

## Legal Alert

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### **9<sup>TH</sup> CIRCUIT: A CONTRACT THAT INCORPORATES AAA ARBITRATION RULES DEMONSTRATES THE PARTIES' "CLEAR AND UNMISTAKABLE" INTENT TO HAVE AN ARBITRATOR DECIDE ITS ARBITRABILITY**

Arbitration has increasingly come under the spotlight as more and more companies insert mandatory arbitration clauses in contracts and use agreements. But there are still a lot of grey areas regarding arbitration: What if multiple parties are involved and not everyone agreed to arbitrate? What if I don't think that my problem falls within the scope of the arbitration clause at all? If I think that I shouldn't be forced to go to arbitration, can I ask a judge to decide the question, or do I instead have to go to an arbitrator to decide if I have to go to an arbitrator?

That last question was the focus of the 9<sup>th</sup> Circuit's opinion in *Brennan v. Opus Bank*.<sup>1</sup> The Plaintiff, Mr. Brennan, worked for the Defendant, Opus Bank, as an executive vice president. He came to believe that he had been effectively demoted and so he sued the bank for breach of his employment agreement.

That employment agreement stated that "any controversy or claim arising out of this Agreement...shall be settled by binding arbitration in accordance with the Rules of the American Arbitration Association ["AAA"]" and that the parties would use California procedural law during arbitration. Mr. Brennan argued that it would be "unconscionable" under California law to force him to arbitrate his claim. He asked the district court judge to declare the arbitration provision unenforceable and hear his case. But the district court held that—regardless of California law—the agreement gave the questions of unconscionability and enforceability to an arbitrator to decide and so the court dismissed Mr. Brennan's case to proceed via arbitration.

The 9<sup>th</sup> Circuit agreed with the district court. The AAA rules state that an arbitrator has the power to decide both her own jurisdiction as well as the validity of the agreement to arbitrate. Thus, the Court held, because Mr. Brennan signed the employment agreement that expressly incorporated those AAA rules, that was "clear and unmistakable evidence" that he agreed to submit the very question of arbitration to an arbitrator's decision.

The 9<sup>th</sup> Circuit also noted that, when contracts are ambiguous regarding arbitration, courts default to the use of federal arbitration law to resolve the ambiguity. Here, even though the agreement said to use California's law for procedural issues, it was silent about which law to use to determine the threshold question of arbitrability. Much to Mr. Brennan's dismay, the agreement's silence on that aspect created an ambiguity that had to be resolved using federal law, and so ultimately gave the question to the arbitrator.

Mr. Brennan's situation could have been significantly improved by better contract drafting. The attorneys at Gammage & Burnham can help you draft an unambiguous contract that "clearly and unmistakably" sets forth your rights. Contact us for more information.

<sup>1</sup>Decided on August 11, 2015 and found at <http://cdn.ca9.uscourts.gov/datastore/opinions/2015/08/11/13-35580.pdf>.

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