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Rethinking Redevelopment Oversight: Exploring Possibilities for Increasing Local Input

By Grant Boyken, Senior Research Specialist

Requested by Assembly Member Chuck DeVore

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Exploring Possibilities for Increasing Local Input

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EXECUTIVE SUMMARY

For local governments in California, redevelopment is one of the principal tools available for revitalizing areas that are physically or economically blighted. The statutory purpose of redevelopment agencies is to make improvements to blighted areas "in the interest of the health, safety, and general welfare of the people…and of the state" (California Health and Safety Code, Section 33030).

After a redevelopment area is established, a redevelopment agency uses tax increment financing to "freeze" the amount of property tax revenues that other local governments receive from property in that area . The majority of the increases in property tax revenues go to the redevelopment agency for the life of the project. However, tax revenues produced by some types of tax rate increases are allocated to the taxing entity rather than the redevelopment agency, and redevelopment agencies are required to "pass through" to other local taxing agencies a portion of the tax increment that is determined by statutory formulas. Redevelopment agencies may issue bonds to finance redevelopment and use revenue from future tax increments to repay debt. During fiscal year 2004/2005, there were 422 redevelopment agencies in California, and 760 redevelopment project areas.

In recent years, redevelopment agencies have been the subject of significant criticism and scrutiny. Critics have raised questions about the value and necessity of redevelopment, and the use of tax increment financing which diverts increases in local property taxes away from other local taxing entities. Redevelopment agencies have been charged with making questionable declarations of blight and criticized over the use of eminent domain to support private development. Concerns have also been raised about the lack of formal redevelopment oversight mechanisms.

Redevelopment officials, like city council members and officials on other governing bodies, are appointed to make policy decisions. Certain types of decisions, because of their particular sensitivity or potential impact, are subjected to a higher standard of review. Some decisions require a "super majority" of the governing body. In some instances, opposing parties may subject the decisions of a governing body to a referendum or appeal to the courts.

With respect to redevelopment, critics have argued that the costs of litigation and the referendum process, as well as the timelines for filing referendum petitions or legal challenges, prohibit the use of these mechanisms. The purpose of this report is to examine what other types of mechanisms might increase the input of local citizens and governments in redevelopment decisions.

Due to concerns about the use of redevelopment in the wake of significant public concern over the decision in *Kelo v. City of New London (2005)*[1] – in which the U.S. Supreme Court held that the taking of private property for the purpose of private development (as part of a redevelopment project) satisfied the constitutional "public use" requirement – the California Legislature held a series of joint interim hearings on redevelopment reform

in the fall of 2005. As a result, in 2006 the legislature passed several bills to reform redevelopment practices. Perhaps most notably, SB 1206 (Kehoe) narrowed the statutory definition of "blight," contained provisions to increase state oversight of redevelopment, and made it easier to challenge redevelopment plans through litigation or by referendum.

Assembly member Chuck DeVore requested that the California Research Bureau conduct further study of oversight mechanisms for redevelopment agencies. The principal question addressed in this report is how local citizens and governments can exercise greater input in redevelopment decisions.

A logical starting point might be to examine the possibility of county oversight. Over the years, there has been some interest in granting redevelopment agency oversight responsibilities to Local Agency Formation Commissions (LAFCOs) or to some other body that represents the interest of the counties in which redevelopment agencies operate. Counties certainly have a financial incentive in exercising oversight. Redevelopment diverts (to redevelopment agencies) a significant portion of property tax revenue that would otherwise go to counties.

In 1983, AB 322 (Costa) established a form of oversight mechanism by requiring new redevelopment project areas to be reviewed by fiscal review committees composed of local taxing agencies. If, through the fiscal review committee process, other local agencies could show "financial burden or detriment," a redevelopment agency could share its property tax increment revenues with other agencies through "pass-through agreements." Critics, however, suggested that these agreements often protected the fiscal interests of local agencies while nonetheless allowing questionable redevelopment projects to proceed.[2] Eventually, the Redevelopment Law Reform Act of 1993 (AB 1290, Isenberg) repealed the fiscal review committee process and established statutory formulas to determine "pass-through" payments.

Could LAFCOs play an oversight role in the adoption of redevelopment plans? LAFCO'S were established in 1963 to replace county boundary commissions. The courts have described LAFCOS as the legislature's "watchdog over local boundaries." Although redevelopment project areas are a type of boundary, staff members from the local government committees of the Assembly and the Senate suggest that redevelopment oversight would be a significant departure from LAFCOs' existing statutorily defined role of overseeing boundaries between, not within, local jurisdictions. Nonetheless, redevelopment disputes typically involve issues that are related to LAFCOs' mission of improving coordination among local governments and encouraging efficient and effective growth.

The focus of this report is primarily on arbitration rather than county oversight. Assembly member DeVore requested that the California Research Bureau examine the idea of binding arbitration as a means to settle disputes that arise from the use of redevelopment funds.

The first section of this report provides a description of California redevelopment law, including recent reform legislation and existing oversight mechanisms.

The second section examines how arbitration might be established in the context of redevelopment disputes. Two possibilities are outlined:

1. Arbitration as an alternative to litigation in cases where opponents challenge the legal validity of redevelopment plans.
2. Some form of arbitration might be adopted that would formalize the process by which local residents, businesses, or community groups provide input into redevelopment plans.

The report concludes with a section that considers increasing the effectiveness of redevelopment project area committees (PACs) by making key changes such as:

- Broadening the criteria that require redevelopment agencies to form project area committees (PACs).
- Broadening PAC membership, possibly to include representatives of affected taxing agencies.
- Making it more difficult for redevelopment agencies to override PAC recommendations, perhaps allowing PACs to initiate some form of arbitration proceedings when an impasse is reached with the agency.

REDEVELOPMENT IN CALIFORNIA

BRIEF OVERVIEW OF CALIFORNIA REDEVELOPMENT LAW

Redevelopment is a tool created by state law to assist local governments in eliminating blight by rehabilitating residential, commercial, industrial, and retail development in a designated area. In general, blight is defined as physical and economic conditions within an area that cause a reduction, or lack, of proper utilization of that area.

The California Community Redevelopment Law (California Health and Safety Code, Section 33000 et seq.) provides that any county or city can establish a redevelopment agency by the action of its governing body. In all but a few agencies in California, the local governing body also serves as the redevelopment agency board. In a handful of cities and counties, the redevelopment agency is a separate body comprised of members appointed by elected officials.

The California Community Redevelopment Law prescribes the powers of a redevelopment agency. An agency may prepare and carry out plans for the improvement, rehabilitation, and redevelopment of blighted areas. A redevelopment plan provides the agency with powers to take certain actions such as purchasing and selling land within the area covered by the plan (project area), improving dilapidated facilities, and using tax increment financing.

Redevelopment activities may include the rehabilitation/reconstruction of existing structures, the redesign/re-planning of areas with inefficient site layout, the demolition and clearance of existing structures, the construction/rehabilitation of affordable housing and the construction of public facilities including, public buildings, streets, sidewalks, sewers, storm drains, water systems, and street lights.

A redevelopment plan is adopted by ordinance of the governing body of the community. Adoption of the plan is based on the recommendations of the agency, the planning commission, and the project area or redevelopment advisory committee (if formed). The project area must first be presented at a public hearing (giving citizens who will be included in the project area a chance to express their views) after which the redevelopment agency acts on the adoption of the project area and becomes primarily responsible for carrying out the plan.

Redevelopment is financed primarily by tax increment revenue. Other revenue sources include loans, grants and the issuance of tax allocation bonds. California voters adopted Article XVI, Section 16 of the California Constitution in 1952, providing for tax increment financing. Tax increment financing is based on the assumption that a revitalized project area will generate more property taxes than were being produced prior to redevelopment. When a redevelopment project area is adopted, the current assessed values of the property within the project area are designated as the base year value. Tax increment comes from the increased assessed value of property, not from an increase in tax rate. Any increases in property value, as assessed because of change of ownership or

new construction, will increase tax revenue generated by the property, the majority of which goes to the agency.

Taxing entities such as the county, school districts, and special districts that serve the project area, continue to receive all the tax revenues they were receiving the year the redevelopment project was formed (the base year). In addition, taxing entities receive a portion of the incremental increase in property tax revenues from a redevelopment project area.

The California Community Redevelopment Law requires that no less than 20 percent of tax increment revenue derived from a redevelopment project area be used to increase, improve, and preserve the supply of housing for very low-, low- and moderate-income households.

LEGISLATIVE REFORM OF REDEVELOPMENT LAW IN CALIFORNIA

Due to concerns about redevelopment agency activities, there have been a number of legislative reforms designed to change, and add some oversight, to redevelopment agency practices.

In the 1970s, the Legislature responded to concerns that redevelopment projects caused a loss of affordable housing. Legislation required redevelopment officials to replace affordable housing that they destroyed (AB 4473, Sieroty, 1976). Redevelopment agencies must also set aside 20 percent of tax increment revenues for the construction and rehabilitation of affordable housing (AB 3674, Montoya, 1976). At least 30 percent of housing units developed by the redevelopment agency, and 15percent of those developed by builders other than the redevelopment agency must be affordable to low- and moderate-income households (AB 1018, Sieroty, 1975).

After the passage of Proposition 13 and the resulting reduction of property tax revenues, cities had a strong incentive to use their redevelopment authority to promote development that produced sales tax revenues and to capture a larger share of property tax revenues.[3] The number of redevelopment agencies and project areas grew significantly.[4] County officials expressed concern that cities were declaring agricultural areas and open space land blighted and including those properties in redevelopment project areas. Legislators responded by banning “bare land projects” and by requiring fiscal review committees composed of local taxing agencies to review proposed new project areas (AB 322, Costa, 1983).

A decade later, another important redevelopment reform bill was passed (AB 1290, Isenberg, 1993). The bill, which was sponsored by the California Redevelopment Association, narrowed the statutory definition of blight and set time limits on redevelopment projects.

AB 1290 also repealed the fiscal review committee process, which redevelopment agencies had used to settle, or avoid, lawsuits by negotiating deals with counties and school districts to "pass through" large portions of their share of property tax revenue to these taxing entities. As an alternative to fiscal review committees, AB 1290 established a set of statutory formulas to determine pass-through payments.

In 2006, the passage of SB 1206 (Kehoe) established further reforms. The bill narrowed the statutory definition of blight. It increased state oversight by requiring redevelopment agencies to submit preliminary reports to the Department of Finance (DOF) and the Department of Housing and Community Development (DHCD) 45 days prior to public hearings on proposed amendments and adoptions. It also required the DOF to estimate certain effects of the proposed adoption or amendment.

SB 1206 makes it somewhat easier to challenge redevelopment plans. It increases the statute of limitations on a legal action challenging a redevelopment plan from 60 to 90 days and increases the time for submitting a referendum petition on an ordinance adopting or amending a redevelopment plan from 30 to 90 days.

The passage of SB 53 (Kehoe) in 2006 requires redevelopment plans to specify how, when, and where eminent domain powers will be used, and prohibits redevelopment agencies from amending a redevelopment plan without first documenting new findings of blight.

CURRENT REDEVELOPMENT AGENCY OVERSIGHT IN CALIFORNIA

Although there is no formal system of review or approval of redevelopment plans beyond the agency and the city or county that created it, the Community Redevelopment Law provides for several oversight mechanisms. Challenges can be brought against redevelopment agencies through litigation or through a referendum process. In addition, the law requires redevelopment agencies to report certain activities to the DOF and the DHCD. In some cases, redevelopment agencies are also required to form Project Area Committees to oversee plan adoptions and a limited range of redevelopment activities.

Litigation

A 1994 report by the Legislative Analyst's Office (LAO) found that oversight of redevelopment agency activities comes primarily through legal challenges or referenda initiated by three parties: [5]

- Local taxing agencies including the counties, special districts, and school and community college districts serving the redevelopment project area.
- The state, primarily the state DOF.
- The public, which includes local residents and businesses.

Referendum

Local residents may also challenge the adoption or amendment of a redevelopment plan by referendum. The law specifies that referendum petitions of all cities and counties must be submitted to the clerk of the legislative body within 90 days of the adoption of an ordinance subject to adopt or amend a redevelopment plan.[6] A 1994 study published by the California LAO found that even though local residents and businesses frequently commented on proposed redevelopment activities, few pursued their challenges in court or through the referendum process.[7]

In an attempt to make the referendum process more accessible, the passage of SB 546 (Torkalson) in 2004 increased the time period in which a referendum petition could be filed from 30 days to 90 days for petitions circulated in cities or counties with populations greater than 500,000. SB 1206, which was passed in 2006, extends the 90-day time period to petitions circulated in all cities and counties, regardless of population size.

Redevelopment agency reporting requirements

California law requires redevelopment agencies to file annual reports with the legislative body and the state that describe agency finances and provide information regarding the provision of housing for low- and moderate-income persons.[8] Agencies are required to file an annual financial report with the local legislative body and with the State Controller. The legislature also requires redevelopment agencies to file an annual report with the California DHCD that provides specific information on agency activities that affect housing such as displacement, housing units destroyed, and housing units constructed.

Based on redevelopment agencies' financial audit reports, the State Controller is required to compile a list of agencies that appear to have major violations of the Community Redevelopment Law. In cases where violations are found, the law establishes a procedure for consultation between the State Controller's Office and redevelopment agency, referral of the violation to the Attorney General, a court hearing, and the issuance of court orders and fines designed to remedy violations.

Of the 422 redevelopment agencies that existed during the 2004/05 fiscal year, the State Controller's Office found 86 major violations based on the annual reports filed by the agencies. Of these, 51 (60 percent) were for failing to adopt an implementation plan, which the law requires agencies to adopt every five years. Thirteen (15 percent) of the 86 major violations were for failing to file an audit report, and another eight (9 percent) were for a "lack of findings for administrative expenditures from the Low and Moderate Income Housing Fund." The remaining 14 violations (16 percent) were for failing to initiate development, failing to file an annual report with the Controller's Office, not establishing time limits on incurring/repaying debt and on the duration of the plan, and for failing to accrue interest to the Low and Moderate Income Housing Fund.

Other than these finding, the state has taken few steps to enforce statutory requirements. A 2005 LAO report found that the Department of Finance had only used its authority to challenge proposed redevelopment projects once. The same report found that the Attorney General had done so only twice.[9]

Project Area Committees

California redevelopment law provides for the formation of project area committees to oversee plan adoptions and a limited range of redevelopment activities.[10] Under the law, redevelopment agencies are required to form a project area committee if: (1) "a substantial number of low- or moderate-income persons, or both, live within the project area, and the redevelopment plan will give the redevelopment agency the authority to acquire residential property by eminent domain;" or (2) "the redevelopment plan contains one or more public projects that will displace a substantial number of low- and/or moderate-income persons."

If a redevelopment agency does not form a PAC, the agency must adopt a resolution making a finding that the formation of a PAC is not required. A statement of the specific reasons why the project will not displace a significant number of low- and/or moderate-income persons should support the finding. If a PAC is not formed, the agency must consult with residents and community organizations before the redevelopment plan is adopted. If a PAC is to be formed, the law contains a number of provisions that require the agency to adopt procedures to publicize the opportunity to serve on the PAC and to assist with its formation.

PAC membership is limited to elected representatives of residential owner-occupants, residential tenants, business owners, and existing organizations within the project area. Each represented organization must appoint one of its members to the committee. Neither the legislative body, nor the redevelopment agency may appoint a committee member. The election of committee members must be held within 100 days after the preliminary plan for a project area is adopted.

PACs serve as advisory bodies to redevelopment agencies. Redevelopment plans must be submitted to a PAC, which reviews the plans and may prepare a report and make recommendations. If a PAC recommends against the approval of a redevelopment plan, the legislative body of the redevelopment agency may only adopt it by a two-thirds vote. The redevelopment agency must consult with the PAC on matters related to the planning and provision of residential facilities displaced by the project and on other policy matters affecting residents within the project area. The agency must continue to consult with the PAC for at least three years after the plan is adopted.

CONSIDERING ARBITRATION AS AN OVERSIGHT MECHANISM FOR REDEVELOPMENT AGENCIES

Assemblyman Chuck DeVore's request directed the California Research Bureau to determine:

- Who the interested parties would be in a dispute;
- Who would settle the dispute; and
- How arbitration would work if applied to redevelopment agencies.

This section addresses these issues by examining existing California arbitration statutes and the American Arbitration Association's (AAA) procedures for large complex commercial cases, and considering how those laws and rules might be applied to disputes that arise from redevelopment.

The appeal of arbitration is that it has the potential to be less costly and quicker than litigation. It should be noted, however, that arbitration is typically used to settle disputes related to commerce. The decision to arbitrate disputes is agreed upon within the context of a contractual relationship between parties.[11] In the commercial context, part of the appeal of arbitral proceedings is that they are generally private.[12] In a sense, arbitration can be viewed as an "opting out" of the public forum of conventional courts into a more private forum of dispute resolution.[13] Unlike litigation, pleadings are not publicly filed, arbitration sessions are closed, and decisions are not released to anyone other than the parties.[14] Because redevelopment is a matter of public policy with impacts that reach beyond disputing parties, it follows that the rules and procedures should be designed with the goal of creating proceedings that are more open and accessible than is the case in commercial arbitration.

A number of California statutes allow for, prescribe, or limit, arbitration as a means of settling consumer, commercial, labor, and regulatory disputes in a variety of substantive areas. Some of the statutes simply list arbitration as an option that parties may choose for settling disputes, but stop short of specifying how arbitrators should be chosen or the rules that should govern the proceedings. At the other end of the spectrum, some of the statutes contain detailed language that cover aspects of the entire dispute resolution process from initiating arbitration proceedings and selecting arbitrators, to awards and appeals.

In addition to California laws, the discussion in this section also refers to the American Arbitration Association's (AAA) procedures for large complex commercial cases. A number of California statutes require or recommend the use of AAA procedures and/or AAA-affiliated arbitrators. The AAA has developed procedural guidelines for various types of arbitral disputes. AAA's procedures for large, complex commercial disputes are perhaps best suited to redevelopment disputes, due to the complexity and the potential magnitude of the financial impact of these cases.

What types of redevelopment-related disputes might be settled with arbitration?

California law currently provides for arbitration in cases where there is a dispute over the amount of compensation that a redevelopment agency or other public entity must provide when acquiring property through the use of eminent domain power.[15] As with litigation in these cases, the property owner is compensated for all costs associated with the proceedings.

Arbitration could also be used in two additional contexts including:

- As an alternative to the courts in disputes over whether redevelopment plans and redevelopment activities conform to the law; and
- To provide a means for local citizens and governments to be meaningfully involved in the planning process prior to the adoption or amendment of a redevelopment plan.

For disputes involving claims related to the validity of redevelopment plans and redevelopment activity (i.e., claims that a redevelopment agency has violated existing statutes) although there is currently no provision in the law that allows for arbitration, parties that challenge redevelopment agencies could be given the option to submit their disputes to a binding arbitration process. An arbitrator (or arbitrators) would be selected to settle disputes that would otherwise be handled through litigation.

For these types of cases, however, arbitration is probably less desirable than litigation. In a sense, arbitration can be viewed as "opting out" of the public forum of conventional courts into a more private realm of dispute resolution.[16] This is often desirable in commercial disputes, but not for redevelopment disputes that involve public funds and public impacts. Another reason to favor litigation in these cases is that arbitral awards do not set precedence for decisions in future disputes – there is no "law of arbitration."[17] With litigation, judges' decisions shape public policy by specifying the meaning and application of the statutes.

It might be more worthwhile to consider the possibility of establishing some form of arbitration procedure for settling disputes that are related to the scope, purpose, and details of a redevelopment plan before the plan is adopted. Currently, challenges that are brought against redevelopment agencies by referenda or through litigation cannot be initiated until a redevelopment plan or amendment is adopted. It seems, however, that the establishment of some formal mechanism to allow local citizens and governments more leverage to influence redevelopment issues such as project area size and boundaries, land uses, proposed projects, and financing could potentially allay local concerns about redevelopment and stave off challenges that occur after a plan is adopted.

Any proposal to adopt some type of arbitration process to address disputes over the scope and purpose of a redevelopment plan prior to adoption, however, would likely be met with strong opposition from redevelopment agencies. Establishing such an arbitration process would give local taxing agencies and citizens a formal role in shaping redevelopment plans that they have not previously enjoyed.

Despite likely opposition, if an arbitration process were established to settle disputes related to the scope and purpose of redevelopment plans, it might be useful to consider some form of tiered dispute resolution process that includes an initial mediation period prior to arbitration, similar to the model used in collective bargaining disputes.

According to a representative from the American Arbitration Association:

> *…this type of issue [redevelopment disputes] would seem to lend itself well to an initial mediation attempt. If the types of disputes that arise are largely foreseeable and usually involve many of the same repeat players, a conflict resolution system could be designed and adopted by all the agencies and other likely stake-holders (environmental groups, etc.) in a pre-dispute environment -- something along the lines of what is done on large construction projects, where everyone knows that disputes will inevitably arise and the resolution process is agreed to by all before the project even starts. Arbitration might work for valuation disputes once a redevelopment area has been designated.*[18]

A useful model for this approach can be found in laws that govern collective bargaining disputes, which sometimes require a mediation period prior to arbitration. Under interest, or contract, arbitration, a union and employer that cannot agree on a contract typically go through mediation, which involves a neutral third party who listens to each party separately and makes suggestions to narrow differences and allow the parties to reach a voluntary settlement. If necessary, the dispute continues to binding arbitration, in which a neutral party proposes a settlement by recommending one of the party's final offers at the bargaining table.

Another example of this type of tiered arbitration approach, one that perhaps most closely parallels redevelopment disputes between counties and municipal redevelopment agencies, is the dispute resolution process for property tax exchange agreements between California cities and counties. Before a city can annex territory, it must negotiate a property tax exchange agreement with its county. Section 99 of California's Revenue and Taxation Code provides a three-step process to resolve disputes related to property tax exchange agreements between a city and a county when the city annexes territory:

1. If the city and county cannot reach an agreement after an initial 60-day negotiation period, they must choose a mutually acceptable third-party consultant who has 30 days to provide a fiscal analysis.
2. If no agreement has been reached at the end of this analysis period, the two parties must submit to a 30-day mediation period with a mutually selected mediator.
3. If mediation does not produce an agreement, the two parties must present their last and best offers to a mutually selected arbitrator who, at the end of the 30-day arbitration period, selects one of the offers and recommends it to the governing bodies of the city and county.

According to a Senate Local Government Committee analysis, this three-tiered dispute resolution process for property tax exchange agreements has never been used, but may

have prevented disputes between cities and counties that would not have otherwise reached an agreement.[19] The analysis suggests that prior to the establishment of the dispute resolution process, a county could effectively veto a city annexation by refusing to agree to a property tax exchange. It is possible that having the process in place makes counties more willing to negotiate with their cities rather than have an agreement dictated by an arbitrator. As this example suggests, one possible advantage of a multi-tiered approach to dispute resolution is that by first giving parties the opportunity to negotiate a resolution on their own, they may ultimately be more satisfied with the outcome.

Timelines

Timelines are often imposed to limit the length of time between the decision to arbitrate and the hearing date, the length of hearings, and the length of time between the conclusion of the hearing and the written award.

In commercial disputes, timelines are generally imposed by arbitrators (if not previously agreed upon by contract) or through negotiations between the parties after the dispute has arisen. The American Arbitration Association does not have specific guidelines in terms of timelines for large commercial cases, but instead leaves it to the arbitrators to take steps to "avoid delay and to achieve a just, speedy and cost-effective resolution."

Similarly, some sections of California Law that require, or provide for, arbitration leave timelines to the discretion of the arbitrator. For example, Section 7085.5 of the California Business and Professions Code, which allows for arbitration in complaints arising from work conducted by licensed contractors, directs arbitrators to guide the discovery process and schedule hearings in a manner that is "consistent with the expedited nature of arbitration," and that will "permit full and expeditious presentation of the case."

Some sections of California Law do specify timelines for arbitration proceedings. For example, under Section 1428(c) and 1428(d) of the California Health and Safety Code, long-term care facility licensees that wish to contest a citation or proposed assessment of a civil penalty by the Department of Health Services may elect to submit the matter to arbitration. The arbitration hearing must be set between 28 to 45 days of the election to arbitrate. At the discretion of the arbitrator, the hearing may be continued up to 15 additional days.

Similarly, Section 2685 et seq. of the California Labor Code defines the procedures for mandatory arbitration of pricing and product quality disputes arising out of written contracts between manufacturers and contractors. Section 2686 specifies that upon the written request to arbitrate made by a manufacturer or contractor, the Department of Industrial Relations will appoint an arbitration panel. Within seven days of appointment, the chairperson of the arbitration panel will notify the parties of the date, time, and location of the hearing, which must be scheduled no later than 21 days after the filing of the request for arbitration. The arbitration panel has 15 days after the conclusion of the hearing to make a written award. The party or parties that are required to comply with

the terms of the award have 10 days in which to comply and to file proof of compliance with the commissioner.

If the purpose of creating some form of arbitration mechanism for redevelopment disputes is to reduce the time and cost that would be required to resolve disputes in court, it seems that some form of timelines might be warranted. Allowing a 90-day period in which to initiate arbitration proceedings would be consistent with California Health and Safety Code, Section 33501. This section of the law establishes a statutory limitation of 90 days for initiating legal actions to challenge redevelopment plan adoptions, amendments and redevelopment agency findings or determinations. Consideration should also be given to developing timelines for setting a hearing date, the length of hearings, and for the award and appeal process.

Who could bring a dispute to arbitration?

A Legislative Analyst's Office (LAO) report notes that challenges to redevelopment could potentially come from the following parties:[20]

- Local taxing agencies including the counties, special districts, and school and community college districts serving the redevelopment project area.
- The state. Redevelopment projects rely heavily on the schools' share of property taxes. Recognizing the need to protect the financial interests of the state, which must reimburse schools for property tax revenues that go to redevelopment agencies, California redevelopment law names the Department of Finance (DOF) and, with the passage of SB 1206 (Kehoe) in 2006, the Attorney General as interested parties in any action brought with regard to the validity of an ordinance adopting a redevelopment plan.
- Members of the public, including local residents and businesses and environmental groups that raise concerns about whether a redevelopment plan is consistent with their desires or meets environmental laws.

In practice, however, the LAO report notes that counties are the most likely party to challenge redevelopment agencies. Other taxing agencies tend not to have the fiscal incentive to do so. The DOF has not played an active role in challenging redevelopment agencies. Local residents and businesses, according to the report, seldom pursue redevelopment agencies through either litigation or the referendum process.

It is instructive to examine how the law defines interested parties to redevelopment-related disputes. According to California Health and Safety Code, Section 33501(c), in order to protect the interests of the state, the Attorney General and the DOF are interested persons in any action brought with respect to the validity of an ordinance adopting or amending a redevelopment plan. For the purpose of contesting the inclusion of restricted land, or agricultural land in a project area, Section 33501(d) names the following as interested parties in legal challenges to the validity of a redevelopment plan:

- The Department of Conservation.

- The county agricultural commissioner.
- The county farm bureau.
- The California Farm Bureau Federation.
- And agricultural entities and general farm organizations.

Section 33501.2 requires parties who challenge redevelopment plans, with the exception of the Attorney General, to present the grounds for the challenge, and object to the decision of the agency or the legislative body, prior to the close of the public hearing that is required for the adoption or amendment of a redevelopment plan.

As far as the public, the courts have placed substantial limits on the class of persons who are eligible to challenge the adoption or amendment of a redevelopment plan. *Torres v. City of Yorba Linda* (1993) addressed the issue of who has legal standing to bring a complaint against a redevelopment plan adoption. [21] The plaintiffs in the case did not live or own property in the city that had adopted the plan. Nevertheless, the plaintiffs challenged the adoption of a redevelopment plan by arguing that that they could be harmed by decreased county funds for social services. The court decided against the plaintiffs and held that because tax increment revenues are generated through improvements that would not occur without redevelopment, and because the fiscal review committee process established by law protects affected taxing agencies and county residents, the plaintiffs suffered no harm.

The plaintiffs in *Torres* also argued that their status as taxpayers, having paid both property and sales taxes in the county, established their standing in the dispute. The court held, however, that having paid property taxes was insufficient to distinguish them from most other county residents, and that having paid sales tax was also insufficient because a sales tax is a tax on the retailer, not the consumer.

If some form of arbitration were created either as an alternative to litigation over the validity of redevelopment plans or as a means of increasing local input in the planning process prior to the adoption of redevelopment plans, some consideration should be given to the question of who could initiate or participate in the proceedings. If the goal is to increase input in redevelopment, it might be necessary to consider broadening participation beyond the groups or persons that the courts consider to have standing to file complaints against redevelopment agencies.

How many arbitrators?

Arbitration proceedings are generally administered by a single arbitrator or by a panel of three arbitrators. Because increasing the number of arbitrators adds to the costs of the proceedings, decisions about the number of arbitrators must weigh both the need for a full and thorough review of the dispute, as well as concerns about cost effectiveness.

As a general rule, single arbitrators are used for disputes that are less complex and involve smaller awards while panels are preferred for disputes that are more complex. For example, the American Arbitration Association (AAA) procedures mandate that if an

arbitration agreement does not specify the number of arbitrators, and if the case is worth less than $75,000, there will only be one arbitrator.[22]

The AAA's large case procedures require three arbitrators for cases worth more than $1 million.[23] Based on this logic, a panel of three arbitrators would probably be desirable for the arbitration of redevelopment-related disputes, which are arguably quite complex and involve large sums of money. When a panel of three arbitrators is used, the two parties can each independently select one arbitrator. The third, or neutral, arbitrator is typically selected through a process that requires both parties, or their selected arbitrators, to select and agree upon a third arbitrator.

Some laws do not specify the number or arbitrators or simply state that the dispute "be submitted to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association." Some require a specific number of arbitrators. For example, in disputes between automobile liability insurers and the insured, California Insurance Code, Section 11580.2(f) states that the "arbitration shall be conducted by a single neutral arbitrator." Others leave the decision to the parties. For example, California Public Contract Code, Section 10240.3, states that for arbitration to resolve claims that arise from certain state contracts, "unless otherwise agreed by the parties, the arbitration shall be conducted by a single arbitrator selected by the parties from the certified list created by the Public Works Contract Arbitration Committee."

Selecting arbitrators

Unless the parties in arbitration have not already agreed to some other method for choosing arbitrators, the AAA's method for large, complex commercial cases is to send each party an identical list of (usually) ten names of potential arbitrators. If the parties fail to agree on arbitrators from the list, each party may be allowed to strike a fixed number of names from the list, and rank the remaining names in order of preference. The AAA will choose the highest-ranked arbitrators that are mutually agreeable to the parties.

Some sections of California law that establish arbitration procedures do not specify how arbitrators are to be chosen, or state that the arbitrator(s) should be chosen in accordance with the rules of the AAA. Other sections, however, do specify a process for selecting arbitrators.

For mandatory arbitration in disputes related to pricing and product quality arising out of written contracts between manufacturers and contractors, California Labor Code, Section 2686 specifies that the arbitration panel must consist of:

1. A management level representative from a manufacturer in the general geographic area in which the dispute arises;
2. A representative from the contractors' association whose membership encompasses the general geographic are in which the dispute arises; and
3. A third party to be chosen and agreed upon by the first two from a list of arbitrators provided by the American Arbitration Association (AAA). The law also specifies that the third arbitrator is to act as the chairperson of the panel.

In the context of redevelopment, a similar structure would require the redevelopment agency and the challenging party to both select arbitrators. The third arbitrator could be selected from a list of potential arbitrators provided by the AAA.

At the request of the California Research Bureau, the AAA conducted an e-mail inquiry to determine the extent to which AAA-affiliated arbitrators in California felt they had the necessary expertise and experience to arbitrate redevelopment-related disputes. The request elicited 18 responses. All respondents reported having experience with redevelopment and related issues such as eminent domain, tax allocation, land use planning, and environmental issues.

An alternative to selecting a neutral arbitrator from an AAA list would be to create some form of state-certified list of potential arbitrators for redevelopment disputes. For example, for arbitration in disputes between public agencies and contractors, Section 10240 et seq. of the California Public Contract Code requires that the parties select an arbitrator from a list of certified arbitrators established by the Public Works Contract Arbitration Committee.

Similarly, California Health and Safety Code, Sections 25356.2 through 25356.10, provide for an arbitration panel to resolve disputes related to the cleanup of hazardous substances. "Potentially Responsible Parties" that are assigned a collective share of responsibility for the hazardous substances at a site exceeding 50 percent may initiate binding arbitration before three arbitrators selected from CalEPA's Office of Environmental Health Hazard Assessment's (OEHHA) Hazardous Substance Cleanup Arbitration Panel. Arbitrators must be approved by OEHHA and must meet statutory criteria including relevant arbitration experience and expertise in engineering, the physical, biological, or health sciences, or other relevant experience and qualifications.

Rules and procedures for arbitration proceedings

Arbitration rules and procedures can vary significantly. Consumer and commercial contracts or agreements often specify elements such as:

- The method of initiating arbitration;
- Rules and procedures for pre-hearing motions;
- Rules for discovery and evidence;
- The specific laws, regulations and rules and types of evidence that arbitrators must consider in reaching a decision;
- Powers of arbitrators, including the power to compel witnesses through subpoena; and
- The content of the award and procedures for correcting an award.

When these types of procedures are not spelled out in a contract, or in statutes that provide for arbitration, they are generally determined by an arbitration administrator such

as the AAA, or by the arbitrator(s) presiding over the proceedings. Some sections of California Law do specify arbitration procedures.

In arbitration for pricing and product quality disputes arising out of written contracts between manufacturers and contractors, Section 2689 of the California Labor Code specifies the following procedures to govern arbitration hearings:

- The chairperson may issue subpoenas;
- Each party may be represented by attorneys at their own expense;
- Formal rules of evidence are not applicable, but any relevant evidence shall be admitted if it is "evidence upon which responsible persons would rely in the conduct of serious business affairs;"
- All testimony shall be taken under oath;
- No formal written records shall be kept unless one or both parties agrees to employ at their own expense a qualified court reporter for that purpose;
- Hearing attendees are limited to the panel, the parties and counsel, a court reporter, interpreters when requested, and witnesses while testifying;
- Panel members may allow a period of up to three days at the end of the hearing to allow parties to submit evidence not available during the course of the hearing.

Section 1299 et seq. of the California Code of Civil Procedure (which provides for arbitration in labor disputes involving firefighters and police officers) specifies, but does not limit, factors that the arbitration panel may consider in choosing between the last best offers made by the disputing parties such as the interest and welfare of the public and the ability of the employer to meet the costs of the award.

Section 6200(g) of the California Business and Professions Code specifies that arbitrators presiding over disputes between attorneys and clients may take and hear evidence, administer oaths and compel witnesses by subpoena.

Similar to decisions about the number of arbitrators and timelines for arbitration proceedings, decisions about specific arbitration procedures must weigh concerns about fairness, the necessity of allowing for a thorough hearing of the dispute, cost, and efficiency.

Responsibility for costs and fees of arbitration proceedings

As with many aspects of arbitration, the responsibility for paying the costs and fees associated with the proceedings can vary. It may be specified by contract or statute, or left to the discretion of the presiding arbitrator.

It is common for the costs of the neutral arbitrator and other costs of administering the arbitration to be divided proportionally among the parties. Generally, each party is

separately responsible for the fees of their own attorneys and witnesses. But in some cases, the law may specify otherwise.

In arbitration proceedings to determine the value owed a property owner in eminent domain cases, Section 1273.020(a) of the California Code of Civil Procedure specifies that the party acquiring the property in question is responsible for all costs associated with the arbitration proceedings including the expenses and fees of the neutral arbitrator and the fees and mileage of all witnesses subpoenaed in the arbitration. Property owners, however, must pay their own attorney's fees and expert witness fees. This arrangement serves to safeguard the due process rights of property owners who might otherwise find it difficult to pay the costs of arbitration.

In disputes between a developer and a time-share association, regardless of which party requests arbitration, Section 11241 of the California Business and Professions Code requires the developer to pay the fee that AAA charges to initiate the arbitration. Ultimately, the arbitrator determines the cost of arbitration borne by each party in these cases.

In some types of arbitration, responsibility for some of the costs and fees may depend on the outcome. For example, in arbitration proceedings for pricing and product quality disputes arising out of written contracts between manufacturers and contractors, Section 2692 of the California Labor Code specifies that the basic costs of the arbitration proceeding is to be borne equally by all parties, but that the panel may, as a part of its award, impose all such costs on the party requesting arbitration if a majority of the panel determines that the matter brought before it was frivolous. In arbitration to resolve disputes that arise from public agency contracts, Section 10240.13 of the California Public Contract Code specifies that the cost of conducting the arbitration shall be borne equally by the parties, with the exception "that the arbitrator may allow the prevailing party to recover its costs and necessary disbursements, other than attorney's fees, on the same basis as is allowed in civil actions."

If one of the purposes of considering the establishment of an arbitration process to settle disputes related to redevelopment in a manner that is more accessible and less cost prohibitive to potential challengers, it might be worthwhile to explore the possibility of shifting some portion of arbitration costs and fees to redevelopment agencies.

EXPANDED PROJECT AREA COMMITTEE OVERSIGHT

In addition to arbitration, project area committees might work more effectively to increase local input and oversight with several key changes such as:

- Broadening the criteria that require redevelopment agencies to form project area committees;
- Broadening project area committee membership, possibly to include representatives of affected taxing agencies;
- Making it more difficult for redevelopment agencies to override project area committee recommendations, perhaps allowing the committees to initiate some form of arbitration proceedings when an impasse is reached with the agency.

Project area committees are currently required for project areas that could potentially displace significant numbers of low- and moderate-income persons. PAC membership is limited to elected representatives of residential owner-occupants, residential tenants, business owners, and existing organizations within the project area. To form PACs, redevelopment agencies adopt their own procedures for allowing interested individuals and organizations to file for election, for registering qualified voters from the project area, and for publicizing and holding elections.

Redevelopment agencies must consult with the PACs on matters related to the planning and provision of residential facilities displaced by the project and on other policy matters affecting residents within the project area. Redevelopment plans must be submitted to a PAC, which reviews the plans and may prepare a report and make recommendations. If a PAC recommends against approving a redevelopment plan, the redevelopment agencies can only adopt the plan if two-thirds of its legislative body vote to do so.

By communicating constituents' concerns to redevelopment agencies and publicizing opposition to redevelopment, PACs have the potential to make redevelopment agencies more accountable to project area residents and businesses. It is also possible that PACs may play a role in relieving some of the tension surrounding redevelopment. According to the California Redevelopment Association, PACs not only "play a key role in forming the direction of the project. They also help bridge the communication gap between the community and the agency."[24]

San Francisco Bay Area project area committees

Several San Francisco Bay Area examples illustrate how PACs can exercise some influence over redevelopment. The South of Market Project Area Committee and the Bayview-Hunters Point Project Area Committee both operate independent websites that explain the redevelopment process, describe the history, current status, specific elements of redevelopment plans, and publicize PAC meetings as well as other news and events of interest to local residents and businesses.

Both of these San Francisco PACs make recommendations to ensure that redevelopment meets the needs and interests of their communities. Recently, the South of Market PAC opposed the redevelopment agency's plans to convert a hotel into low-income apartments for more than 100 chronically homeless people after local residents expressed concerns about the project.[25] The Bayview-Hunters Point Project Area Committee has worked with the San Francisco Redevelopment Agency on amendments related to truck routes, land use, affordable housing, and the use of eminent domain.[26]

Another example of an active Bay Area PAC is the West Oakland Project Area Committee, which recently voted to pay the first year of rent for a food cooperative in an area where there is only one full service grocery store.[27] The Committee also recommended that the city guarantee the second year of rent.

The Russian River Redevelopment Oversight Committee

The Russian River Redevelopment Oversight Committee (RRROC) is not technically a project area committee. Nonetheless, it is similar in its composition and responsibilities. Its formation and operation provide a case study of how a committee whose members include project area residents and businesses might work to influence redevelopment.

In July of 2000, the Sonoma County Board of Supervisors established the Russian River Redevelopment Plan, which encompasses a 1,800 acre area along the Russian River between Rio Nido and Villa Grande. Supervisors viewed the plan as an attempt to fund necessary public projects and revitalize an area prone to flooding and economic problems.[28] Critics of the plan, however, feared that the Sonoma County Board of Supervisors would approve redevelopment projects not in keeping with the region's rural setting. [29] Two lawsuits charged that the plan was an illegal effort to benefit developers, and challenged the county's assertion that the area qualifies as "blighted" and "urban."[30]

In response to criticism of the redevelopment plan, Supervisor Mike Reilly developed a proposal to create a citizens oversight committee that would give local residents and business owners the authority to approve or veto proposed projects. In July of 2000, a resolution of the Sonoma County Board of Supervisors created the Russian River Redevelopment Oversight Committee (RRROC) to participate in the implementation of the Russian River Redevelopment Plan throughout the plan's duration. Similar in structure to redevelopment project area committees, the RRROC consists of nine elected members that serve staggered four-year terms, and who reside in, or have business interests in the project area including:

- Three residential owner occupants;
- Three residential tenants;
- Three business operators and/or business property owners.

RRROC members are elected at an election meeting. Any person eligible for RRROC membership may also vote in a RRROC election. To qualify to vote or serve as a member of the RRROC, a person must present proof that he or she is a residential

owner/occupant, residential tenant, business operator, or business property owner within the project area.

In contrast to PACs, the RRROC not only acts in a review and advisory capacity, but may exercise approval/veto power over redevelopment agency activities. Without the affirmative recommendation of the RRROC, the Sonoma County Community Development Commission (the Sonoma County Community Redevelopment Agency) may not acquire property or engage in projects that use redevelopment funds. Since its inception, the RRROC has never exercised its veto power to halt a project that the redevelopment agency approved.[31] The RRROC, however, has been quite active in advising the Development Commission and has even proposed small capital projects that the Commission has approved. [32]

In 2001, seven members of the anti-redevelopment Russian River Community Forum, which had filed two lawsuits to stop redevelopment, were elected to serve on the nine-member RRROC.[33] The two women and five men elected to the RRROC were described in a newspaper article as a child-care provider, a stained glass artist, a community activist, a contractor, a psychotherapist, a glass artist, and a website operator. [34]

According to a representative from the Sonoma County Community Development Commission, members of the Commission and the community generally agree that the RRROC has been a positive experiment.[35] The current chair of the RRROC, a former member of the Russian River Community Forum shared this sentiment as well.[36] He admitted, however, that some in the community feel that the RRROC has been co-opted by redevelopment interests and that some view him and other committee members as "sell-outs."[37]

The number of people voting to elect RRROC members has increased over time, and attendance at RRROC meetings has remained high.[38] And, in this area, that has no other local government body, RRROC meetings have, according to the RRROC chair and a representative from Sonoma County's Community Development Committee, become a vibrant community forum. [39]

Are Bay Area PACs and the Russian River Redevelopment Oversight Committees models that can be replicated elsewhere?

Admittedly, Bay Area PACs and Sonoma County's RRROC may be somewhat unique examples. According to Thomas Hart, Deputy Director of the California Redevelopment Association, San Francisco PACs wield significantly more power than those that exist in other communities.[40] The RRROC appears to be a one-of-a-kind redevelopment oversight committee in California.

It is possible that Bay Area PACs and the RRROC are able to play an active role in shaping the direction of redevelopment because they are able to draw from a base of community activism that does not necessarily exist in other locales. San Francisco certainly has a tradition of strong community activism that has influenced local politics,

and, prior to the formation of the RRROC, the communities in the Russian River redevelopment project area had already formed the Russian River Community Forum.

In contrast, not all communities have a well established tradition, or network of activist organizations, from which a PAC might draw. An LAO analysis, for example, found that local residents and businesses in California rarely pursue redevelopment challenges either through litigation or the referendum process.[41] When PACs are formed, it might be difficult to find enough interested persons to participate. In Moorpark, the city council in 2005 voted to proceed with PAC meetings even though they were unable to completely fill the committee because no one expressed interest in representing the residential tenant category.[42]

It is important to consider whether PACs could play a significant role even in communities where the participation of residents and businesses in redevelopment and other local issues is less well established. It is possible, however, that if PACs were structured in a way that gave them more influence or power they could become a more meaningful tool for local input and oversight in a wide variety of communities.

APPENDIX: ARBITRATION

WHAT IS ARBITRATION?

Arbitration, like pre-trial settlements and mediation, is a type of alternative dispute resolution. Arbitration is generally contractual in nature. According to the authors of a recent book titled *Arbitration Law in America* (2006), "arbitration rests on a firm foundation of party autonomy…A contract is central to the success of party autonomy in arbitration procedure."[43] Arbitration can take different forms, but generally includes several elements:

- There is typically an agreement between two or more parties to submit a current or future dispute to arbitration. The powers of the arbitrator, the arbitrator selection process, the arbitration forum, the substantive laws or rules that will apply to the dispute, and other procedural elements of arbitration are defined by this agreement.
- There must be a dispute or controversy between parties.
- An arbitrator, or panel of arbitrators, conducts a process to gather information from documents, briefings from disputing parties and the testimony of witnesses.
- Unlike mediation, where a mediator attempts to guide parties to a resolution, the arbitrator(s) render a decision.
- The decision and the award made by the arbitrator(s) are generally binding on the parties.

In the U.S., the popularity of arbitration rose during the industrial revolution.[44] Businesses favored arbitration because of its privacy and because of the potential for quicker, cheaper dispute resolution at the hands of an arbitrator who was often an expert in the industry.[45] In labor disputes, both unions and management also viewed arbitration as a speedy, fair, and more inexpensive means of resolving disputes.[46]

TYPES OF ARBITRATION

In addition to commercial arbitration, which is used to resolve disputes between commercial entities, arbitration is used in a number of other contexts as well.

Consumer arbitration

Historically in the U.S., arbitration agreements were entered into by two or more business entities.[47] In the late 1800s however, stock exchanges and brokerages began to require arbitration for claims brought by investors, but beyond the securities industry, arbitration between consumers and businesses was not common.[48] When the Federal Arbitration Act (FAA) was enacted in 1925, the possibility of arbitration among businesses and consumers was viewed as inappropriate and fraught with potential problems.[49]

In the 1980s, the U.S. Supreme Court began to view arbitration more favorably and reversed earlier decisions that limited the types of claims that contracts could require to be settled through arbitration.[50] In the 1990s, a broad range of companies began to require customers to agree to resolve future disputes through arbitration rather than litigation.[51] The practice is now used by financial institutions, service providers, and sellers of consumer goods, educational institutions, health care providers, and health insurers.[52] One study found that in 2001, one-third of the consumer transactions of an "average person" in Los Angeles were likely covered by an arbitration clause.[53]

Although arbitration may be a more accessible means for the typical consumer to resolve a dispute with a company than litigation, as the practice of adding arbitration clauses to consumer contracts becomes more ubiquitous, concerns about fairness and equity abound. According to one consumer advocacy group, arbitration clauses are "the single biggest threat to consumer rights in recent years, a de-facto rewrite of the Constitution that undermines a broad range of consumer protections painstakingly built into law."[54] Concerns about consumer arbitration include the following:[55]

- Because there is no requirement that a document containing an arbitration clause be signed by the consumer, it is likely that many consumers do not read, and are not aware of, the arbitration clause.
- Arbitration requirements are sometimes added after a business relationship is established. For example, credit card companies may send a small-print notice of a change of policy that requires arbitration after an account has been opened.
- The broad expansion of consumer arbitration beyond the securities industry means that a wider class of less-educated consumers is affected by arbitration clauses.
- Consumer arbitration clauses tend to favor the company that drafts them, and can limit consumers' procedural and substantive rights. For example, arbitration clauses may:
    - Shorten the length of time that plaintiffs have to bring a dispute.
    - Limit discovery and the types of evidence allowed.
    - Prevent consumers from joining together in a class action.
    - Bar certain types of relief such as punitive damages or attorneys fees.

Due to concerns about these issues, many states have passed legislation to prevent abuses and protect consumers. In California, for example, several statutes require that arbitration clauses in certain types of contracts include specific language in upper case text that clarifies what it means to agree to the arbitration clause. Similarly, the American Arbitration Association (AAA) has adopted a consumer due process protocol, which includes provisions that allow consumers to opt into small claims court, and requires businesses to develop an arbitration process that has a reasonable cost for consumers.[56] The AAA will not administer arbitration unless businesses substantially comply with the consumer due process protocol.

Labor and employment arbitration

With the rise of the labor movement in the U.S. in the 1900s, unions and employers recognized the need for a speedy, inexpensive, and fair method to resolve disputes that arose in the context of the modern workplace.[57] In 1947, the U.S. Congress enacted the Labor Management Relations act, which provides for federal court jurisdiction for purposes of enforcing collective bargaining agreements. Courts have held that the power to enforce a collective bargaining agreement includes the power to enforce an arbitration provision in such an agreement. Based on this theory, the Labor Management Relations Act is the authority that binds parties to labor arbitration.

Professional arbitrators help to establish and apply a system of justice that both the union and the employer can accept. Because much of labor arbitration is aimed at clarifying conditions of employment or other details left unspecified in a collective bargaining agreement, arbitrators serve a law-making function similar to government agencies that apply and interpret the directions of the legislature by issuing regulations. As opposed to interest arbitration, grievance arbitration occurs when unions and employers employ arbitration to resolve employee grievances arising under a collective bargaining agreement.

Employment arbitration includes arbitration agreements contained in an employment contract between an employee and an employer. As with arbitration agreements in commercial contracts, the procedures for employment arbitration can vary. Because the U.S. Supreme Court has decided that the Federal Arbitration Act (FAA) applies to employment arbitration, FAA default procedures such as methods for appointing arbitrators are used when procedures are not specified in the arbitration agreement.[58] As with consumer arbitration, concerns have been raised that employment arbitration agreements are more favorable for employers.[59]

International arbitration

International arbitration has developed over the past century as a means of resolving disputes between parties of different countries.[60] Arbitration avoids the problem of having one or more parties in a dispute seek judgments in courts in their own countries, then re-litigating the issues in a court of the other party's jurisdiction to seek enforcement of the judgment.

In 1958, the United Nations published the Recognition and Enforcement of Foreign Arbitral Awards, a multilateral treaty generally known as the "New York Convention."[61] More than 100 countries have ratified the treaty, which applies to the recognition and enforcement in one nation's courts of an arbitral award made in another nation. The treaty calls for the courts of each signatory nation to recognize written arbitration agreements, to compel parties that have a valid agreement into arbitration when one party petitions the court to do so, and to recognize and enforce arbitral awards.

Judicial arbitration

Many state court systems offer some form of judicial arbitration, often for civil cases that involve small claims. In judicial arbitration, a judge orders a legal action into arbitration, or the parties and counsel agree to submit the matter for arbitration. An arbitrator, or a panel of arbitrators, usually attorneys who are selected from the court's panel of arbitrators, conducts the arbitration. Typically, either side may request a *trial de novo* (new trial) if they are unhappy with the arbitration award.

WHY USE ARBITRATION?

Arbitration is considered to have a number of advantages over litigation in disputes between private parties. Some of these include:

- ***Arbitration proceedings are generally private.*** Arbitration sessions are closed and decisions are not released to anyone other than the parties. Parties to disputes often find it desirable to keep the findings and the decision private.
- ***Parties to an arbitration typically have significant say in choosing an arbitrator.*** Parties may agree on an arbitrator or may use a sponsoring organization that provides a list of potential arbitrators from which they can choose. The ability to choose an arbitrator is viewed as important for disputes involving complex or technical matters with which most judges and juries have little experience or expertise.
- ***Arbitration allows for flexible rules.*** Parties may choose the rules and procedures that they feel will most likely achieve a fair and efficient resolution.
- ***Parties sometimes prefer arbitration because they believe it is cheaper and faster than litigation.*** Arbitration generally has more streamlined procedures (e.g., relatively little discovery) that can improve the speed of the decision-making process. There is limited research on this, largely because arbitration tends to be private. Nonetheless, depending on the complexity of a dispute, and the arbitration rules agreed upon by the parties, it is possible that resolution will take as long or longer than it would in the courts. There is also evidence that arbitration can be more costly because in addition paying the costs of attorneys, disputants must pay the fees of the arbitrators and various administrative costs that may be higher than that charged by the courts.[62]
- ***The relative informality of arbitration proceedings are sometimes considered an advantage over litigation.*** Proceedings typically take place in private conference rooms rather than in a court-like setting. Rules of evidence and procedures are relaxed.
- ***The finality and enforcement of binding arbitration are also viewed as positive.*** Parties to arbitration have limited rights of appeal. Under the Federal Arbitration Act and most state laws, factual errors, and even errors of law, are not sufficient grounds to vacate an award.

THE FEDERAL ARBITRATION ACT (FAA): KEY PROVISIONS

In 1925, the U.S. Congress enacted the Federal Arbitration Act (FAA) whose fundamental premise was that agreements to submit disputes to arbitration should be as enforceable as any other contracts. [63] The FAA applies to transactions and contracts in which the parties have agreed in writing to submit controversies that arise out of the contract to arbitration.

Under the Commerce Clause of the U.S. Constitution, the FAA preempts state arbitration laws, which means that with respect to most transactions, there is "little room for state arbitration law."[64] Parties subject to the FAA, however, may "opt out" and choose state arbitration laws to govern the arbitration even when those laws differ from the FAA.

Although most state's arbitration laws are modeled on the Uniform Arbitration Act which is consistent with the principles of the FAA, some states have enacted legislation, particularly in the area of consumer arbitration, that gives the courts greater jurisdiction in matters related to arbitration.

Validity of arbitration agreements

Under the FAA, "arbitrability" generally depends on whether:

1. There is an agreement to arbitrate;
2. The agreement is in the proper form (e.g., written);
3. The dispute is within the scope of the agreement to arbitrate;
4. The agreement to arbitrate is valid (e.g., not induced by fraud); and
5. The dispute is capable of arbitration (as opposed to being required to be heard in court). [65] The FAA provides that a party may petition a court to order another party to participate in an arbitration if the court finds that the arbitration agreement between the parties is valid.

An arbitration agreement may be invalidated, or a court may decide that a party has waived its right to pursue arbitration, if it can be shown that a party entered into the agreement due to fraud, if there is pending litigation related to the dispute, or if, as a matter of public policy, the dispute is "inarbitrable."

Even after the passage of the Federal Arbitration Act in 1925, the U.S. Supreme Court held that certain types of disputes, because they were matters of public policy, could not be resolved through arbitration. In *Wilko v. Swan* (1952), for example, the Court held that the effectiveness of federal securities laws could be impaired if parties were permitted to consent to arbitration of securities law claims.[66] In subsequent years, the courts extended this public policy limitation on arbitration.[67]

By the 1980s, however, the U.S. Supreme Court recognized a "liberal federal policy" favoring arbitration and declared that public policy does not preclude arbitration involving important federal rights. [68] The public policy-based inarbitrability doctrine today applies to a narrow range of cases that are truly public in character such as criminal cases, child custody, and bankruptcy. [69]

Appointing arbitrators

When an arbitration agreement does not specify the number of arbitrators, a single arbitrator will typically conduct the arbitration. Commercial arbitration provider guidelines generally recommend the use of a single arbitrator for smaller cases and a panel of three arbitrators for larger cases.

The FAA requires that if an arbitration agreement specifies a method for choosing arbitrators, that method must be followed. If no method is provided, a court may appoint the arbitrator or arbitrators. In practice, however, the method of selecting arbitrators is generally specified in an arbitration agreement.[70] The party that drafts the agreement typically designates a private arbitration provider such as the American Arbitration Association (AAA) to handle arbitration proceedings. Arbitration providers have detailed default procedures that they use to appoint arbitrators if the agreement does not specify another method. [71]

Two common methods for choosing arbitrators are the "party-appointed" method and the "strike and rank" method. In some cases, arbitration agreements allow parties to appoint arbitrators on their own or from a pre-approved list developed by the parties or by an arbitration administrator such as the AAA. It should be noted that a party-appointed arbitrator is generally required to be a neutral arbitrator except in rare cases where the parties agree beforehand that each will be allowed to appoint an advocate to the panel. Generally, the two party-appointed arbitrators will then choose a third arbitrator who serves as the chair of the panel. [72]

Under the "strike and rank" method, both parties to a dispute receive an identical list of the names of potential arbitrators. The parties are given a time-period within which to strike a fixed number of names from the list and rank the remaining names. The AAA will then choose the highest ranked arbitrator(s) that is(are) agreeable to both parties.

Subpoenas by arbitrators

The FAA provides that arbitrators may issue subpoenas to compel witnesses to appear, to testify, and to provide documents. Persons who neglect or refuse to testify before an arbitration panel may be compelled by a court order.

Confirming, vacating, or modifying an award

If the losing party in an arbitration proceeding does not comply with the award, the winning party may seek a court judgment confirming the award. As a court action, the confirmation of an arbitration award is enforceable. A motion to confirm an award must be filed within one year after the award is made.

The losing party may file a motion to vacate, modify, or correct an award within three months after the award is filed. However, the FAA provides review for arbitration awards on the narrow grounds that:

1. The award was procured by corruption or fraud;
2. That there was corruption or evident partiality in the arbitrators;
3. The arbitrators were guilty of misconduct;
4. The arbitrators exceeded their powers. The FAA does provide, however, that a court may modify or correct an award when an evident mistake was made in calculating the award.

THE CALIFORNIA ARBITRATION ACT: KEY PROVISIONS

When contracts to arbitrate affect interstate commerce, the (FAA) applies.[73] But because disputes arising from redevelopment agency activities within California are truly intrastate in nature, and would thus be subject to state laws, this section provides an overview of the California Arbitration Act. California's general arbitration statutes are contained in Title 9 of the Code of Civil Procedures, Sections 1280 through 1294.2.

Validity of arbitration agreements

Under California Law, a written agreement to arbitrate is "valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract." If an arbitration agreement exists, one party may petition the court to compel arbitration. The court may invalidate the arbitration agreement only if it finds that:

1. The right to compel arbitration has been waived by the petitioner;
2. Grounds exist for the revocation of the agreement; and
3. A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.

Class arbitration

Although the Federal Arbitration Act does not recognize or provide for class actions in arbitration cases, Section 1281.3 of the California Code of Civil Procedure allows a party to an arbitration agreement to petition the court to consolidate separate arbitration proceedings, and states that the court may order consolidation of separate arbitration proceedings when:

1. Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party;

2. The disputes arise from the same transactions or series of related transactions; and
3. There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

Appointment and (dis)qualification of arbitrators

Section 1281.6 provides that the method of choosing an arbitrator specified in the arbitration agreement will be followed. When the arbitration agreement does not suggest a particular method for appointing arbitrators, the court will appoint an arbitrator. The court will nominate five people from lists provided by the parties seeking arbitration. If the parties still cannot decide on an arbitrator within five days, the court appoints an arbitrator from the nominees.

Sections 1281.85 through 1281.96 prescribe the qualifications of arbitrators. Persons serving as neutral arbitrators must comply with ethical standards adopted by the Judicial Council and must disclose financial, professional, and other potential conflicts of interest. Private arbitration firms are prohibited from administering any type of consumer arbitration if they have had a financial interest in any party or attorney for a party within the preceding year. Private arbitration companies that administer consumer arbitration must publish a searchable, public list of all consumer arbitration proceedings they have administered. Entries for each proceeding must include information such as the parties involved, the nature of the dispute, and the prevailing party.

Confirming, vacating, or modifying an award

California Code of Civil Procedure, Section 1285 provides that a party to an arbitration in which an award has been made may petition the court to confirm, correct, or vacate the award. Similar to the Federal Arbitration Act, Section 1286.4 specifies that a court may vacate an award if it finds that:

- The award was procured by corruption or fraud;
- There was corruption on the part of the arbitrators;
- The rights of the party were substantially prejudiced by the misconduct of a neutral arbitrator;
- The arbitrators exceeded their powers;
- The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause or by the refusal of the arbitrators to hear evidence material to the controversy “or by other conduct of the arbitrators contrary to the provisions of this title;”
- An arbitrator making the award failed to disclose reasons that may have been grounds for disqualification.

Section 1286.6 provides that the court may correct an arbitration award if it determines that:

1. There was a miscalculation of figures or an "evident mistake in the description of any person, thing or property referred to in the award:"

2. The arbitrators exceeded their powers;

3. The award is "imperfect in a matter of form, not affecting the merits of the controversy."

Section 1288 requires that a petition to confirm an award be served and filed within four years after the date of the award, and that a petition to vacate an award or to correct an award be served no later than 100 days after the date of the award.

NOTES

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[5] O'Malley, Marianne, "Redevelopment after Reform: A Preliminary Look," California Legislative Analyst's Office, December 1994, p. 11.

[6] California Health and Safety Code, Section 33378(b) (2).

[7] O'Malley, Marianne, "Redevelopment after Reform: A Preliminary Look," California Legislative Analyst's Office, December 1994, p. 13.

[8] California Health and Safety Code, Section 33080 et seq.

[9] "State Oversight of Redevelopment," Legislative Analyst's Office, November 2005, p. 3.

[10] California Health and Safety Code, section 33385 et seq.

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[20] O'Malley, Marianne, "Redevelopment after Reform: A Preliminary Look," California Legislative Analyst's Office, December 1994, p. 11.

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[36] Telephone interview with Dan Fein, Chair, Russian River Redevelopment Oversight Committee, October 25, 2006.

[37] Telephone interview with Dan Fein, Chair, Russian River Redevelopment Oversight Committee, October 25, 2006.

[38] Telephone interview with Kathleen H. Kane, Executive Director, Sonoma County Community Development Commission, September 28, 2006; and telephone interview with Dan Fein, Chair, Russian River Redevelopment Oversight Committee, October 25, 2006.

[39] Telephone interview with Kathleen H. Kane, Executive Director, Sonoma County Community Development Commission, September 28, 2006; and telephone interview with Dan Fein, Chair, Russian River Redevelopment Oversight Committee, October 25, 2006.

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