

Arbitration and the California Residential Purchase Agreement

Although an attempt to engage in mediation is required in the standard residential purchase agreement (CAR form RPA-CA) to recover attorney's fees, it is not required that the parties initial and thereby agree to the binding arbitration provision. Whether the parties agree to arbitration is one of the most important decisions that the parties must make in preparing and responding to the RPA-CA, and it can have significant consequences. Agents are cautioned against giving legal advice to their clients regarding the arbitration provision, and this article can be provided for information purposes regarding this important provision.

The typical arguments in favor of the arbitration provision is that it is quicker, and less expensive than a legal action. But the time required, after payment of a significant fee to the arbitration provider, can be delayed by the parties with disputes over the selection of the arbitrator, discovery, location of the hearing, and timing of the hearing. These disputes may require adjudication by the arbitrator who may be charging \$500-\$700 per hour. After the arbitration decision, the parties may need to have the Court affirm and enforce the decision.

I recently filed a legal action in January 2018 and went to trial in late October, winning the court trial for over \$300,000, without incurring the expense of a jury or court reporter, or any additional fee to the Court for the judge's considerable time in reaching a decision. So an arbitration is not necessarily quicker or less expensive than a Superior Court action.

There are many reasons not to initial the arbitration provision, including the arbitrator does not have to follow California law, discovery may be limited, the resolution of litigation disputes may be more expensive than Court hearings, the parties waive their right to appeal, and the parties can always agree to arbitration as an alternative to the Court action.

Many times a party to the sale transaction will need to preserve the status quo of the property's title by recording a notice of pendency of action (lis pendens), and thereby avoid a sale to a bona fide buyer or further encumbrance by a bona fide lender.

The RPA-CA provides a preservation of actions provision that allows the filing of a Court action to preserve a statute of limitations, or to enable the recording of a lis pendens or other provisional remedy, or the filing of a mechanic's lien.

These are important rights, but if the parties can file a Court action to obtain those remedies including recording a lis pendens, why agree to arbitration so that after a Court action is filed to obtain those remedies, the dispute must be arbitrated anyway with the loss of the benefits of a Court action and an increased cost?

In the recent decision of *Zhang v. Jenevein*, the California Court of Appeal added an additional reason to refuse an arbitration provision in a contract. After an arbitration, Zhang filed a Court action for invasion of privacy and eavesdropping on or recording confidential communications in violation of Penal Code §§ 632 and 637.2. Defendant filed a special motion to strike and the trial court denied the motion, ruling that neither making the recordings nor using them as evidence in the arbitration was protected activity because the arbitration was not a judicial or official proceeding under the motion to strike statute.

The Court of Appeal found that the trial court was correct, because recording the conversations and using the recordings in the arbitration were not in connection with a judicial or official proceeding authorized by law, and they were not protected activities subject to a special motion to strike.

The arbitrators awarded over \$65 million in damages, attorneys' fees, and expenses, and a federal district court affirmed the arbitration award, with an appeal of that decision. Meanwhile, after the arbitrators issued their award, Zhang filed the Court action alleging a cause of action for eavesdropping on or recording confidential communications under the Penal Code.

A moving defendant's initial burden in making a special motion to strike showing the plaintiff's cause of action arises from protected activity. The defendant argued the causes of action against him arose from protected activity because the recording of the conversations were to gather evidence in anticipation of, and use in, the arbitration, and an arbitration is a "judicial proceeding" or an "official proceeding authorized by law" within the meaning of that subdivision.

The Court of Appeal held that California law, however, is to the contrary. Private contractual arbitration is not a judicial proceeding under the motion to strike statute, an arbitrator is not a "judicial body", and an arbitration proceeding is not an "official proceeding". Demanding private arbitration is an "unprotected act".

Contractual arbitration is not a "judicial proceeding"; it is an alternative dispute resolution process that bypasses judicial proceedings. Arbitration is alternative to, and independent of, the judicial forum.

As a general rule, "private contractual arbitration" is not an "official proceeding authorized by law". For example, unlike hospital peer review, arbitration is not part of a comprehensive statutory licensing scheme and is not reviewable by administrative mandate. And unlike mandatory fee arbitration, private arbitration is not required by statute.

Defendant cited the decision in *Manhattan Loft, LLC v. Mercury Liquors, Inc.*, which held that a party to an arbitration involving real property could not record a lis pendens because "a lis pendens may only be filed when an action in a court of law is pending." The appellate court in *Manhattan Loft* reversed an order granting a

special motion to strike a cause of action for slander of title against the parties that had improperly recorded the lis pendens because the court concluded the plaintiffs had shown a probability of prevailing. Before reaching that conclusion, however, the court in *Manhattan Loft* stated the filing of a notice of lis pendens falls squarely within the definition of protected activity. But the filing of a lis pendens falls squarely within the statutory definition of protected activity only if it was filed in connection with a pending Court action because communications in connection with matters related to a lawsuit come within the scope of the litigation privilege and are acts arising from the protected activity.

But this is not necessarily true for acts, like the filing of lis pendens, in connection with proceedings that are not legislative, executive, or judicial, or other official proceedings authorized by law, such as private arbitration.

Defendant argued that conduct in connection with arbitration involves the exercise of the right of petition because it is closely related to actual or potential litigation in the courts. Again, the Court of Appeal found that California law is to the contrary. That a party to an arbitration agreement may resort to the courts to compel arbitration or confirm or enforce an arbitration award does not convert the arbitration proceeding into a judicial or official proceeding within the meaning of the motion to strike statute.

Statements made in arbitration may be protected by the litigation privilege. But statements protected by the litigation privilege are not necessarily protected by the motion to strike statute. The litigation privilege and the motion to strike statute are substantively different statutes that serve quite different purposes

Lessons:

1. Agreeing to arbitration in the RPA-CA has important consequences, and careful consideration should be given to the loss of significant rights that exist in a Court action, before agreeing to arbitration.
2. A Court action may be filed to recording of a lis pendens under the RPA-CA and it is considered protected activity, but an arbitration alone is not sufficient to have the recording of a lis pendens deemed a protected activity.
3. If a Court action is necessary to record a lis pendens and have it deemed protected activity, agreeing to arbitration that will require both the Court action and arbitration may not be the best decision in many disputes.
4. A party should not violate the Penal Code by an invasion of privacy and eavesdropping on or recording confidential communications, and if it is done, it should only be in connection with a Court action, as doing so in an arbitration proceeding will not allow the filing of a successful special motion to strike.

