

Alternate Form of Contractual Waiver of Jury Trial May Also Be Unenforceable in California

By June Lin

Introduction

Imagine a commercial contract that contains an express provision in which the parties unambiguously waive their respective right to jury trial on any action on the contract. Such a provision, although enforceable in the majority of state and federal jurisdictions, would not be enforceable in California. Suppose the contract goes on to provide that in the event the jury trial waiver is not enforceable, the parties agree that controversies arising out of the contract will be resolved by a “reference proceeding” in state or federal court in accordance with the provisions of Sections 638 *et seq.* of the California Code of Civil Procedure, which means that the matters will be heard and decided not by a jury but by a referee, i.e. a retired judge selected by mutual agreement of the parties. This provision would provide an alternate way for the parties to contractually agree to waive their right to jury trial. Would such a provision be enforceable in California? Possibly not, at least since February 9, 2011.

Unenforceability of jury trial waivers

A previous article by this author¹ discussed the unenforceability of pre-dispute contractual jury trial waivers in California following the 2005 case *Grafton Partners L.P. v. Superior Court*². In that case the California Supreme Court surprised the business community by holding that prelitigation contractual jury waivers are unenforceable, overturning previous lower

¹ See “Contractual Waivers of Jury Trial in California” in the Primerus Business Law Institute e-Newsletter dated June 2010.

² 36 Cal. 4th 944 (2005).

court holdings to the contrary, and bringing California out of step with the authority in most other state and federal jurisdictions which have permitted predispute jury waivers. The Supreme Court distinguished its holding from the long history of cases upholding the validity of arbitration agreements, in which parties are essentially waiving their right to jury trial prior to the filing of an action. The Court pointed out that unlike predispute jury waivers, predispute arbitration agreements are specifically authorized by statute, expressing a strong state policy favoring arbitration. There was no comparable state policy favoring court trials, as opposed to jury trials, in the judicial forum. The Court found it rational for the State Legislature to promote the use of arbitration by permitting predispute agreements, while not according the same advantage to jury trial waivers, given arbitration conserves judicial resources more than the selection of a court trial over a jury trial.

Pre-dispute reference agreements

Subsequent to the *Grafton* case, some contracting parties in California have included provisions in their contracts stating that if a contractual jury trial waiver is unenforceable, the parties agree that disputes will be resolved by a reference proceeding in accordance with California Code of Civil Procedure Section 638 *et seq.* Such agreements are known as “reference agreements.” Section 638 states, “A referee may be appointed...upon the motion of a party to a written contract...that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:

(a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.

(b) To ascertain a fact necessary to enable the court to determine an action or proceeding.”

Section 638 would appear to allow parties to contractually waive their right to jury trial, even after the *Grafton* decision, by allowing parties to agree to submit disputes to a referee. However, on February 9, 2011, in the case *Tarrant Bell Property, LLC v. Superior Court (Abaya)*³ the California Supreme Court held that a trial court has the discretion to refuse to enforce pre-dispute reference agreements. The Court based its decision on the wording of Section 638 which states “a referee *may* be appointed” (Italics added). The Court stated that under well-settled principles of statutory construction, the word “may” would ordinarily be construed as permissive, while “shall” would be construed as mandatory. Section 638 therefore did not require the trial court to appoint a referee. The Court also found the legislative history of Section 638 to be consistent with its decision, as the history showed the Legislature consciously rejected language that would have imposed on courts a mandatory duty to enforce pre-dispute reference agreements. Instead, the Legislature consciously chose permissive language giving courts discretion to refuse to enforce such agreements.

The *Tarrant* case involved about one hundred lessees and residents of a mobilehome park who sued the park’s owners for failing to properly maintain the park’s common areas and facilities. Some of the lease agreements contained reference agreements, others did not. The trial court decided against enforcing the reference agreements for those plaintiffs whose lease agreements contained them because of the possibility of conflicting rulings on common issues of law and fact. According to the trial court, ordering two groups of plaintiffs to try their cases in separate but parallel proceedings would not reduce the burdens on the court or the parties, result in any cost savings, streamline the proceedings, or achieve judicial efficiencies of any kind. In this case, enforcing the reference agreements would result in a duplication of effort, increased costs, and potential delays in resolution, which would not promote the purposes of Section 638.

³ 11 C.D.O.S. 1894.

Conclusion

After the *Grafton* and *Tarrant* decisions, parties contracting in California must be aware that pre-dispute contractual waivers of jury trial, even if knowingly and voluntarily entered into, are unlikely to be enforced by a California court, and reference agreements in which parties agree to refer disputes to a judicial referee (rather than have a jury trial) may be enforceable but only at the discretion of the trial court.

This article is intended to provide a general summary and should not be construed as a legal opinion nor a complete legal analysis of the subject matter. June Lin is an attorney at Niesar & Vestal LLP in San Francisco, a law firm specializing in business law and corporate finance.