COMPELLING ARBITRATION?

NOT SO COMPELLING IN NEVADA

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If arbitration is so swift and inexpensive, why are orders, improperly denying arbitration, subject to Nevada's lengthy appeal process?[1] More and more agreements contemplate arbitration of an ensuing dispute. As the Nevada Supreme Court has described, "[s]trong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation."[2] No doubt this long-held observation of the court fostered the creation of Nevada's Court Annexed Arbitration Program, a mandatory system whose explicit purpose is to create "a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters."[3]

Nevada's partiality for arbitration of disputes is not confined solely to rulings of the Supreme Court, as evidence of the Legislature's same inclinations is readily apparent in statute. Nevada Revised Statutes (NRS) Ch. 38 – the Uniform Arbitration Act of 2000 – states that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable *except upon a ground that exists at law or in equity for the revocation of a contract*."[4] Accordingly, even if a party to a contract opposes arbitration of a dispute, "the court shall proceed summarily to decide the issue *and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate*."[5]

Further explaining this statutory mandate, the Nevada Supreme Court has held that "Nevada courts resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration," and that "courts should order arbitration of particular grievances 'unless it may be said *with positive assurance* that the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute.'"[6] While Nevada law leaves little room for contracting parties to avoid an arbitration clause, the procedure for remedying an

improper denial of a motion to compel arbitration guts the purpose of arbitration – a prompt and simple procedure to resolve disputes.

Not only is the law clear that arbitration is favored between parties to the contract, but the Supreme Court of Nevada recently applied this inclination toward arbitration to nonsignatories. The court held, in *Truck Ins. Exchange v. Palmer J. Swanson, Inc*., 124 Nev. 59, 189 P.3d 656 (2008), that "the obligation to arbitrate, which was executed by another party, may attach to a nonsignatory."[7] The Supreme Court went on to note that "various courts have adopted theories for binding nonsignatories to arbitration agreements:

1) incorporation by reference;
2) assumption;
3) agency;
4) veil-piercing/alter ego; and
5) estoppel."[8]

Though the Supreme Court in *Truck Ins. Exchange* ultimately "decline[d] to extend alter ego as a theory for binding nonsignatories to arbitration agreements," it did so only "under the unique facts and circumstances of this case" – implicitly refusing to foreclose future litigants from utilizing the alter ego doctrine as grounds for compelling a non-signatory to arbitration.[9] The indication must be that subsequent decisions of the Nevada Supreme Court will expand on this ruling, thus subjecting future nonsignatory litigants to contractual arbitration clauses in appropriate circumstances.

Expanding the scope of arbitration provisions perhaps even more greatly, the Nevada Supreme Court has hinted that nonsignatories may be entitled to *enforce* arbitration provisions *against* signatories, stating in a recent unpublished order that "[u]nder equitable estoppel a plaintiff signatory to a contract containing an arbitration provision is prevented from avoiding the agreement to arbitrate if the claims rely on the contract as the basis for relief."[10]

There can be little dispute that both the courts and the Legislature hold arbitration in the highest of regards, and a greater number of litigants will be entitled to enforce mandatory arbitration clauses, even if not signatories to the actual agreement. However, the law concerning lower-court denials of motions to compel arbitration is unwieldy, and serves only to erode the desirability of a prompt and equitable resolution by arbitration.

NRS 34.160 provides that a "writ [of mandamus] may be issued by the Supreme Court...to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station..." However, petitions for extraordinary writs are addressed to the sound discretion of the court and may only issue where there is no "plain, speedy, and adequate remedy" at law.[11] Where "the Legislature has created a right to petition for judicial review, that right constitutes an 'adequate and speedy legal remedy,' which generally precludes writ relief."[12] Simply put, the expediency of a writ petition to the Nevada Supreme Court is not available where the Legislature has afforded a right to immediate appeal.[13] Pursuant to NRS 38.247, the Legislature has afforded such right when the lower court refused to compel arbitration. Accordingly, a litigant aggrieved by a lower court's refusal to compel arbitration of a dispute has no alternatives but to appeal the decision or sacrifice the benefits of arbitration.

However, in the recent "Report to the 74th Regular Session of the Nevada State Legislature, 2007, Regarding the Creation of the Nevada Court of Appeals," it was estimated that "the number of cases filed in the Nevada Supreme Court in 2013 is expected to be almost 2,900" and that "[b]y the year 2016, that number will increase to nearly 3,100."[14] The report further observed that "[b]ased upon a 'disposition per justice' ratio, the Nevada Supreme Court has a substantially higher caseload than all other states without intermediate appellate courts," and that "parties involved in a case may have to wait for months, or even years, before a decision is rendered."[15] In comparison to the relative expediency of arbitration proceedings, the report indicates that, in 2006, the Nevada Supreme Court decided only 60 percent of appeals within two years of docketing, subjecting 40 percent to significant appellate delay.[16] As "further expansion of the Supreme Court is not a viable option at the present time," Nevada's continued growth threatens to protract cases even longer.

Where a lower court denies a motion to compel arbitration, the aggrieved party's only recourse is to suffer the inevitable delay of the appellate process – incurring both higher costs and longer periods than perhaps even traditional litigation would have forced. The very real potential of losing a motion to compel arbitration in Nevada is a consideration you should discuss with your client before filing the motion – because compelling arbitration in Nevada often proves less than compelling. NL

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1 **NRS 38.247 Appeals.**
1. An appeal may be taken from:
(a) An order denying a motion to compel arbitration;
(b) An order granting a motion to stay arbitration;
(c) An order confirming or denying confirmation of an award;
(d) An order modifying or correcting an award;
(e) An order vacating an award without directing a rehearing;
or
(f) A final judgment entered pursuant to NRS 38.206 to 38.248, inclusive.
2. An appeal under this section must be taken as from an order or a judgment in a civil action.

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2 *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004) (citing *Burch v. Dist. Ct.*, 118 Nev. 438, 442, 49 P.3d 647, 650 (2002)).
3 NAR 2(A).
4 NRS 38.219.1 (emphasis added).
5 NRS 38.221.1(b) (emphasis added).
6 *Clark County Public Employees Ass'n v. Pearson*, 106 Nev. 587, 591, 798 P.2d 136, 138 (1990) (emphasis in original) (citing *AT&T Technologies v. Communications Workers of America,* 475 U.S. 643, 650, 106 S.Ct. 1415, 1419 (1986); *Int'l Assoc. Firefighters v. City of Las Vegas,* 104 Nev. 615, 618, 764 P.2d 478, 480 (1988); *Exber, Inc. v. Sletten Constr. Co*., 92 Nev. 721, 729, 558 P.2d 517, 522 (1976)).
7 *Truck Ins. Exchange v. Palmer J. Swanson, Inc.*, 124 Nev. 59, ___, 189 P.3d 656, 660 (2008) (emphasis added) (citing *Inter. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 416-17 (4th Cir 2000)).
8 *Id*. (citing *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *Carte Blanche (Singapore) v. Diners Club Intern.*, 2 F.3d 24, 26 (2d Cir. 1993); *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991); *Interbras Cayman Co. v. Orient Victory Shipping, Etc.*, 663 F.2d 4, 6-7 (2d Cir. 1981); *Continental U.K. Ltd. v. Anagel Confidence Compania*, 658 F. Supp. 809, 813 (S.D.N.Y. 1987)).
9 *Id*.
10 See "Order of Reversal," dated September 5, 2008, in *Bates, et al. v. Nevada Resort Properties Polo Towers Ltd. Partnership d/b/a Polo Towers*, Supreme Court of Nevada Case No. 48348 (*unpublished*) (citing *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *Hughes Masonry v. Greater Clark County Sch. Bldg.*, 659 F.2d 836, 838, 840-41 (7th Cir. 1981); *Metalclad v. Ventana Environmental*, 1 Cal. Rptr. 3d 328, 334-35 (Ct. App. 2003).). Note that, pursuant to SCR 123, "[a]n unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority except when the opinion or order is (1) relevant under the doctrines of law of the case, res judicata or collateral estoppel; (2) relevant to a criminal or disciplinary proceeding because it affects the same defendant or respondent in another such proceeding; or (3) relevant to an analysis of whether recommended discipline is consistent with previous discipline orders appearing in the state bar publication."
11 See NRS 33.340; *State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 662 P.2d 1138 (1983).
12 *Howell v. Ricci*, 124 Nev. Adv. Op. No. 99, 197 P.3d 1044 (2008).
13 The Supreme Court of Nevada has left little doubt in this regard, as its own website's FAQ section notes: "If you want to seek review of a final judgment or another order that may be appealed, i.e., if you have a plain remedy such as an immediate appeal to the Nevada Supreme Court, the supreme court will not entertain a writ petition." http://www.nvsupremecourt.us/info/faq (citing *Columbia/HCA Healthcare v. Dist. Ct.*, 113 Nev. 521, 936 P.2d 844 (1997)).
14 See Report to the 74th Regular Session of the Nevada State Legislature, 2007, Regarding the Creation of the Nevada Court of Appeals, at p.12 (available at www.nvsupremecourt.us/documents/reports/rpt_IAC_2007.pdf).
15 *Id*. at p. 17.