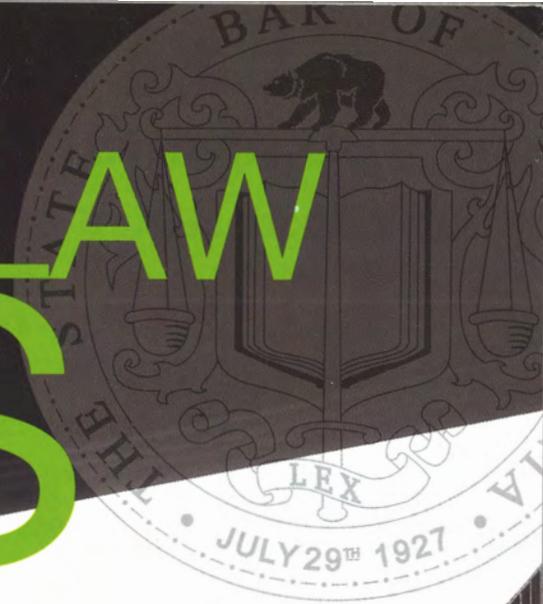


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Does Arbitration Make Sense for Franchisors? A Litigator's Perspective



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Let's face it; arbitration is not always the quicker, cheaper forum for parties to resolve their differences. Although arbitration does have the potential to be more economical and efficient than court, in practice, these benefits can prove elusive when arbitrating franchise disputes. Still, franchise agreements very often contain ADR provisions that require arbitration of all disputes. Given this, why do franchisors and their attorneys treat arbitration provisions as a *one-size-fits-all* addition to franchise agreements?

This article examines the current state of arbitration from a litigator's perspective, the flaws with some historically touted benefits of arbitration, and the real, present-day benefits of arbitration to franchisors with footprints that extend into California.

Is Arbitration Faster?

Because arbitration is considered a private proceeding, there is limited recent information available to the general public on the average length of time that elapses from the filing of a commercial arbitration dispute to the arbitrator's issuance of the final award. This creates a challenge when attempting to compare a typical arbitration timeline to that of a court action. However, the information that is available suggests that the often touted expediency of arbitration may be overstated.

For example, the Financial Industry Regulatory Authority (FINRA) reported the conclusion of 3,635 arbitrations involving securities and employment disputes during the 2016 calendar year.¹ The median length of these arbitrations from commencement to hearing was 17.1 months.² Similarly, during calendar year 2016, the median length of time from filing through trial of civil cases in the U.S. District Court for the Central District of California was 18.3 months.³ While these statistics,

in a vacuum, leave a lot to be desired, they do suggest that the timeline for an arbitration proceeding may not be materially different than the time it takes for a litigated case to progress through the court system.

The length of the arbitration's related confirmation proceeding also must be considered when comparing arbitration to a court action. An arbitration award cannot be enforced until it is confirmed by a court and judgment is entered. The confirmation proceeding can easily extend the arbitration process by upwards of six months. The net result is an arbitration proceeding that easily can extend beyond the length of a typical court action.

Certainly, the purported temporal expediency of arbitration does not, by itself, justify the inclusion of arbitration provisions in franchise agreements.

Does Arbitration Cost Less?

Arbitration costs are tied to the length of the proceeding. Because arbitration is a creature of contract, technically, the parties are free to streamline the process. However, there is a practical limitation when attempting to expedite a franchise dispute—*i.e.*, discovery is almost always necessary in commercial litigation. Trial without discovery is akin to going into battle blind: it's difficult to prepare for something you have not seen. Documents, depositions, and even written responses to interrogatories are tools that help the parties and their attorneys properly evaluate the case and prepare for trial. The discovery phase of a case can easily be the most time-consuming and costly to the client.

Arbitration service providers appreciate the significance of discovery to commercial disputes. This is reflected in the evolution of their procedural rules. For instance, an earlier version of the Commercial Rules of the American Arbitration Association (AAA)

granted arbitrators the limited authority to “direct (i) the production of documents and other information, and (ii) the identification of any witnesses to be called” at the hearing.⁴ The current version of the AAA’s Commercial Rules significantly expands upon the type and form of discovery arbitrators may allow. This includes not only the exchange of documents in the parties’ “possession or custody on which they intend to rely,” but also an obligation to update the production as documents are discovered, the exchange of written discovery requests and requested materials, and, importantly, detailed instructions on the production and exchange of electronic discovery.⁵ Naturally, more discovery means more expense to the clients.

There also are significant costs associated with arbitration. These include the arbitrators’ fees, administrative fees charged by the arbitration service provider, and fees charged by the facility that houses the hearing. In California Superior Court, a party must pay an initial filing fee of \$435 to commence an unlimited civil action.⁶ In contrast, the AAA charges an initial administrative filing fee, depending on the amount of the claim, ranging from \$500 to over \$10,000.⁷ There is also a “Final Fee” charge—between \$800 and \$12,500—in the event the matter progresses to a hearing.⁸ Judicial Arbitration and Mediation Services (JAMS) charges a relatively nominal initial non-refundable filing fee of \$1,200 to \$2,000.⁹ However, it also charges an additional “Case Management Fee” of 12% of “all Professional Fees, including time spent for hearings, pre- and post-hearing reading and research and award preparation.”¹⁰ Depending upon the nature of the dispute being arbitrated and the amount at issue, these administrative fees can be substantial.

While the administrative fees and facility rental can far outweigh court filing fees, all of these expenses are usually dwarfed by the hourly rates charged by the arbitrators. For example, this author recently received a “strike list” from one of the prominent arbitration service providers that identified eight potential arbitrators from Southern California with experience in franchising. The hourly rates of these arbitrators ranged from \$350 to \$600. Multiply this figure by three if the relevant contractual arbitration provision calls for a panel of three arbitrators. At the end of a complex commercial dispute, this figure can be staggering.

Of course, attorneys’ fees are typically the most significant cost of litigation in any forum. If the arbitration is substantially shorter than the court action, then there should be a proportionate reduction in attorneys’ fees. However, if the duration of each proceeding is substantially similar—as suggested above—commercial arbitration is not a viable cost-saving option to litigation in court.

What Happens If The Other Side Refuses To Pay For Arbitration?

In many instances, the high costs associated with arbitrating a case have been leveraged by the more affluent party to motivate the less affluent adversary to capitulate or settle. Typically, if a party did not pay, they were not permitted to pursue any affirmative claims in the arbitration and faced dismissal of the action altogether. However, franchisors may want to keep in mind that the recent trend in case law has placed the payment obligation on the party seeking to keep the matter in arbitration. This could substantially increase the costs of arbitration to the franchisor.

The Ninth Circuit case of *Tillman v. Tillman* is illustrative of this recent trend.¹¹ In that case, the claimant filed a malpractice lawsuit in court. The respondent law firm’s motion to compel arbitration was granted by the court, and the matter was moved to the AAA. Ultimately, the claimant could not pay the AAA’s required deposit of \$18,562.50.¹² When the respondent refused to front the deposit for the claimant, the arbitration was terminated pursuant to the AAA’s rules.¹³ Following the termination, the claimant again sought to pursue her claims in court, but the trial court refused, finding that the Federal Arbitration Act deprived the court of the authority to hear the claimant’s claims because they were subject to arbitration.¹⁴ The matter was dismissed and claimant appealed.

On appeal, the Ninth Circuit reversed the trial court’s dismissal, finding that although the claimant lacked the resources to pay the arbitration deposit, she was willing to arbitrate her claims “and the [respondent] firm could have fronted the costs but did not.”¹⁵ According to the Ninth Circuit, the claimant’s failure to pay the deposit did “not merit a harsh penalty, particularly given ‘the public policy favoring disposition of cases on their merits.’”¹⁶ Because the AAA proceeding had been terminated consistent with

the AAA's rules "before the merits were reached or any award issued, allowing [claimant's] claims to proceed in district court [was] the only way her claims [could] be adjudicated."¹⁷ Consequently, the trial court's ruling was reversed, and the claimant's lawsuit was allowed to go forward in court notwithstanding her failure to pay her share of the arbitration fees.

The Tenth Circuit recently also reached a similar conclusion. In *Pre-Paid Legal Services, Inc. v. Cahill*, the plaintiff-employer filed a lawsuit against its former employee, alleging tort and contract violations.¹⁸ The former employee compelled arbitration as required by his employment contract. Once in arbitration, the employer advanced its share of the required fees, but the former employee repeatedly declined to do so. The arbitration was eventually suspended, and then terminated, for non-payment of fees. Thereafter, in light of the termination of the arbitration proceedings, the employer petitioned the court to lift the court stay that had been in place pending arbitration. The stay was lifted, and the former employee appealed. On appeal, the Tenth Circuit held that "[f]ailure to pay arbitration fees constitutes a 'default' under [Federal Arbitration Act] § 3," and that the former employee's "failure to pay his share of costs precludes him from seeking arbitration."¹⁹ The court action was allowed to proceed.

The *Tillman* and *Cahill* cases reflect a recent trend in case law to allow disputes—governed by valid agreements to arbitrate—to proceed in court because of a party's failure to pay for its portion of the arbitration fees. This trend will likely place the obligation to pay arbitration fees on franchisors seeking to keep their disputes in arbitration. Franchisor clients should be aware of this, and be prepared to pay all of the arbitration costs and fees in connection with any arbitration that they initiate or compel.

Is Immediate Relief Available In Arbitration?

Many franchise disputes involve the former franchisee's unauthorized use of the franchisor's name and mark. When this happens, the franchisor will need immediate injunctive relief to stop the former franchisee's unlawful use and potential harm to the brand. Although the Commercial Rules of the AAA and the JAMS Comprehensive Arbitration Rules both authorize arbitrators to issue interim relief, the procedural hurdles

and subsequent enforceability of the interim relief make arbitration a poor forum for franchisors seeking immediate relief.

Before an injunction can be issued in arbitration, the arbitrator must be appointed—a process that can take weeks—and a hearing on the motion for injunctive relief must be held. Then, even if the arbitrator does grant the injunctive relief, the order still must be confirmed and enforced by a state or federal court through a separate proceeding.²⁰ These procedural shortcomings make obtaining and enforcing an injunction in arbitration impractical at best.

Prudent franchisors have included a "carve out" in their franchise agreements that allows them to seek immediate injunctive relief from a court of competent jurisdiction. This "carve out" is a necessary addition to any franchise agreement that contains an agreement to arbitrate.

Is Arbitration Really Private?

Another widely touted benefit of arbitration is the private nature of the proceeding compared to a lawsuit in court. Arbitral hearings are held in private and attended only by those designated by the parties and their counsel. On the other hand, court hearings, trials, and related filings are all open to the public.

This lack of transparency is a significant consideration for many franchisors. Confidentiality can be important, particularly when dealing with threatened franchise law violations, a dispute over trade secrets, or other claims that involve negative publicity or damage to the brand. In practice, however, arbitration privacy may be overstated, as a large percentage of arbitrated disputes involve related, public court actions. Franchisees, for example, regularly initiate court actions against franchisors in total disregard of the parties' agreement to arbitrate. While these matters typically are sent to arbitration, the franchisee's filings with the court have already publicized the nature of its dispute with the franchisor.

Arbitrated disputes also can find their way into the public sphere in other ways. Court intervention is needed to enforce preliminary injunctive relief or subpoenas issued by an arbitrator. Likewise, an arbitration award must be confirmed by a court before it can be enforced or executed upon. These public filings—including all attachments, declarations, and exhibits—in the related

court action often undermine the privacy element of arbitration that franchisors typically desire.

The Item 3 requirement in a franchise disclosure document (FDD) also cannot be ignored when addressing the potential confidentiality of a franchise dispute.²¹ The Federal Trade Commission has promulgated a comprehensive pre-sale disclosure rule—the “FTC Rule”—that governs the offer and sale of franchises by all franchisors throughout the United States.²² California, not unlike other states, has adopted additional pre-sale disclosure requirements in addition to the mandatory federal disclosures.²³ The FTC Rule and California’s supplemental disclosure laws require franchisors to disclose in Item 3 of the franchisor’s then-current FDD any “material civil action”—including any arbitration proceeding—pending against it alleging a violation of a franchise, antitrust, or securities law, fraud, unfair or deceptive practices, or comparable claims.²⁴ In other words, the franchise disclosure laws compel franchisors to disclose certain disputes without regard to the forum in which those disputes were resolved. The use of arbitration cannot prevent this.

At the end of the day, although arbitration is a private proceeding, the confidential nature of the arbitration can be substantially eroded by any related court action and by the publication of the arbitration proceeding in Item 3 of the FDD.

The True Benefits of Commercial Arbitration

While the much-publicized purported benefits of arbitration—speed, cost, and privacy—are not persuasive grounds to support the almost universal inclusion of arbitration provisions in franchise agreements, there are several legitimate reasons why franchisors still should seriously consider this alternative dispute forum.

Preemption of Certain California Franchise Laws

“One of the most important protections California offers its franchisee citizens is an anti-waiver statute which voids any provision in a franchise agreement which waives any of the other protections afforded by the Franchise Investment Law.”²⁵ These protections have been interpreted to include, among other things, a prohibition on class action waivers, the right to recover punitive damages, a limitation on out-of-state forum selection clauses, and the right to a trial by jury.²⁶ Despite the strong public policy behind these statutory

protections, contractual provisions that purport to waive these protections may still be enforced if included in an agreement to arbitrate that is governed by the Federal Arbitration Act (FAA).

In 2001, the Ninth Circuit found that the FAA preempted the California Franchise Investment Law’s limitation on out-of-state forum selection clauses in agreements to arbitrate.²⁷ The Ninth Circuit’s rationale was later expanded by several U.S. Supreme Court opinions negating the individual state’s ability to legislate terms contrary to those contained within an otherwise valid agreement to arbitrate.²⁸ Sixteen years later, there is little doubt that the FAA generally controls the enforceability of arbitration provisions in franchise agreements (at least, those that provide that they are to be governed by federal law) and preempts any state law seeking to frustrate arbitration agreements.²⁹

Arguably, the most significant benefit to large franchisors coming out of the FAA preemption cases is the almost certain enforceability of class action waivers built into their agreements to arbitrate. In *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court considered whether the FAA prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.³⁰ The Court explained that section 2 of the FAA makes agreements to arbitrate “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³¹ After analyzing California’s general prohibition of class action waivers, the Court found that this prohibition stood “as an obstacle to the accomplishment of the FAA’s objectives” and was therefore preempted by the FAA.³²

Similarly, punitive damage waivers and out-of-state venue designations are also generally enforceable if embedded in agreements to arbitrate governed by the FAA. The ability to dictate the venue should be particularly appealing for franchisors operating in multiple jurisdictions. By identifying a specific location where the arbitration must take place, franchisors can minimize the cost of dispute resolution proceedings by having all such proceedings on the franchisor’s “home turf.” There also are other strategic advantages available to franchisors that dictate venue, including being able to avoid litigating disputes in jurisdictions with unfavorable laws that are fraught with uncertainty.

Arbitration is also the most effective way for franchisors to avoid jury trials in California. Franchisees almost always favor jury trials, for obvious reasons—*e.g.*, the franchisee is often viewed by jurors as the underdog, resulting in juror bias against the franchisor. California has a strong public policy favoring trial by jury, and, since the California Supreme Court’s 2005 decision in *Grafton Partners, L.P. v. Superior Court*, contractual pre-dispute jury trial waivers have not been enforced by California state courts.³³ In 2015, the Ninth Circuit held that in actions based on California law, but tried in federal court by reason of diversity, Ninth Circuit courts would uphold California’s prohibitions on advance jury trial waivers.³⁴ After *Grafton* and related Ninth Circuit precedent, the only way for a franchisor to confidently avoid a jury trial in California is through arbitration.

Without an agreement to arbitrate governed by the FAA (and benefitting from its preemptive power), California’s statutory protections would invalidate all contradictory terms of franchise agreements in California (and even some outside of California, if involving a California franchisee). Arbitration is the best mechanism for franchisors to avoid many of these laws that favor franchisees. For this reason, franchisors are well-advised to consider utilizing their franchise agreements as tools to mitigate the application of the various California statutory protections afforded franchisees.

Knowledgeable Trier-Of-Fact

A more subtle, but important, factor that cannot be overlooked in evaluating the usefulness of arbitration is the parties’ ability to choose an arbitrator with experience in franchising. Unlike court proceedings, where the parties are randomly assigned to a judge, in arbitration the parties typically choose arbitrators with qualifications tailored to the needs of the arbitration in question.³⁵ These desired qualifications can include arbitrators familiar with the franchise laws.

Franchise and distribution law is one of a handful of legal specialties certified by the State Bar of California.³⁶ Franchising is recognized as a substantive specialty largely due to the complexities and nuances incorporated into state and federal franchise laws—most notably, California’s Franchise Investment Law and Franchise Relations Act. Similar legal issues and fact patterns often arise in franchise litigation. However, judges unfamiliar

with these legal issues can face a steep learning curve when presiding over a franchise matter. This extensive judicial education can be avoided if the parties appoint an arbitrator experienced in this area of law.

More importantly, with arbitration, the franchisor can avoid the potentially difficult task of presenting these nuanced franchise issues to a jury. Experienced arbitrators can provide counsel and their clients with a level of comfort and predictability that may not be available in a jury trial.

Finality

It is important for every business involved in a commercial dispute that the matter be resolved with finality and certainty. Drawn-out proceedings significantly increase costs, and may divert employees and other resources away from the business, causing litigation-induced paralysis. Due to the limited legal grounds available for the appeal of an arbitration award under the FAA and related state arbitration statutes, arbitration provides a level of finality that trial courts cannot offer.

For instance, under the FAA, an arbitration award may be vacated only if the award was procured by corruption or fraud; where the arbitrator was partial or corrupt; where the arbitrator’s misconduct prejudiced the rights of a party; or where the arbitrator exceeded his or her powers.³⁷ Importantly, arbitrators “exceed their powers not when they merely interpret or apply governing law incorrectly, but [only] when the award is completely irrational, or exhibits a manifest disregard of law.”³⁸ This is a very strict standard that requires an abject manifest disregard of the law, and has been defined to mean “more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law. It must be clear from the record that the arbitrators recognized the applicable law and then ignored it.”³⁹ The vacation of an arbitration award on these grounds is not easily achieved.

An additional, narrow, ground on which an arbitral award may be vacated is that a court cannot enforce an arbitration award that violates public policy. However, satisfying that standard requires the party challenging an award to establish that the public policy in question is “explicit,” “well defined,” and “dominant.”⁴⁰ Again, this is a very difficult standard to meet.

These potential grounds for vacating an arbitration award are difficult to show and even more difficult to establish on appeal if challenging the trial court’s denial of a request to vacate the arbitration award. Because of this, the finality of an arbitration award carries with it more certainty than a court judgment or order.

Malleable Process

Other important reasons that franchisors and other businesses typically favor arbitration over court include the flexible nature and predictability of the arbitration proceeding. In court, the parties are at the mercy of the judge’s calendar. Hearings, trials, and other important deadlines are regularly continued—with little or no notice—to accommodate changes in the court’s calendar. These last-minute changes can cause great disruption to franchisors’ business operations. In arbitration, on the other hand, parties can schedule hearings and deadlines to meet their objectives and accommodate the needs of their employees, experts, and other witnesses. For example, parties may schedule witnesses out of order to accommodate individual or business needs, continue hearings after normal business hours or on weekends to avoid schedule conflicts, examine remote witnesses by video conference or by telephone, and use written witness statements on discrete matters in lieu of time-consuming, oral direct testimony.

Because arbitration is a malleable process, it can better accommodate, and cause less disruption to, franchisors than a court proceeding.

Conclusion

Litigating a franchise dispute provides the best insight into the true value of an agreement to arbitrate. Still, litigators aren’t always consulted before arbitration provisions are included in form franchise agreements. As this article attempts to convey, from a litigator’s perspective, the real value in arbitration to a franchisor is not necessarily the cost, speed, or privacy that historically have been associated with arbitration. Instead, it’s the level of control that arbitration provides the franchisor—control over the location of the dispute, the limitation of damages that can be obtained by franchisees, the number of parties to the action, the trier-of-fact, and the flexibility of the procedure itself. The nature and extent of these characteristics of arbitration will likely advance the business and legal interests of the franchisor.

Disclaimer: While every effort has been made to ensure the accuracy of this article, it is not intended to provide legal advice, as individual situations will differ and should be discussed with an experienced franchise lawyer. For specific technical or legal advice on the information provided and related topics, please contact the author.

Endnotes

- 1 Dispute Resolution Statistics, Historical Statistics for Cases Filed and Closed, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics>.
- 2 *Id.*
- 3 Judicial Business of the U.S. Courts, Table C-5 – U.S. District Courts – Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2016, http://www.uscourts.gov/sites/default/files/data_tables/stfj_c5_1231.2016.pdf. For reference, during the 2016 year, the median length of time from filing through trial of civil cases pending before United States District Courts in the Ninth Circuit was 23.9 months.
- 4 American Arbitration Ass’n, Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), Rules Amended and Effective June 1, 2009, R-21. Exchange of Information, <https://www.adr.org/sites/default/files/Commercial%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Jun.%2001%2C%202009%20Fee%20schedule%20Jan.%201%2C%202010.pdf>.
- 5 American Arbitration Ass’n, Commercial Arbitration Rules and Mediation Procedures, Including Procedures for Large, Complex Commercial Disputes, Rules Amended and Effective October 1, 2013, R-22. Pre-Hearing Exchange and Production of Information, <https://www.adr.org/sites/default/files/Commercial%20Rules.pdf>.
- 6 *See* CAL. GOV’T CODE §§ 70611, 70602.5, 70602.6.
- 7 *See* Commercial Arbitration Rules and Mediation Procedures, Administrative Fee Schedules, Amended and Effective July 1, 2016, <https://www.adr.org/sites/default/files/Commercial%20Fee%20Schedule.pdf>.
- 8 *Id.*
- 9 Demand for Arbitration Form, Instructions for Submittal of Arbitration to JAMS, Judicial Arbitration and Mediation Services, https://www.jamsadr.com/files/Uploads/Documents/JAMS_Arbitration_Demand.pdf.
- 10 *Id.*
- 11 *Tillman v. Tillman*, 825 F.3d 1069 (9th Cir. 2016).
- 12 *Id.* at 1072.
- 13 *Id.*
- 14 *Id.* at 1073.
- 15 *Id.* at 1074.
- 16 *Id.* (citing *Patalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002)).

- 17 *Id.* at 1076.
- 18 Pre-Paid Legal Servs., Inc. v. Cahill, 786 F.3d 1287, 1293-94 (10th Cir. 2015), *cert. denied* 136 S. Ct. 373 (Oct. 19, 2015).
- 19 *Id.* at 1294-95 & n.3.
- 20 See 9 U.S.C. § 13; CAL. CIV. PROC. CODE §§ 1288, 1288.4.
- 21 An FDD is a legal document which is prepared and presented by a franchisor to prospective buyers of franchises in the pre-sale disclosure process in the United States.
- 22 16 C.F.R. § 436.
- 23 CAL. CODE REGS. §§ 310.111(b), 310.114.1.
- 24 See 16 C.F.R. § 436.5(c).
- 25 Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc., 32 Cal. App. 4th 1511, 1520 (1995).
- 26 See CAL. CORP. CODE § 31300 *et seq.*
- 27 Bradley v. Harris Research Inc., 275 F.3d 884, 892 (9th Cir. 2001) (finding that “Cal. Bus. & Prof. Code § 0040.5 is not a generally applicable contract defense that applies to any contract, but only to forum selection clauses in franchise agreements. We therefore hold that, under the reasoning of [Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996)] and [Perry v. Thomas, 482 U.S. 483 (1987)], as well as the language of 9 U.S.C. § 2 itself, § 20040.5 is preempted by the FAA.”).
- 28 See *e.g.*, AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011).
- 29 See United States Arbitration Act, ch. 213, Pub. L. No. 68-401, 43 Stat. 883 (1925) (The FAA was specifically enacted “[t]o make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts”); see also, 9 U.S.C. §§ 3, 4; Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985) (“By its terms, the [Federal Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”).
- 30 AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
- 31 *Id.* at 336 (citing 9 U.S.C. § 2).
- 32 *Id.* at 344.
- 33 Grafton Partners, L.P. v. Superior Court, 116 P. 3d 479 (Cal. 2005).
- 34 *In re* County of Orange, 784 F.3d 520 (9th Cir. 2015), *cert. denied sub nom.* Tata Consultancy Servs. Ltd. v. County of Orange, 136 S. Ct. 808 (2016).
- 35 In fact, a prudent franchisor will include within the agreement to arbitrate certain franchise qualifications and experience that an arbitrator must possess to preside over the matter. This additional language in the agreement to arbitrate should help direct the search for potential arbitrators that will be conducted by the arbitration service provider.
- 36 The rules that govern the certified legal specialization program are contained in Rules of the State Bar, Title 3, Division 2, Chapter 2.

California attorneys who are certified as specialists have taken and passed a written examination in their specialty field, demonstrated a high level of experience in the specialty field, fulfilled ongoing education requirements

and been favorably evaluated by other attorneys and judges familiar with their work. Only these attorneys can advertise or identify themselves as ‘certified’ specialists in California because they are the only attorneys who are certified either by the State Bar of California Board of Legal Specialization or an organization whose certification program has been accredited by the State Bar. Such an organization must have requirements for certification that are at least equal to those of the State Bar’s program.

Legal Specialization of the State Bar of California, Statement of The State Bar of California, Board of Legal Specialization, <http://www.calbar.ca.gov/Attorneys/Legal-Specialization>. The California Board of Legal Specialization currently provides a certification process for attorneys practicing in the following eleven areas of law: Admiralty and Maritime Law, Appellate Law, Bankruptcy Law, Criminal Law, Estate Planning, Trust and Probate Law, Family Law, Franchise and Distribution Law, Immigration and Nationality Law, Legal Malpractice Law, Taxation Law, and Workers’ Compensation Law. *Id.*

- 37 9 U.S.C. § 10.
- 38 Schoendube Corp. v. Lucent Technologies, Inc., 442 F.3d 727, 731 (9th Cir. 2006) (quoting Kyocera Corp. v. Prudential-Bache Trade Secs., Inc., 341 F.3d 987, 997 (9th Cir. 2003)).
- 39 TSYS Acquiring Sols., LLC v. Elec. Payment Sys., LLC, 2009 U.S. Dist. LEXIS 98470, at *5-6 (quoting Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 832 (9th Cir. 1995)).
- 40 Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int’l Ass’n of Machinists & Aerospace Workers, 886 F.2d 1200, 1210 (9th Cir. 1989) (quoting W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983)).