Filed 6/23/16 Avanesians v. The College Network CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

AREN AVANESIANS, Plaintiff and Respondent, v. THE COLLEGE NETWORK, INC., Defendant and Appellant.	B263186 (Los Angeles County Super. Ct. No. EC063127)

APPEAL from an order of the Superior Court of Los Angeles County, Donna F. Goldstein, Judge. Reversed and remanded with directions.

Reich Radcliffe & Hoover, Adam T. Hoover and Richard J. Radcliffe, for Defendant and Appellant.

Sardarbegian Law Offices and Henrik Sardarbegian, for Plaintiff and Respondent.

INTRODUCTION

The College Network, Inc. (appellant or TCN), an Indiana corporation, appeals from an order denying its motion to compel a consumer of its educational products, respondent Aren Avanesians, to arbitrate his claims against appellant in Indiana. Appellant contends the trial court erred in determining that the arbitration provision between the parties was unconscionable and thus unenforceable. For the reasons set forth below, we conclude the arbitration provision was not unconscionable. Accordingly, we reverse and remand the matter for further proceedings.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 13, 2014, respondent filed a complaint against appellant for breach of contract, breach of the covenant of good faith and fair dealing, fraud, negligent misrepresentation, and violation of Business and Professions Code sections 17200 and 17500. The complaint alleged that appellant is an Indiana corporation, and respondent a resident of California. In October 2010, respondent entered into a contract with appellant for educational services and online nursing classes. The complaint alleged that respondent did so in reliance on appellant's representation that if respondent purchased appellant's services, he would be able to obtain a Bachelor's degree in Nursing from Indiana State University (ISU), which would lead to licensure as a California registered nurse. Appellant allegedly represented that its partnership with ISU would allow respondent to receive credit from ISU for appellant's nursing classes. Appellant further represented that a relationship between ISU and Sonoma State University would permit respondent to fulfill his clinical requirements in California. The complaint alleged that appellant failed to disclose that its partnership with ISU would expire in 2012 and that the relationship between ISU and Sonoma State was severed. As a result, the

complaint alleged, respondent was left without any viable opportunity to complete his educational goals. The complaint prayed for compensatory, special and general and punitive damages, prejudgment interest, injunctive relief, and attorney fees and costs.

On December 4, 2014, appellant moved, pursuant to Code of Civil Procedure section 1281.2 and the Federal Arbitration Act (FAA), Title 9 United States Code section 1 et seq., for an order compelling arbitration of respondent's claims. In the motion, appellant alleged that the parties were signatories to a valid, binding arbitration provision that encompassed all the causes of action. Appellant also sought an order dismissing the complaint.

Appellant submitted a copy of the written arbitration provision executed on October 27, 2010. On the reverse side of the double-sided document, entitled "LPN to BS in Nursing Purchase Agreement," under the bolded heading "GOVERNING LAW AND DISPUTE RESOLUTION," the parties agreed that "[a]ny and all disputes, claims or controversies (Claims) arising from, out of, or relating to this Agreement, or the relationships between Buyer and TCN which result from this Agreement, or the breach, termination, enforcement, interpretation or validity thereof, shall be determined, confidentially, by binding arbitration in Marion County, Indiana, before one neutral arbitrator selected by TCN, and with the consent of Buyer (and no other person), provided, however, that either party may assert an action in small claims court." They further agreed that the "Agreement shall, notwithstanding any conflicts of laws, be governed by the laws of Buyer's State of residence when executed by Buyer, and any applicable federal laws. However, Buyer and TCN agree and understand that their decision and agreement to arbitrate shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. The arbitration proceeding may be conducted telephonically or

videographically." In addition, if the parties failed to agreed on the rules for conducting the arbitration, those rules would be determined by the arbitrator.

Respondent opposed the motion. He argued the arbitration provision was unenforceable, as it was procedurally and substantively unconscionable. Respondent contended the arbitration provision was procedurally unconscionable, as it was a contract of adhesion and failed to provide the rules governing the arbitration. In addition, respondent asserted, he was surprised by the existence of the arbitration provision, noting that it was printed on the back of a double-sided document, and that the back page did not require any handwritten information such as a signature or date. Respondent further asserted he did not review the back of the double-sided page when he signed the document, and that appellant's representative did not bring it to his attention. Respondent also contended that the arbitration provision was substantively unconscionable, as it required him to travel to Indiana to arbitrate his claims and did not provide the arbitration rules.[1]

In a supporting declaration, respondent stated that when he met with appellant's representative about purchasing the LPN to BSN program, he was provided with several different documents for his signature. He was unaware that any document was double-sided, and appellant's representative did not inform him of that fact. Respondent observed that except for the purchase agreement, none of the other documents contained language on the back. He stated that when he met with his legal counsel, he copied only the front of the documents. He did not know that the purchase agreement had language on the back until he was served with appellant's notice to compel arbitration. Respondent further stated that he purchased appellant's product so he could earn a Bachelor's degree in Nursing

[1] Respondent did not argue that the arbitrator selection provision supported a finding of either procedural or substantive unconscionability.

from ISU without being required to leave California, and that he would not have done so had he known he would be required to arbitrate any claims in Indiana.

In its reply, appellant argued that the arbitration provision was not unconscionable. Appellant noted that on the front page of the purchase agreement, immediately above respondent's signature, the document provided: "I acknowledge that I have read, fully understand, and agree to the terms on both sides of this Agreement." Above the acknowledgment, the document advised respondent that he had three business days to cancel the transaction.[2] As to the rules governing the arbitration, appellant argued that the arbitration provision contemplated that the parties would agree to those rules. In the event the parties could not agree, the arbitrator would determine the rules. Thus, appellant asserted, the failure to provide the rules did not render the provision procedurally or substantively unconscionable. Finally, as to the choice of forum (Indiana), appellant argued that the forum selection was justified, as appellant was headquartered in Indiana. Appellant observed that the arbitration provision permitted participation in the arbitration hearing telephonically or videographically. It further observed that the provision permitted respondent to file a case in small claims court in California seeking up to $10,000 (see Code Civ. Proc., § 116.221). The purchase agreement showed appellant paid $10,598 for respondent's services.

On February 20, 2015, the trial court denied appellant's motion for an order compelling arbitration. After determining that respondent's causes of action in the complaint were subject to the arbitration provision, the court found the provision

---

[2] Appellant notes that respondent signed the purchase agreement on October 27, 2010, a Wednesday. Thus, respondent had five calendar days to cancel the purchase agreement.

procedurally and substantively unconscionable. It found the arbitration provision procedurally unconscionable, as (1) the provision was a contract of adhesion; (2) appellant failed to draw respondent's attention to the arbitration provision on the back side of a double-faced document; and (3) the selection of Indiana as the forum defeated respondent's strong expectation that any dispute would be resolved in California. The court found the arbitration provision substantively unconscionable, as (1) requiring "a student who signs a contract in California to travel to Indiana to resolve any dispute" "imposes a substantial cost only on the student[]"; and (2) permitting appellant to select the arbitrator would allow appellant to unreasonably delay the arbitration by "repeatedly selecting biased arbitrators."[3]

On March 25, 2015, appellant filed a timely notice of appeal from the order denying its motion to compel arbitration.

DISCUSSION

Code of Civil Procedure section 1281.2 provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that . . . [¶] . . . [¶] . . . [g]rounds exist for revocation of the agreement."[4] Generally, "applicable contract defenses, such as fraud, duress, or

---

[3] Although the trial court cited the forum selection clause as a factor in finding the agreement substantively unconscionable, at the hearing on appellant's motion to compel arbitration, the court stated: "I don't have a problem with the forum because -- it says it can be done by video."

[4] All further statutory citations are to the Code of Civil Procedure, unless otherwise stated.

unconscionability, may be applied to invalidate arbitration agreements without contravening" the Federal Arbitration Act. (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687; accord, *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 114 (*Armendariz*).)

As our Supreme Court has explained: "The party resisting arbitration bears the burden of proving unconscionability. [Citations.] Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on '"a sliding scale."' (*Armendariz*, *supra*, 24 Cal.4th at p. 114.) '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247 (*Pinnacle*).) "Where, as here, the evidence is not in conflict, we review the trial court's denial of arbitration de novo." (*Id*. at p. 236.)

A. *Procedural Unconscionability*

"[P]rocedural unconscionability requires oppression or surprise. '"Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form."'" (*Pinnacle*, *supra*, 55 Cal.4th at p. 247, quoting *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317.) The trial court found the arbitration provision was procedurally unconscionable, as (1) the provision was a contract of adhesion, (2) appellant failed to draw respondent's attention to the provision, and (3) the choice of Indiana as the forum defeated appellant's "strong expectation" that he would be able to resolve disputes in California.

1. *Contract of Adhesion*

The arbitration provision was a contract of adhesion, as it was preprinted on the back of a purchase agreement and presented on a "take it or leave it" basis. (See *Graham v. Scissor-Tail, Inc*. (1981) 28 Cal.3d 807, 817, quoting *Neal v. State Farm Ins. Cos*. (1961) 188 Cal.App.2d 690, 694 [contract of adhesion is "'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it'"].) However, "an adhesion contract remains fully enforceable unless . . . the provision falls outside the reasonable expectations of the weaker party" or is otherwise unconscionable. (*Fittante v. Palm Springs Motors, Inc*. (2003) 105 Cal.App.4th 708, 722.)

2. *Failure to Draw Appellant's Attention to Arbitration Provision*

"Where the contract is one of adhesion, conspicuousness and clarity of language alone may not be enough to satisfy the requirement of awareness. Where a contractual provision would defeat the 'strong' expectation of the weaker party, it may also be necessary to call his attention to the language of the provision." (*Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 359-360.) The trial court found that appellant failed to call respondent's attention to the arbitration provision. Respondent asserted that appellant's representative presented several documents for his signature, and only the purchase agreement -- containing the arbitration provision -- had language on the back. Appellant's representative did not draw respondent's attention to the arbitration provision, and respondent was not required to initial it. (See *Gutierrez v. Autowest, Inc*. (2003) 114 Cal.App.4th 77, 89 [procedural unconscionability shown where, in contract of adhesion, arbitration clause was printed in small typeface on opposite side of signature page, and consumer was neither informed of arbitration clause nor required to initial it].)

However, the front of the purchase agreement, above respondent's signature, contained an acknowledgment that respondent had read, fully understood and agreed to the terms "on both sides of this Agreement." In addition, the arbitration provision was printed in the same typeface as the other contractual provisions and under a bolded heading entitled "GOVERNING LAW AND DISPUTE RESOLUTION." Finally, respondent had five calendar days to review the document and cancel the transaction. On this record, although there was some procedural unconscionability, the degree of unconscionability was low.

Respondent's reliance on *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74 (*Carmona*), *Wherry v. Award, Inc*. (2011) 192 Cal.App.4th 1242 (*Wherry*), and *Higgins v. Superior Court* (2006) 140Cal.App.4th 1238 (*Higgins*), is misplaced. In *Carmona*, *supra*, 226 Cal.App.4th at page 85, the arbitration provision was not translated into Spanish for employees who could not read English, and one of the employees had only a few minutes to review and sign the multi-page employment agreement. Similarly, in *Wherry*, *supra*, 192 Cal.App.4th at page 1247, the employees had only minutes to review the employment agreement containing an arbitration provision before signing it and were not provided a copy of the agreement. In contrast, here, respondent was provided with a copy of the agreement; he does not claim to have been unable to read or understand the arbitration provision, and he had five days to review the agreement and cancel the transaction.

In *Higgins*, *supra*, 140 Cal.App.4th at pages 1242 to 1243, the appellate court held that an arbitration clause contained in a 24-page document was unenforceable, notwithstanding an acknowledgment stating, "'I have been given ample opportunity to read and I have carefully read, this entire agreement.'" Additionally, the arbitration provision was one of 12 numbered paragraphs under a

section entitled, "'MISCELLANEOUS.'" The court also found that petitioners were told to "'flip through the pages [of the contract] and sign.'" They did so and returned the signed documents five to 10 minutes later. (*Id*. at p. 1252.) In contrast, here, the arbitration provision was on the back of a single sheet of paper, and the acknowledgment on the front stated that respondent had read and understood the terms on *both* sides. Additionally, the arbitration provision was printed under the bolded heading "GOVERNING LAW AND DISPUTE RESOLUTION." Finally, respondent had ample time to review the provision and, if he wished, cancel it.

3. *Forum Selection Clause*

The trial court found that the forum selection clause in the arbitration provision defeated respondent's "strong expectation" that he would be able to resolve any disputes in California. Respondent's expectation, however, was unreasonable. While respondent could expect that he would not have to travel outside California to complete the requirements for a nursing degree, he could not reasonably expect that he would not have to travel to Indiana to resolve disputes related to obtaining a degree from an Indiana university. Appellant is an Indiana corporation, and respondent acknowledged he was purchasing appellant's educational services to obtain a nursing degree from ISU. Thus, Indiana is a logical choice of forum, and it should have come as no surprise to respondent that he would be required to resolve disputes in Indiana. (See *CQL Original Products, Inc. v. National Hockey League Players' Assn.* (1995) 39 Cal.App.4th 1347, 1355 [choice of Ontario, Canada as forum "completely consistent with the reasonable expectations" of plaintiff given that defendant is an Ontario, Canada domiciliary].) Moreover, any expectation appellant may have had that he would be able to remain

in California can be met by the provision's allowance for his participation in arbitration via telephone or video.

4. *Failure to Provide Rules Governing Arbitration*[5]

Under the arbitration provision, the arbitrator would apply California substantive law when resolving respondent's claims. With respect to the procedural rules governing the arbitration, the provision states that the rules would be chosen by mutual agreement, or in the event the parties failed to agree, a neutral arbitrator would determine the rules. Citing *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402 (*Harper*), *Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702 (*Fitz*), *Trivedi v. Curexo Technology Corp*. (2010) 189 Cal.App.4th 387 (*Trivedi*), *Zullo v. Superior Court* (2011) 197 Cal.App.4th 477 (*Zullo*) and *Carmona*, *supra*, 226 Cal.App.4th 74, respondent notes that California courts have held the failure to attach the arbitration rules to an arbitration provision may support a finding of procedural unconscionability. He contends the instant arbitration provision's failure to reference *any* arbitration rules heightens the procedural unconscionability and renders the provision illusory. We disagree.

On this issue, we find *HM DG, Inc. v. Amini* (2013) 219 Cal.App.4th 1100, instructive. There, the arbitration provision provided multiple alternative methods for selecting the arbitrator and did not specify the arbitration rules or forum. Plaintiff argued that the multiple options for selecting arbitrators and the omission of the arbitration rules and forum demonstrated there was no mutual consent to arbitrate. The court disagreed. (*Id*. at pp. 1108-1109.) It held that under California law, "the absence of a specified forum or set of rules in an arbitration clause does not invalidate the agreement to arbitrate." (*Id.* at p. 1110.) Likewise,

---

[5] This ground, though not relied on by the superior court, was raised by respondent below and is reasserted on appeal.

here, the failure to specify arbitration rules did not render the arbitration provision illusory or unconscionable.

The cases cited by appellant are factually and legally distinguishable. They involved arbitration agreements where the drafter specified a set of arbitration rules, but failed to attach the rules to the agreement. (See *Harper*, *supra*, 113 Cal.App.4th at p. 1406 [arbitration agreement referenced Better Business Bureau arbitration rules]; *Fitz*, *supra*, 118 Cal.App.4th at pp. 708 & 721 [agreement provided American Arbitration Association (AAA) arbitration rules would apply as "'modified'"]; *Trivedi*, *supra*, 189 Cal.App.4th at p. 392 [AAA arbitration rules referenced]; *Zullo*, *supra*, 197 Cal.App.4th at pp. 481-482 & 486 [same]; *Carmona*, *supra*, 226 Cal.App.4th at p. 84 [same].) Here, in contrast, appellant did not choose and specify a set of arbitration rules. Moreover, in *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 690, this court held that the failure to attach a copy of arbitration rules, standing alone, would not render an arbitration agreement unconscionable. More important, we find nothing oppressive or surprising about the provision regarding arbitration rules, as the rules are to be chosen by mutual agreement or by a neutral arbitrator. Accordingly, the failure to provide or attach arbitration rules does not support a finding of procedural unconscionability.

B. *Substantive Unconscionability*

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."'" (*Pinnacle*, *supra*, 55 Cal.4th at p. 246, quoting *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.) As the

California Supreme Court recently explained, the doctrine of unconscionability is concerned with contractual terms that are "'"unreasonably favorable to the more powerful party."'" (*Sanchez v. Valencia Holding Co. LLC* (2015) 61 Cal.4th 899, 911.)

The trial court found the arbitration provision substantively unconscionable, as (1) it imposed unreasonable costs on respondent in requiring him to arbitrate his claims in Indiana, and (2) it authorized only appellant to select the arbitrator. With respect to the latter finding, respondent argues that the fact that the arbitrator also might choose the arbitration rules adds to its substantive unconscionability.

1. *Forum Selection Clause*

The California Supreme Court has held that "forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of such a clause would be unreasonable." (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 496 (*Smith*).) "Given the importance of forum selection clauses [to both national and international commerce], both the United States Supreme Court and the California Supreme Court have placed a heavy burden on a plaintiff seeking to defeat such a clause, requiring it to demonstrate that enforcement of the clause would be unreasonable under the circumstances of the case." (*Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1493 (*Lu*), citing *Smith, supra,* at p. 496 & *The Bremen v. Zapata Off-Shore Co*. (1972) 407 U.S. 1, 10, 15; accord, *Bancomer, S.A. v. Superior Court* (1996) 44 Cal.App.4th 1450.) "The party's burden . . . is to demonstrate that the contractually selected forum would be unavailable or unable to accomplish substantial justice or that no rational basis exists for the choice of forum." (*Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 199 (*Intershop*).) The inconvenience and additional

expense of litigating in another state is insufficient to meet this burden. (*Smith*, *supra*, 17 Cal.3d at p. 496.)

A forum selection clause that "discourages legitimate claims by imposing unreasonable geographical barriers is unenforceable." (*Aral v. EarthLink, Inc*. (2005) 134 Cal.App.4th 544, 549 (*Aral*) [clause requiring consumer to travel 2,000 miles to recover $40 to $50 was unreasonable], overruled on other grounds by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333.) However, a forum selection clause is reasonable and valid if it has a logical connection with at least one of the parties or their transaction. (*CQL Original Products, Inc. v. National Hockey League Players' Assn.*, *supra*, 39 Cal.App.4th at p. 1354 [enforcing forum selection clause requiring parties to settle disputes in Ontario, Canada where defendant was domiciled]; *Intershop*, *supra*, 104 Cal.App.4th at pp. 199, 202 [enforcing forum selection clause requiring an employee of a German corporation to settle disputes in Germany].)

Here, the selection of Indiana as a dispute resolution forum is reasonable, as appellant is headquartered in Indiana, and the transaction is related to obtaining a degree from an Indiana university. (See, e.g., *Lu*, *supra*, 11 Cal.App.4th at p. 1493, fn. 2 [reasonable for companies to limit venue to the state where their principal place of business is located].) Respondent has not demonstrated that the forum selection clause would unreasonably discourage or prevent him from pursuing his claims against appellant, particularly in light of his option to participate telephonically or videographically in the arbitration hearing.

Respondent's reliance on *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659 (*Patterson*), *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900 (*Bolter*), and *Aral*, *supra*, 134 Cal.App.4th 544, is misplaced. In *Patterson*, the plaintiffs, California residents who borrowed relatively small

amounts of money from defendant finance companies, agreed that claims related to the loans "'shall be resolved . . . by the National Arbitration Forum, Minneapolis, Minnesota.'" (*Patterson*, at pp. 1662 & 1664.) There was no evidence that the parties or the transaction had any logical connection to Minnesota. In contrast, appellant is headquartered in Indiana, and the transaction concerns obtaining educational credits from an Indiana university. Likewise, *Bolter* is distinguishable. There, the forum selection clause requiring any arbitration to be conducted in Utah was imposed upon preexisting California franchisees. As the *Bolter* court noted, "[w]hen petitioners first purchased their . . . franchises in the early 1980's, [the franchisor] was headquartered in California, and the franchise agreement did not contain an arbitration provision. Thus, they never anticipated [the franchisor] would relocate its headquarters to Utah and mandate that all disputes be litigated there." (*Bolter*, *supra*, 87 Cal.App.4th at p. 909.) In contrast, respondent was provided notice that appellant was headquartered in Indiana and that its products could be used to obtain educational credits from an Indiana university. Finally, *Aral* does not assist respondent. There, this court held it was unreasonable to require California consumers to travel to Georgia to recover on a $40 to $50 claim. (*Aral*, *supra*, at p. 561.) In contrast, the claim here exceeded $10,000. In short, the forum selection clause would not impose unreasonable costs on respondent and thus did not support a finding of substantive unconscionability.

2. *Arbitrator Selection Clause*

The arbitration provision provides that appellant would select the neutral arbitrator, and that respondent could consent to or reject the choice of arbitrator. Although respondent did not initially raise this as a basis for finding the provision unconscionable, the trial court determined that allowing appellant to nominate the arbitrator was a substantively unconscionable term. While a better method for

selecting a neutral arbitrator would be to allow both parties to participate in nominating the arbitrator, we conclude the instant arbitrator selection clause is not fatal to appellant's motion to compel arbitration.

Here, although only appellant may nominate an arbitrator, respondent may accept or reject that nomination. Thus, the arbitrator chosen to resolve the dispute between the parties will be one on whom both parties agree. The trial court's concern that appellant could delay any arbitration proceeding by continuing to nominate unacceptable arbitrators is addressed by the FAA. Title 9 United States Code section 5 states: "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."[6] Thus, in

---

[6] The California Arbitration Act contains a substantially similar provision. Section 1281.6 provides: "If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator."

the event appellant fails to nominate an acceptable arbitrator, respondent may petition the court to appoint a neutral arbitrator.

Respondent's reliance on *Chavarria v. Ralphs Grocery Co.* (9th Cir. 2013) 733 F.3d 916, is misplaced. There, the arbitration provision provided that the parties would mutually agree on an arbitrator. In the event they could not agree, each party would nominate three arbitrators. The parties would then alternate striking arbitrators and the last remaining arbitrator would be selected. As the party not demanding arbitration would make the first strike, in practice, "the arbitrator selected through this process will invariably be one of the three candidates nominated by the party that did not demand arbitration." (*Id*. at p. 920.) In contrast, here, the arbitrator selection process will not invariably result in the selection of an arbitrator acceptable solely to appellant.

Respondent further contends that allowing appellant to nominate the arbitrator creates the risk that the arbitrator would feel beholden to appellant. (See *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 178 [noting fact that an employer repeatedly appears before the same group of arbitrators conveys distinct advantages over the individual employee: "These advantages include knowledge of the arbitrators' temperaments, procedural preferences, styles and the like and the arbitrators' cultivation of further business by taking a 'split the difference' approach to damages."].) Respondent has produced no evidence that appellant chooses from among a small group of arbitrators or appears repeatedly before any particular group. (Cf. *ibid*. [finding that under arbitrator selection clause, only 8 arbitrators would qualify to hear dispute].) More important, respondent has the option to reject potentially biased arbitrators and, in the absence of an arbitrator acceptable to him, seek relief from the court in appointing a neutral arbitrator.

In short, we conclude that neither the low degree of procedural unconscionability nor the alleged substantive unconscionability suffices to render the arbitration provision unenforceable.

DISPOSITION

The order is reversed, and the matter remanded to the superior court to issue an order granting appellant's motion to compel arbitration. Each party to bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.