

## Ninth Circuit Finds Arbitration Clause Unenforceable Under California Law

In *Bridge Fund Capital Corp. v. Big Bad 1, LLC*, 2010 U.S. App. LEXIS 19309 (9<sup>th</sup> Cir. Sept. 16, 2010), the Ninth Circuit rejected a franchisor's appeal from a district court's holding that an arbitration clause contained in its franchise agreement was unenforceable under California law. The franchisor had first argued that the question of arbitrability was one to be decided by the arbitrator, not a court. The court disagreed, finding that the franchisee had raised a specific challenge to the arbitration clause itself, separate and apart from its challenge to the franchise agreement. Had the franchisee made the same challenge to the arbitration clause that it made to the franchise agreement as a whole, the issue of arbitrability would have been left to the arbitrator. Because the franchisee raised a separate and distinct challenge to the arbitration clause, however, the arbitrability question was properly decided by the district court.

The Ninth Circuit also upheld the district court's decision to disregard the choice of law provision contained in the franchise agreement in favor of California law. The court agreed that California's interest in the parties' dispute outweighed that of Texas, the law the parties selected to govern their contract.

Finally, the court of appeals agreed with the district court's finding that the arbitration clause was unconscionable under California law. The court agreed that the arbitration clause violated various provisions of the California Franchise Investment Law, and thus could not be enforced. In particular, the court rejected the arbitration clause's mandatory waivers of nonwaivable statutory rights, as well as the clause's forum selection provision.