Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2006 Issue

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When arbitration becomes impossible: When are parties excused from an agreement to arbitrate?

Arbitration: Do-it-yourself tort reform for businesses

At every turn, businesses are including arbitration clauses in their standard-form consumer contracts. Anyone who buys health coverage, trades stocks, opens a bank account, has a cell phone, or applies for a job, is likely required to accept arbitration of disputes as part of the contract. There is no mystery about why this is so. Businesses perceive that arbitration favors their interests because it is likely to deter claims from being made against them and it will reduce the value of the claims that are presented.

Arbitration deters claims because it is expensive. Someone who wants to file a civil lawsuit has to hire a lawyer and may have to pay the costs of depositions and experts. But the costs of having a forum to hear the case are usually nominal. In arbitration, the costs of the lawyer and discovery are the same (unless no discovery is permitted) but the forum costs money – often a lot of money. And that does not even count the cost of the arbitrator. The filing fee for the American Arbitration Association in a standard commercial case is computed as a percentage of the amount at issue, and can amount to thousands of dollars. Arbitrators are typically practicing lawyers or retired judges who charge $400 to $750 per hour.

Armendariz and "repeat players"

Arbitration reduces the value of claims because arbitrators commonly do not make as large of awards to claimants as juries and judges do. Some of this may be the result of the "repeat player" effect. Large businesses tend to need the services of arbitration providers and arbitrators on a regular basis. These providers and arbitrators want the business, and may refrain from taking actions that might jeopardize it, like making a large award to a claimant. The California Supreme Court has acknowledged the repeat-player effect, and its tendency to result in lower arbitration awards to claimants. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 115 [99 Cal.Rptr.2d 745].)

While it is increasingly easy for consumers to get sucked into arbitration, it is difficult to get out. In *Armendariz*, the court imposed certain minimal due-process protections for arbitrations that involve the claims of employees under Fair Employment and Housing Act ("FEHA") (Gov't Code § 12900, et seq.) Under *Armendariz*, employers who wish to require their employees to arbitrate disputes arising under the FEHA, or other similar statutes, must use arbitration agreements that provide for a truly neutral arbitrator, more than minimal discovery, a written award, and the full panoply of relief available under California law. (*Armendariz,* 24 Cal.4th at 102.) In addition, the arbitration system may not impose costs on the employee that exceed those that the employee would incur in court. (*Id*.)

The California Supreme Court extended the protections afforded in *Armendariz* to employees who are pursuing tort claims for wrongful discharge in violation of public policy, (*Little v. Auto Steigler, Inc.* (2003) 29 Cal.4th 1064, 1077 [130 Cal.Rptr.2d 892]) but it refused to extend them even further to arbitrations involving claims by insurance policyholders against their insurers for breach of the insurance policy and insurance bad faith. (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 598 [30 Cal.Rptr. 3d 787].)

All arbitration agreements – not just those subject to heightened scrutiny under *Armendariz* or *Little* – can be challenged as unconscionable and therefore unenforceable. (*See, e.g., Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406 [7 Cal.Rptr.3d 418] [arbitration clause in a construction contract].) But even when courts find that some aspect of the arbitration clause is unconscionable, they are required to sever the offending term and enforce the balance of the arbitration clause unless they determine that the entire agreement is "permeated by unconscionability." (*Armendariz*, 24 Cal.4th at 122.)

Arbitration and the defense of impossibility

Once a court grants a motion to compel arbitration, the case enters what has been called "the twilight zone of abatement," in which the court maintains "merely a vestigial jurisdiction over matters submitted to arbitration." (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1796 [13 Cal.Rptr.2d 678].) This vestigial jurisdiction generally "consists solely of making the determination, upon conclusion of the arbitration proceedings, of whether there was an award on the merits ... or not...." (*Id*.)

But this vestigial jurisdiction also extends to the power to deal with a situation where a case that has been ordered to arbitration cannot proceed. This article explores the remedies available to court and the parties when there is a contention that it has become "impossible" to arbitrate the case. In many cases, the consumer who has been forced into arbitration in the first place, will seek to avoid arbitration entirely and have the case return to court. The defendant will typically try to have the court salvage the situation by ordering the case to proceed to arbitration but in a different manner than in the prior order compelling arbitration, often before a different arbitrator.

A creature of contract

Arbitration is a creature of contract. "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." (*Ajida Technologies, Inc. v. Roos Instruments, Inc*. (2001) 87

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Cal.App.4th 534, 541-542 [104 Cal.Rptr.2d 686].) "[W]e accept appellant's basic premise that a party cannot be compelled to arbitrate without its consent. It is beyond cavil that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (*Id.*, citations omitted.)

Stating the point differently, but to the same effect, the Court in *Zakarian v. Bekov* (2002) 98 Cal.App.4th 316, 322 [119 Cal.Rptr.2d 623], explained, "The heart of the arbitration process is the agreement of the parties to forgo resort to the courts and elect the alternative process of arbitration to resolve specified disputes. Arbitration is consensual in nature. The fundamental assumption of arbitration is that it may be invoked as an alternative to the settlement of disputes by means other than the judicial process solely because all parties have chosen to arbitrate them. [Citations omitted.]."

Arbitration agreements in California are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) That is, California recognizes and approves of such agreements, but they are not given *special* consideration; rather, they are evaluated under the same standards as any other contract which a party seeks to avoid. (*Armendariz,* 24 Cal.4th at 126-127, *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, 906 [104 Cal.Rptr.2d 888].)

Since arbitration agreements are treated like any other contract, they are subject to the same defenses applicable to all contract disputes. (*Fittante v. Palm Springs Motors, Inc*. (2003) 105 Cal.App.4th 708, 713-714 [129 Cal.Rptr.2d 659].) Most commonly, the defenses asserted to enforcement of arbitration agreements are fraud, duress, or unconscionability. (*Id*.) But impossibility of performance would also be a valid defense, just as it would to any contract.

Cases on impossibility of performance

The relevant cases on the defense of impossibility of performance were decided by the California Supreme Court more than 80 years ago, but the principles still apply. The leading case is *H. Hackfeld & Co. v. Castle* (1921) 186 Cal. 53, 57-58 [198 P. 1041], which involved a dispute between the buyer and seller of Hawaiian honey. Their contract provided that shipment would be on a particular route – from Hawaii to the Isthmus of Tehuantepec in Mexico, there connecting to railroads that connected to Atlantic ports, so the honey could be shipped to Hamburg, Germany. Political unrest in Mexico caused the Tehuantepec route to be discontinued. Some honey was shipped via San Francisco and accepted by the buyer, but the buyer refused to accept the bulk of the shipment. The seller sued, and lost, and the California Supreme Court affirmed.

The Court rejected the suggestion that the instruction that the honey was to be shipped via the Tehuantepec route was merely an advisory shipping instruction. The Court explained that, " . . . the mere presence of the provision in the contract would alone indicate prima facie that the provision was part of the contract itself . . . ." (186 Cal. at 57.) The Court held that the provision was material to the contract, "so that the contract could not be performed according to its terms except by shipment by that route." (*Id.*) The Court then determined that the continued existence of the route was a condition of the contract, and that the impossibility of performance in accordance with the contract's terms operated to excuse the promisor's performance. (*Id.*)

The Court relied on 3 *Williston on Contracts*, section 1948, which explained the rule, citing a host of cases applying the rule that impossibility of performance in similar circumstances excuses performance. Hence, a contract to manufacture goods in a particular factory is discharged if the factory is destroyed; a contract to do work on a specific building is discharged if the building is destroyed; a contract to ship goods via a particular ship is discharged if the ship is destroyed, etc. (*Id.* at 58.) The Court also relied on English cases to the same effect.

More recent decisions recognize that when performance in accordance with the contract's terms is impossible, the contract obligation is discharged. (See, e.g., *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co*. (1977) 66 Cal.App.3d 101, 153 [135 Cal.Rptr. 802]; *Ellison v. City of San Buenaventura* (1975) 48 Cal.App.3d 952, 962 [122 Cal.Rptr. 167].)

The options available to courts and parties

So, when does an arbitration become "impossible," and what can a trial court do when it does? The most common situations are when the arbitration provider, that is, the organization that provides the arbitral forum, refuses to administer the arbitration, or when the particular arbitrator appointed to conduct the arbitration is unable or refuses to proceed. Arbitrators may have other commitments that intervene, or they may become ill, or otherwise may be unable to proceed. Arbitration providers can go out of business, or may adopt rules or policies that are inconsistent with the terms of the arbitration clause that has been enforced, or may be subject to new legal requirements that they cannot satisfy, or that they do not wish to comply with.

Obviously, an arbitration provider or an arbitrator will refuse to proceed if one party has refused to pay the required fees. Impossibility requires at the threshold that the party claiming that it is impossible to proceed has not unilaterally created the situation. Although these difficulties might not occur frequently, they do occur often enough that there are published decisions that address the situation.

One example of an arbitration provider refusing to proceed is *Alan v. Superior Court (UBS Painwebber*) (2003) 111 Cal.App.4th 217 [3 Cal.Rptr.3d 377]. The dispute in *Alan* involved claimed mismanagement of an investors' accounts. Like most actions involving securities, the investment agreements signed by the investor provided for all disputes to be arbitrated by the National Association of Securities Dealers ("NASD"). More specifically, the agreement provided for arbitration by one of the self-regulatory agencies (SROs) in the security industry, such as the NASD or the New York Stock Exchange ("NYSE"). The claimant did not specify which SRO should hear the case, and the defendant selected the NASD. (*Alan*, 111 Cal.App.4th at 223.) Before the dispute developed, California

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imposed new ethical standards for arbitrators, and the NASD refused to hear any cases in California unless the parties would agree to waive the new ethical standards. (111 Cal.App.4th at 222.) The NASD did agree to hear the case outside of California, as an alternative to a waiver. (*Id*.)

A similar situation was presented in *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107 [12 Cal.Rptr.3d 663], which involved an employment dispute. There, the arbitration agreement specified that the arbitration would be conducted by the American Arbitration Association ("AAA") under its rules. But AAA refused to administer that arbitration because the arbitration agreement did not meet its rules and due-process protocols. (*Id*. at 112.)

The failure to comply with AAA's due-process protocols can arise outside of the employment context as well. AAA has also adopted a due-process protocol in the health care and health insurance areas. Because so many businesses incorporate AAA arbitration into their arbitration agreements, it is important for plaintiffs' counsel to be familiar with AAA's due-process protocols. They can be viewed on its website, *www.adr.org*.

With respect to health care, effective January 1, 2003, AAA announced that it would no longer conduct arbitrations in California arising out of healthcare disputes unless the parties have entered into an agreement to arbitration *after* their dispute developed. In other words, AAA has refused to continue to participate in the enforcement of pre-dispute adhesive arbitration clauses in health plans. AAA's position is explained on its website this way:

AAA Health Care Policy Statement

> As a result of a review of its caseload in the health care area, the American Arbitration Association has announced that it will no longer accept the administration of cases involving individual patients with a post-dispute agreement to arbitrate. In order to provide for an orderly transition, this change will become effective on January 1, 2003.
>
> AAA, the world's largest provider of alternative dispute resolution services, has also determined that there will be no change in the administration of cases in the health care area where businesses, providers, health care companies, or other entities are involved on both sides of the dispute.
>
> Distinguishing a patient undergoing health care treatment from other situations involving an individual, AAA has determined that they will continue to administer pre-dispute agreements to arbitrate in all areas outside of the health care field, as long as there are appropriate due process safeguards as defined by the courts.

The impetus for this change was the report of a joint commission on healthcare dispute resolution established by AAA, the American Medical Association and the American Bar Association in 1997. The Commission's final report, issued in 1998, strongly supported the use of arbitration in the health care area, *provided that* the consumer had given consent to arbitrate the dispute *after* the dispute arose. The joint commission's final report is listed on the AAA website as the AAA's "Healthcare Due Process Protocol."

For example, on page 10 of the report, in the section describing the various ADR models that were considered, the discussion of arbitration includes the following statement: "[T]he Commission's unanimous view is that in disputes involving patients and/or plan subscribers, binding arbitration should be used only where the parties agree to same after a dispute arises."

The AAA's Healthcare Due Process Protocol is based on 10 principles for the resolution of healthcare disputes. Principle 3 is "Knowing and voluntary agreement to use ADR." Under this principle, the protocol explains, "The agreement to use ADR should be knowing and voluntary. Consent to use an ADR process should not be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should only be used where the parties agree to do so after a dispute arises."

Under its Health Care Policy Statement, when a case arising out of a health-care dispute, such as a dispute between a health insurer and its policyholder, has been sent to AAA arbitration, AAA will send each party a new form asking for consent to have AAA administer the arbitration. Unless both parties sign the form, AAA will not proceed with the arbitration.

Does this mean that a plaintiff can refuse to sign the form, invoke the impossibility doctrine, and ask the court to vacate its prior order compelling arbitration? Or can the court simply find a new arbitration provider who is willing to proceed on the basis of a pre-dispute arbitration agreement? The cases are mixed, but the recent trend is clear – if the arbitration clause specifies the arbitral forum, such as AAA, and that forum becomes unavailable, then the court will not require arbitration of the dispute, even if the plaintiff could break the impasse simply by signing a new agreement.

The California Arbitration Act

The California Arbitration Act seems to anticipate these issues. Section 1281.6 of the Code of Civil Procedure provides:

> If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, *or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator*. (Emphasis added.)

Does the California Arbitration Act provide a solution? At first glance, it would seem that section 1281.6 would apply in either of the situations described above; that is, when an arbitration provider refuses to proceed, (that is, when the "agreed method fails") or when an arbitrator fails to act. The court in *Richards v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*

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(1976) 64 Cal.App.3d 899, 901-902 [135 Cal.Rptr. 26] relied on section 1281.6 after it had held that the arbitration clause at issue was unenforceable. *Richards* arose out of arbitration clause in a securities brokerage contract. The arbitration clause provided that the arbitration would be conducted by the NYSE, in New York, under the rules of the NYSE, which could be changed from time to time, or in reference to a particular dispute. (*Id.*) The trial court held that this agreement was unenforceable, and the Court of Appeal affirmed. In particular, it was concerned with the provision allowing the rules of the arbitration to be changed with reference to a particular dispute.

While the court refused to enforce the arbitration agreement as written, it did not hold that the dispute could be resolved in court. Rather, the court explained:

> This [the unenforceability of the arbitration agreement] does not necessarily mean that on a proper showing Merrill Lynch would not be entitled to arbitration under more conventional auspices than the NYSE rules. Having in mind the strong policy in favor of arbitration (see *Madden v. Kaiser Foundation Hospitals*, 17 Cal.3d 699, 706, 131 Cal.Rptr. 882, 552 P.2d 1178), the agreement to arbitrate as such — if otherwise found to be untainted — appears to be severable from the incorporation of the NYSE rules. If the naked agreement to arbitrate is valid, and the parties cannot agree on a method of proceeding, the solution is provided by statute. (See Code Civ.Proc., ss 1281.6, 1282-1284.2.) (*Id.*, 64 Cal.App.3d at 906.)

A decade later, another court faced with the standard arbitration clause in a securities brokerage contract reached the identical result. In *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc; 3433; 3433*. (1986) 183 Cal.App.3d 1097 [228 Cal.Rptr. 345] the court held that the arbitration clause was unconscionable and unenforceable, but relying on section 1281.6 of the Code of Civil Procedure and *Richards*, it directed the trial court to simply appoint a new arbitrator in the event that the parties could not come to an agreement on their own about who should arbitrate the case and what the applicable rules would be. (*Id*. at 1107.)

More recent decisions have taken a different approach. In *Alan*, the court rejected the argument that section 1281.6 would allow the trial court to appoint a new arbitrator when the NASD refused to proceed with the case. It acknowledged that this statute would apply "if the obstacle to arbitration can be resolved by the appointment of an arbitrator." (*Id.*, 111 Cal.App.4th at 228-229.) But it determined that the refusal of the specified arbitral forum to proceed was not equivalent to the failure of an arbitrator to act, and could not be cured by appointing a new arbitrator under section 1281.6. (*Id.*) Rather, in the court's view, the arbitration provisions would "fail in their entirety" without NASD participation, because the forum selection provisions that specified that the arbitration would be conducted by the NASD was an integral part of the arbitration agreement. (*Id.*) The court explained, "[A]n agreement to arbitrate before a particular forum is an integral term of a contract as any other, which courts must enforce." (*Id.*, at 228, citing, *Wall Street Associates v. Becker, Paribas, Inc.* (S.D.N.Y. 1993) 818 F.Supp. 679, 683.) The *Alan* court relied heavily on *In re Salomon, Inc. Shareholders Derivative Lit.* (2d Cir. 1995) 68 F.3d 554. In *Salomon, Inc.*, shareholders brought a derivative action against ex-Salomon officers, who had signed agreements providing for the arbitration before the New York Stock Exchange ("NYSE") of any dispute arising from their employment. The defendants moved to compel arbitration before the NYSE, but the NYSE refused to hear the case, relying on a provision in its bylaws allowing it to decline to hear cases. The case returned to the district court, which refused to send the case to arbitration in another forum, and which instead set the case for trial. The defendants appealed, and the Second Circuit affirmed the district court, explaining:

> Because the parties had agreed that *only* the NYSE could arbitrate any disputes between them [the district court] properly declined to appoint substitute arbitrators and compel arbitration in another forum. . . . The arbitration agreements here required that any arbitration be before the NYSE, and not before any other arbitral forum. Accordingly, we will not disturb [the trial court's] decision to proceed to trial." (*Salomon, Inc.*, 68 F.3d at 557-561, cited by *Alan v. Superior Court*, 111 Cal.App.4th at 226.)

Ironically, despite its holding that that arbitration agreement providing for a NASD forum was "integral," the *Alan* court nevertheless stopped short of ordering the trial court to proceed with the case, as in *Salomon*. Rather, the court held that the NASD's offer to hold the arbitration in a location outside of California might be sufficient, and directed the trial court to evaluate whether arbitration by the NASD was "proper" in the out-of-state forum it selected. Only if the court found that the forum was not "proper" could the trial court refuse to enforce the arbitration agreement entirely and decide the case itself. (*Id*. at 230.)

When the agreed-upon arbitral forum is unavailable, there can be no arbitration

Two cases that followed *Alan* did not hesitate to find that the refusal of the arbitration provider to administer the arbitration provided a basis for the trial court to put the case back on its docket. In *Martinez v. Master Protection Corp.*, 118 Cal.App.4th at 107, after the AAA refused to hold the arbitration, the plaintiff moved to revive the litigation and have the matter resolved in court. The trial court denied the motion, and appointed a retired judge to arbitrate the dispute. The arbitrator ruled against the plaintiff, and the trial court confirmed the award. The plaintiff appealed, and the Court of Appeal reversed, on twin grounds – (1) that the arbitration agreement was unconscionable and could not be enforced, and (2) that the trial court lacked the authority to appoint an arbitrator after AAA refused to conduct the arbitration. (*Martinez*, 118 Cal.App.4th at 120.) Relying on *Alan*, the court explained:

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The parties in this case agreed to an AAA forum, but AAA refused to participate. 'An agreement to arbitrate before a particular forum is as integral a term of a contract as any other, which courts must enforce.' [Citing *Alan*, 111 Cal.App.4th at 228.] Thus, if AAA, the forum selected by the parties – declines to hear the matter, the dispute is to be tried in court.'" (*Martinez*, 118 Cal.App.4th at 121, citing *Alan*, 111 Cal.App.4th at 224.)

Most recently, this issue was addressed in *Provencio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th 1028, 1032 [23 Cal.Rptr.3d 524].) There, the arbitration agreement provided for NASD arbitration. But under the NASD rules, if the brokerage house against whom the claim is made is no longer a NASD member, the NASD will not conduct the arbitration unless the customer agrees to arbitrate the claim after the claim has arisen. (*Provencio*, 125 Cal.App.4th at 1032, 1033 n.5.) Since the investor refused to consent to arbitration, the trial court refused to enforce the arbitration agreement. The defendant appealed, and the Court of Appeal affirmed. The Court explained:

> When the parties to a contract agree to arbitrate any disputes before a particular forum, that provision becomes an integral part of their contract. If that forum is not available to hear the dispute, then a petition to compel arbitration may not be granted. (*Id.*, 125 Cal.App.4th at 1032, citing *Alan*, 111 Cal.App.4th at 224, 227-228.)

The Court held that since the investor had not provided the NASD with its written consent to arbitrate the claim against the defunct broker, the arbitration before the NASD was not possible and the motion to compel arbitration could not be granted. (*Id.* at 1033.)

It is important to note that in *Alan* and in *Provencio*, it was not truly impossible for the arbitration to proceed as ordered by the court. In both cases, the plaintiffs had the option of signing an agreement that would have removed the obstacle that was keeping the arbitration from moving forward. In *Alan*, the plaintiff could have waived the application of the new California ethics rules for arbitrators; in *Provencio*, the plaintiffs could have agreed to allow the NASD to proceed even though their brokerage house was no longer a member of NASD. As the *Provencio* court explained, "Strictly speaking, therefore, the issue is not whether NASD is available as a forum: it is available if the respondents choose to make it available." (*Provencio*, 125 Cal.App.4th at 1033.) Yet, in each case, the courts proceeded as if the forum specified in the arbitration agreement was truly unavailable. The lesson is that the arbitration agreement has to be enforced in accordance with its terms. If the parties' original agreement is not deemed sufficient by the forum to allow it to proceed with the arbitration, neither party can be required to execute what is, in essence, a new agreement to arbitrate on different terms.

Alan, Martinez, and Provencio all hold, either expressly or implicitly, that when an arbitration provider refuses to administer an arbitration, the problem cannot be remedied by resort to section 1281.6 of the Code of Civil Procedure. How then can these cases be squared with the earlier decisions in *Richards v. Merrill, Lynch* and *Lewis v. Merrill, Lynch*? One answer is that in *Richards* and in *Lewis*, the forum became unavailable because the court held that the arbitration agreement was unenforceable; in the trio of later cases, the arbitration clause was perfectly valid, but the forum was unavailable. The cases did not, therefore, present the same issue for resolution.

Alan also regarded *Lewis* as a case where the arbitration agreement did not actually make the specified forum the exclusive forum, and so therefore did not find that it was an integral part of the agreement. Specifically, the *Alan* court distinguished *Lewis* with the following parenthetical: "dictum stating that arbitral fora contained in arbitration provision were not exclusive arbitral fora; no analysis of whether choice of fora was integral term of agreement." (*Alan*, 111 Cal.App.4th at 229.) Hence, the *Alan* court did not feel the need to refuse to follow *Lewis*, it simply found that the case before it presented different facts that dictated a different result.

Because *Alan, Martinez, and Provencio* are more recent than *Lewis* and *Richards*, and far more specific in explaining why section 1281.6 cannot be used to alter the arbitration agreement that the parties originally agreed to, there is not a true split of authority that would allow the trial court to choose whichever strand of authority it found most persuasive. Accordingly, when faced with a motion to vacate an order compelling arbitration because the arbitration provider's refusal to proceed rendered it "impossible" to arbitrate the dispute, the trial court should follow *Alan, Martinez, and Provencio*, excuse the parties from arbitration, and restore the case to its docket. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 456 [20 Cal.Rptr. 321].)

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