent in a petition may file a response thereto. (Code Civ. Proc., § 1290.) If a party properly served with a petition does not file a response, then the allegations of the petition are deemed to be admitted by that party. (Code Civ. Proc., § 1290; also see *Main v. Merrill Lynch, Pierce, Fenner and Smith* (1977) 67 Cal.3d 19, 28.) The time to file a response is governed by Code of Civil Procedure section 1290.6, which dovetails with Code of Civil Procedure section 1290.4.

Expediency

Code of Civil Procedure section 1291.2 requires courts to give petitions to compel arbitration "Preference over all other civil actions or proceedings, except older matters of the same character and matters to which special precedence may be given by law, in the matter of setting the same for hearing and hearing the same to the end that all such proceedings shall be quickly heard and determined."

The petition is to be heard in a summary way in the manner and upon the notice provided by law for the making and hearing of motions, except no less than 10 days' notice of the date set for the hearing in the place shall be given. (Code Civ. Proc., § 1290.2.)

Granting/discretion

Although the court must grant the petition unless one of the conditions under Code of Civil Procedure section 1281.2 is present, the court has broader discretion where pending litigation involves other issues and other parties. The court may delay arbitration when pending litigation between the parties involves overlapping non-arbitrable issues that may make the arbitration unnecessary. (Code Civ. Proc., § 1281.2, subd. (d).)

A court cannot deny a petition for arbitration because the litigation involves some non-arbitrable issues, unless those issues involve a third party who is not contractually required to arbitrate. (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.4th 1399, 1409.)

Where one plaintiff or cross-complainant has claims against several defendants or cross-defendants and has an agreement to arbitrate with only one of them, the court can refuse to compel arbitration and order all parties joined in a single action. (*Mercury Insurance Group v. Superior Court* (1998) 19 Cal.4th 332, 339-340.)

Interesting twist

Another interesting possibility is arbitrating against some defendants and proceeding to trial against the remaining defendants. This is allowed by Code of Civil Procedure section 1281.4, which provides that if a controversy has been ordered to arbitration by a court of competent jurisdiction whether in California or not and has an action or proceeding pending before a California court, then upon motion of a party to such action or proceeding, the court shall stay the action or proceeding until the arbitration is heard, or to an earlier date specified by the court. The same procedure is set for a pending petition to compel arbitration. (Also see *Cuevas v. Truline Corporation* (2004) 118 Cal.4th 56.) This case involved a catastrophic injury to a passenger in a passenger

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vehicle which failed to stop at a stop sign and was then struck by a big rig. Plaintiff would eventually recover a large sum through a bad-faith claim after proceeding to arbitration against the driver and owner of the vehicle and proceeding to trial against the big rig driver and owner.

Avoiding arbitration

If a party has a pending lawsuit with arbitrable and non-arbitrable clauses and a petition to compel arbitration has been granted, a plaintiff may dismiss his/her lawsuit without prejudice under Code of Civil Procedure section 581 and as long as the statute of limitations allows, file a second suit without the arbitrable claims. Since the second suit has no arbitrable claims, the court cannot issue a stay under Code of Civil Procedure section 1281.4. (Also see *Cardiff Equities, Inc. v. Superior Court* (2008) 166 Cal.4th 1541, 1549-1552.)

Consolidation

Multiple arbitration proceedings can be consolidated by the court under certain circumstances under Code of Civil Procedure section 1281.3. The court can consolidate them when;

> (1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third-party; and (2) The disputes arise from the same transactions or series of related transactions; and (3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators....

(Code Civ. Proc., § 1281.3 in pertinent part.)

Code of Civil Procedure section 1281.3 also sets forth procedures for selection of the arbitrator or possible conflicting arbitration provisions. Code of Civil Procedure section 1281.3 does not apply to medical malpractice disputes under Code of Civil Procedure section 1295.

Filing a petition in lieu of an answer

A defendant may file a petition to compel arbitration in lieu of filing an answer to a complaint. This defendant will then have 15 days after any denial of the petition to plead to the complaint. (Code Civ. Proc., § 1281.7.)

Appeal

Code of Civil Procedure section 1294 governs the potential appeal of the denial or dismissal of a petition as well as an order vacating an award or a judgment entered pursuant to these provisions. (Please also see Code Civ. Proc., § 1294.2 which discusses the manner of the appeal.)

Generally, an order compelling arbitration is not immediately available with the appeal actually arising from the ultimate judgment. (*State Farm Fire and Casualty Company v. Harden* (1989) 211 Cal.3d 501, 506.) However, relief may be sought by a writ. (*La Pietra v. Freed* (1978) 87 Cal.3d 1025, 1030-1031; also, *International Film Investors v. Arbitration Tribunal of DGA, Inc.* (1984) 152 Cal.3d 699, 704.)

Voiding arbitration provision for non-payment of fees

Under certain circumstances, in an employment or consumer arbitration where the party who drafted the agreement fails to pay the fees within 30 days of the due date, the drafting party is in material breach of the agreement. The employee or consumer will then have several choices, including withdrawing the claim from arbitration and proceeding to court, or continuing the arbitration hearing. These choices and others are set forth in Code of Civil Procedure sections 1291.97 and 1291.98 as well as Code of Civil Procedure section 1291.99.

Special provisions

There are certain types of arbitrations which have their own guidelines. For example, medical malpractice actions or claims are governed by the provisions of Code of Civil Procedure section 1295, and uninsured and underinsured motorist claims are governed by Insurance Code section 11580.2. Code of Civil Procedure section 1296 pertains to construction contracts with public agencies, in particular dealing with those being supported by law and substantial evidence.

Statement of decision

A party to a motion to compel arbitration may request, before the matter is submitted to the court, that the court issue a statement of decision under Code of Civil Procedure section 1291. The failure to issue a statement of decision may be the basis of an appeal. (*Métis Development LLC v. Bohacek* (2011) 200 Cal.4th 679.)

If you reached this part of this article, you must disagree with my somewhat pessimistic view of the excitement level of the subject. Whether or not this is an interesting topic, it is clearly an important topic, especially in light of the current limitations on getting to a jury trial in the foreseeable future. Justice delayed is justice denied, and as such Zoom arbitrations are certain to become an important avenue to explore to find justice for your clients.


Kramer

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