

## **RESOLUTION 04-08-2007**

### **DIGEST**

#### Arbitration: Resolving Breakdowns in the Arbitrator Selection Process

Amends Code of Civil Procedure section 1281.6 to provide a judicial remedy for breakdowns in the arbitrator selection process.

### **RESOLUTIONS COMMITTEE RECOMMENDATION**

#### **APPROVE IN PRINCIPLE**

#### History:

No similar resolution found.

#### Reasons:

This resolution amends Code of Civil Procedure section 1281.6 to provide a judicial remedy for breakdowns in the arbitrator selection process. This resolution should be approved in principle because it allows for a fair alternative for selecting an arbitrator when the parties can not agree on a selection process.

Currently, there is no clearly stated remedy on how to proceed when one party objects to the selected arbitrator or the method used to select the arbitrator before the arbitration hearing. This means that a party who objects to the selected arbitrator or to the selection process must nonetheless proceed through the arbitration process with these issues still unresolved. Those parties must incur expenses in completing an arbitration with an unwanted arbitrator whose award may be judicially attacked after the arbitration proceedings are complete. The proposed amendment alleviates those problems by providing that when a party objects to a selected arbitrator or to the selection process, the issue must be resolved by the court prior to commencement of the arbitration hearing.

Code of Civil Procedure section 1281.6 already provides that when there is no “agreed method” in selecting an arbitrator or “the agreed method fails or for any reason cannot be followed,” the court “shall appoint the arbitrator” upon petition by a party to the arbitration. However, that section does not address the specific issues of what should occur when a party objects to an arbitrator or the selection process. This resolution would resolve that issue.

### **TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1281.6 to read as follows:

- 1 §1281.6
- 2       If the arbitration agreement provides a method of appointing an arbitrator, that
- 3 method shall be followed. If the arbitration agreement does not provide a method for
- 4 appointing an arbitrator, the parties to the agreement who seek arbitration and against whom
- 5 arbitration is sought may agree on a method of appointing an arbitrator and that method shall

6 be followed. In the absence of an agreed method, or if the agreed method fails or for any  
7 reason cannot be followed, or when an arbitrator appointed fails to act and his or her  
8 successor has not been appointed, the court, on petition of a party to the arbitration  
9 agreement, shall appoint the arbitrator.

10 When a party objects that the method of appointing an arbitrator has not been  
11 followed, and such objection is not resolved prior to the commencement of the arbitration  
12 hearing, on petition of a party to the arbitration agreement, the court shall either appoint an  
13 arbitrator, or alternatively, shall rule on the objection prior to the commencement of the  
14 arbitration hearing. When a petition is made to the court to appoint a neutral arbitrator, the  
15 court shall nominate five persons from lists of persons supplied jointly by the parties to the  
16 arbitration or obtained from a governmental agency concerned with arbitration or private  
17 disinterested association concerned with arbitration. The parties to the agreement who seek  
18 arbitration and against whom arbitration is sought may within five days of receipt of notice  
19 of the nominees from the court jointly select the arbitrator whether or not the arbitrator is  
20 among the nominees. If the parties fail to select an arbitrator within the five-day period, the  
21 court shall appoint the arbitrator from the nominees.

(Proposed new language underline; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing Law: Existing law does not provide a clear judicial remedy when a party to the arbitration objects to the selected arbitrator or the method used to select the arbitrator prior to commencement of the arbitration hearing.

This Resolution: The proposed resolution would require objections to the selection of an arbitrator to be completely resolved prior to the commencement of the final arbitration hearing, so that parties are not forced to incur the expense of completing an arbitration when the selection and authority of the arbitrator are still at issue.

The Problem: Where a party to an arbitration objects to the selection of the Arbitrator or the method of selecting an arbitrator prior to the completion of the Arbitration, and such objection is not resolved prior to commencement of the arbitration hearing, it leaves the process open for gamesmanship. A judicial declaration is a necessary and proper means for resolving a parties' dispute over the selection of an arbitrator. The problem and the need for a statutory remedy are exemplified in the case of *Brook v. Peak International, Ltd* (5<sup>th</sup> Cir. 2002) 294 F.3d 668. Plaintiff ("Brook") and his former employer ("Peak International") arbitrated their contractual dispute before an arbitrator selected by AAA. The arbitrator ruled in favor of Peak and Brook moved to vacate the award on the grounds that the arbitrator was without power to decide the dispute because AAA had not followed the selection procedure set forth in the parties' arbitration agreement. The district court vacated the award on those grounds. On appeal, the Court found

that while AAA deviated from the parties' contractual selection process, the district court erred in vacating the arbitration award because Brook did not timely object to AAA's failure to follow the selection process and thus the objection was waived. In so ruling, the Court stated:

Alternatively, before proceeding to arbitration, Brook could have sought an order from the district court compelling arbitration before a properly selected arbitrator pursuant to sections 4 and 5 of the FAA. But Brook did not timely go to court. In sum, Brook did not state clearly his objection to the AAA's failure to follow the Employment Agreement when an arbitrator was selected; Brook made no effort to preserve his objection to arbitrating while the dispute was pending before Judge Miller; and Brook finally raised the crucial objection after the magistrate judge conceived it. "It is well settled that a party may not sit idle through an arbitration procedure and then collaterally attack the procedure on grounds not raised before the arbitrators when the result turns out to be adverse." *Marino v. Writers Guild of America, East, Inc.*, 992 F.2d 1480, 1484 (9th Cir.1993).

*Peak International, supra*, 294 F.3d 674.

Under the current statutory authority, superior courts are reluctant to intercede and rule on a party's objection to arbitrator selection. The amendment would insure that parties who petitioned the court for redress could receive a ruling on the selection of the arbitrator without incurring the expenses associated with an arbitration in the face of an objection to the method of arbitrator selection.

#### IMPACT STATEMENT

This proposed resolution does not affect any other law, statute, or rule.

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