



# Weekly Law Resume

A Newsletter published by Low, Ball & Lynch  
Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

Issue By: Dave Blinn

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October 14, 2010

## Enforceability of Arbitration Clause - Employment Agreement

*Ramesh C. Trivedi v. Curexo Technology Corporation*  
Court of Appeal, First District (October 20, 2010)

In this case, the Court considered the enforceability of an arbitration clause contained in the parties' employment agreement.

Ramesh C. Trivedi ("Trivedi") filed a complaint against Curexo Technology Corporation ("Curexo") arising out of his termination as President and Chief Executive Officer of Curexo. The complaint alleged causes of action for age discrimination in violation of California's Fair Employment and Housing Act ("FEHA"), race and color discrimination in violation of FEHA, national origin discrimination in violation of FEHA, and unlawful business practices within the meaning of Business and Professions Code § 17200. In addition, the complaint asserted claims for breach of the parties' employment contract, bad faith, intentional infliction of emotional distress, and three causes of action for employment discharge in violation of California public policy. Curexo filed a motion to compel arbitration pursuant to the parties' employment agreement. Within the employment agreement was an arbitration clause under which the parties agreed, among other matters, to resolve "[a]ny dispute arising out of or relating to this Agreement or any act which would violate any provision of this Agreement . . . to arbitration . . . before a sole arbitrator (the 'Arbitrator') selected from the American Arbitration Association ('AAA') pursuant to the AAA's national rules for the resolution of employment disputes . . . ."

Trivedi argued that enforcement of the arbitration obligation would be unconscionable and requested that the court stay the enforcement of the Agreement and allow a jury trial to proceed. The trial court denied Curexo's motion to compel arbitration, finding the arbitration clause to be both procedurally and substantively unconscionable. The trial court further declined to sever the "problematic provisions," and therefore concluded that the arbitration

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clause was unenforceable.

The Court of Appeal affirmed. Unconscionability, as contemplated in judicial review of a contractual arbitration clause, has two components: procedural unconscionability and substantive unconscionability. The trial court found the arbitration clause in the underlying employment agreement to be both procedurally and substantively unconscionable. The Court of Appeal agreed with the trial court's finding that the arbitration clause was procedurally unconscionable for three reasons: (1) the agreement was prepared by Curexo; (2) the clause was a mandatory part of the employment agreement; and (3) Trivedi was not given a copy of the AAA rules.

The Court of Appeal also agreed with the trial court's determination that the arbitration clause was substantively unconscionable. The Court concluded that the fact that the arbitration clause included a mandatory attorney fee and cost provision in favor of the "prevailing party" was unconscionable, because it placed Trivedi at greater risk than if he retained the right to bring his FEHA claims in court. In contrast to case law under FEHA, the employment agreement did not limit Curexo's right to recover to instances where Trivedi's claims were found to be "frivolous, unreasonable, without foundation, or brought in bad faith." Thus, according to the Court of Appeal, enforcing the arbitration clause and compelling Trivedi to arbitrate his FEHA claims lessened his incentive to pursue claims deemed important to the public interest, and weaken the legal protection provided to plaintiffs who bring non-frivolous actions from being assessed fees and costs.

The Court of Appeal also found that the provision allowing a party to seek injunctive relief in court unfairly favored Curexo, which would be more likely to be the party to benefit from this provision. The Court concluded that the injunctive relief provision allowed for broader relief than what it is permitted under Code of Civil Procedure § 1281.8(b), and because Curexo was more likely to invoke the remedy of injunctive relief. As such, the Court of Appeal found that the provision favored Curexo over Trivedi, and was unconscionable.

Finally, the Court of Appeal found that the trial court did not err in refusing to sever the unconscionable provisions. At least two provisions were found to be substantively unconscionable, a circumstance considered to "permeate" the agreement with unconscionability. While the trial court was free to sever the offending provisions, it was not required to do so.

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## COMMENT

Arbitration provisions in employment agreements must be carefully scrutinized. A court will inquire as to whether the arbitration clause is procedurally and substantively unconscionable. An arbitration clause that is neither discussed nor explained with the employee, and is made a mandatory part of the employment agreement, may make the clause procedurally unconscionable. An arbitration clause that is not consistent with case law under FEHA, and does not limit the employer's right to recover attorneys' fees to those instances in which the employee's claims are found to be "frivolous, unreasonable, without foundation, or brought in bad faith," may be found to be substantively unconscionable.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/A127283.PDF](http://www.courtinfo.ca.gov/opinions/documents/A127283.pdf)

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