

# Business Brief

## Business and Client Advisory



### **ARE YOUR EMPLOYEE ARBITRATION AGREEMENTS FAIR?**

The fear of being sued by a current or former employee in California is very real for many employers. Since arbitrators and the arbitration process has been viewed as less liberal and potentially cheaper than the California judicial system, many employers have required their employees to sign mandatory arbitration clauses. These clauses may be part of the application for employment, an employment agreement or a separate document. Recent California decisions have ruled that mandatory arbitration clauses in employment agreements may not be enforceable.

Recent cases, three involving Circuit City Stores, Inc.<sup>1</sup> and two involving Countrywide corporations<sup>2</sup> have found that the arbitration clauses contained in these agreements were “so one-sided as to be unconscionable”. In short, unless the arbitration clauses are more than fair to the employee, they may not be enforceable.

Examples of unfair provisions in arbitration agreements or clauses are:

- Requirements that the employee, but not the employer, submit all disputes to arbitration
- Those that limit the relief available to an employee to that which is less than would normally be available under federal or state laws
- Those that require the employee to split the arbitration costs
- Those that impose a shorter period in which to bring a claim against the employer (statute of limitations) than that provided under law
- Those that are signed as a condition to employment

Not all news from the court is bad news. The courts have found that an arbitration provision can be enforceable if the terms are fair, there is separate consideration for the arbitration agreement and, the employee had a meaningful time to consider and opt out of the arbitration provision.

If you wish to increase the likelihood that your employee disputes may be settled by arbitration rather than the courts, we suggest that you have your arbitration agreements reviewed. This review should occur prior to an employee dispute.

<sup>1</sup> *Circuit City Stores, Inc. v. Adams* (2002) 279 F3d 889; *Circuit City Stores, Inc. v. Ahmed* (9th Circuit 2002) 283 F3d 1198; and *Circuit City Stores, Inc. v. Najd* (9th Cir 2002) 294 F3d 1104

<sup>2</sup> [*Ferguson v. Countrywide Credit Indus. Inc.* (9th Cir 2002) 298 f3d 778 and *Mercuro v. Superior Court (Countrywide Sec. Corp.)* (2002) 96 CA4th 167, 116 CR2d 671]

## DO LIMITED PARTNERS HAVE RIGHTS?

Imagine you are a limited partner in a California limited partnership. What happens when a general partner is believed to be engaging in grossly negligent or reckless conduct, competing with the limited partnership, or otherwise violating the general principles of good faith and fair dealing in business? *The California Corporations Code* delineates the basic legal rights of all partners, and allows a limited partner to make claims against a general partner, which may include:

**Breach of Fiduciary Duty:** a general partner in a limited partnership has a legal duty of loyalty and care, of good faith and fair dealing to a partnership. Such fiduciary duties cannot be negotiated away, nor can the standards of duty be unreasonable, in a limited partnership agreement.

**Tort:** conversion by a general partner of the limited partnership's property, for example, or conspiracy by a general partner to harm a limited partner is illegal.

**Rescission:** inducement of a limited partner to enter into a limited partnership agreement by fraud or misrepresentation is illegal and may render that agreement void.

The foregoing list contains only a few examples of the causes of action available to an aggrieved limited partner in California. Legal remedies available to a prevailing limited partner include, but are not limited to: injunctive relief, formal dissolution of the limited partnership, the appointment of a receiver, and other preliminary, provisional, temporary or permanent remedies.

Limited partners in a California limited partnership have rights. If you have any questions regarding your specific rights as a California limited partner, please contact this office.

## **ALTERNATIVE DISPUTE RESOLUTION: PRIVATE JUDGES**

The most common ways to resolve contractual and other business disputes are through court litigation and binding contract arbitration. Litigation usually involves substantial time and expense with generally unlimited rights to discovery. Therefore, it may be impractical to resort to litigation, unless the amount in dispute is at least \$100,000. Binding arbitration may be less time-consuming and the discovery may be limited, but there may be substantial administrative costs, and, unlike a court judgment, an arbitrator's decision is final and may not be appealable, even if the award is based on an incorrect interpretation of the law.

An increasingly popular alternative to litigation or binding arbitration is the use of a private judge, who is paid by both parties to adjudicate all, or a portion of, a case. In instances where litigation is already pending, the parties may have a temporary judge appointed under Article VI, 21 of the California Constitution, or parties to a contract may provide in the agreement that future disputes arising under the contract shall be resolved by a private judge (or "general referee"), under California Code of Civil Procedure Section 638. In either case, the parties may define the procedures governing the proceedings before the private judge, including discovery, and control the time and place of the proceedings. A private judge need not be a lawyer or judge, so parties may, for example, appoint an accountant to adjudicate financial disputes, when it is deemed appropriate. In contrast to arbitration, a temporary judge has full judicial power, including the power to hold parties in contempt, and a judgment rendered by a temporary judge enjoys the same right of appeal as that which is afforded to judgments rendered by a regular judge.

The primary advantages to using a private judge are: (1) the ability to bypass a crowded civil docket, so the parties can have their dispute heard quickly and at times that are convenient for them; (2) the general confidentiality of the proceedings, (but please note that certain proceedings before a private judge may be open to the public); (3) the prompt resolution of a dispute, without having to forego their right of appeal, and; (4) the ability to modify procedural and evidentiary rules that would normally govern proceedings before a sitting judge, as a means to mitigate litigation costs.

It is important to note that when using a private judge: (1) all parties waive their right to an actual court trial, and the right to present their case to a jury; (2) the proceedings may not be completely confidential, and (3) the final decision is not subject to appeal, which may be construed as a disadvantage, depending on the situation.

When preparing a contract, the parties should carefully consider whether to include provisions for private judging as an alternative means to dispute resolution. Please contact this office for more information regarding private judging and the options which may be available to you.

## **OFF-THE-SHELF COMPUTER SOFTWARE TEMPORARILY ELIGIBLE FOR EXPENSING UNDER IRC SECTION 179**

IRC Section 167(f)(1) provides that capitalized computer software costs, other than computer software to which IRC Section 197 applies, are recovered ratably over 36 months. In lieu of depreciation, a taxpayer generally may elect under IRS Section 179 to currently deduct a specified amount of the cost of qualifying property placed in service for the taxable year. Qualifying property generally includes depreciable tangible personal property that is purchased for use in the active conduct of a trade or business. Off-the-shelf computer software is generally not qualifying property, because in general, computer software is intangible property.

**Act Section 202(c) amends Section 179(d)(1), providing that off-the-shelf computer software placed in service in taxable years beginning 2003, 2004 and 2005 is qualifying property for purposes of IRC Section 179. This amendment is effective for taxable years beginning after December 31, 2002.**

### **For further information, please contact us at:**

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