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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

PATRICIA PAULSEN et al.,

Plaintiffs and Appellants,

v.

TWIN RIVERS UNIFIED SCHOOL DISTRICT,

Defendant and Respondent.

C068888

(Super. Ct. No. 34-
2011-00095012-CU-BC-
GDS)

After they did not receive the severance payments they were promised for resigning their employment with a school district (Grant Joint Union High School District; hereafter, Grant) that was merging with three other districts, plaintiffs Patricia Paulsen, Joan Polster, Jacques Whitfield, and Patricia Newsome (collectively, plaintiffs) sued the successor district (defendant Twin Rivers Unified School District; hereafter, Twin Rivers) and petitioned for arbitration of their claims pursuant to the arbitration clauses in their employment agreements with

Grant. The trial court refused to compel arbitration on the ground that plaintiffs' resignations had rendered their employment agreements, and the arbitration clauses contained therein, "no longer valid and binding."

On appeal, we conclude the trial court erred. As we will explain, the arbitration clauses in the employment agreements are enforceable whether or not plaintiffs remain entitled to employment under those agreements, and the dispute here falls within the scope of those still-viable arbitration clauses. In addition, we reject Twin Rivers' arguments that plaintiffs waived their right to arbitration, that arbitration should not be ordered because the subject contracts are illegal, and that ordering arbitration would violate public policy. Because Twin Rivers is a party to two other cases arising out of the same severance deal, however, there is a possibility of conflicting rulings that requires the trial court to exercise its discretion under Code of Civil Procedure section 1281.2 in deciding how this case should proceed. Because the trial court did not exercise that discretion, we will reverse the order denying arbitration and remand the matter to the trial court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

During the 2007-2008 school year, Grant employed each plaintiff in an administrative position pursuant to a written contract. Paulsen was the Assistant Superintendent of Business and Finance; her term of employment ran through June 2010. Polster was the Associate Superintendent of Educational Options;

her term of employment ran through June 2009. Whitfield was the District General Counsel; his term of employment ran through June 2010. Newsome was the Interim Superintendent; her term of employment in that position ran through June 2008, but thereafter she was to return to her previous position as the Deputy Superintendent of Educational Services through June 2010.

"By virtue of the passage of 'Measure B' in 2007, Sacramento County voters approved the unification of [Grant] and three smaller elementary school districts into one district. Effective July 1, 2008, the merger would result in a new, larger district known as Twin Rivers Unified School District."
(*Polster v. Sacramento County Office of Education* (2009) 180 Cal.App.4th 649, 653-654 (*Polster*).)

After the passage of Measure B, Grant's governing board decided to offer severance payments to some of the district's administrative employees to avoid redundant administrative staff at the central office level. (*Polster, supra*, 180 Cal.App.4th at p. 654.) To that end, in March 2008 Grant's board adopted what was known as the Central Office Transition Plan (hereafter, the Plan). Plaintiffs each elected to participate in the Plan.

Under the terms of the Plan, in exchange for receiving either 12 or 18 months of pay, each plaintiff was required to "submit an irrevocable letter of resignation effective June 30, 2008." According to the Plan, "Said letter of resignation [was] presumed to be conditional upon the receipt by the employee of the full amount of the proffered buyout."

The Sacramento County Superintendent of Schools refused to authorize the special payroll runs necessary to implement the Plan until he completed an investigation of its legality. (*Polster, supra*, 180 Cal.App.4th at pp. 653-655.) As a result, in April 2008, four of the administrators who had elected to participate in the Plan (including Paulsen, Polster, and Whitfield) filed a petition for writ of mandate seeking to compel the Superintendent and the Sacramento County Office of Education to approve the payroll warrants. (*Id.* at pp. 653, 655.) In June 2008, while the mandamus action was pending, the Superintendent announced that he was "staying the [Plan] and rescinding the requests for payroll warrants to implement the [Plan], on the ground that the [Plan] was 'inconsistent with [Twin Rivers'] ability to meet its obligations for next fiscal year.'" (*Id.* at p. 656.) Later that month, however, the trial court ruled in the administrators' favor and issued a writ commanding the Superintendent to approve the special salary runs necessary to implement the Plan. (*Id.* at pp. 656-657.) The Superintendent and the County Office of Education appealed. (*Id.* at p. 657.)

In a published decision issued in December 2009, this court reversed the trial court, concluding that the administrators had failed to show that the Superintendent abused his discretion in refusing to approve the payroll requests. (*Polster, supra*, 180 Cal.App.4th at pp. 669-670.) Thereafter, in 2010, plaintiffs sought reinstatement and back pay from Twin Rivers and demanded arbitration of their claims pursuant to the

arbitration clauses contained in their employment agreements with Grant. Each agreement contained an arbitration clause that provided that "[a]ny controversy or claim arising out of or relating to this Agreement or the breach of this Agreement shall be settled by binding arbitration."

When Twin Rivers refused to participate in arbitration, plaintiffs commenced this action by filing a complaint for breach of contract, misrepresentation, breach of statutory duty, and declaratory relief in January 2011. Two months later in March 2011, plaintiffs filed a petition to compel arbitration and to stay the action.

Twin Rivers opposed the petition to compel arbitration on numerous grounds, contending plaintiffs had failed to establish the existence of an agreement to arbitrate and had waived their right to arbitrate by litigating the *Polster* case, and that ordering arbitration would be contrary to public policy and could result in inconsistent rulings between the courts and the arbitrator. On the latter point, Twin Rivers noted that it was also a defendant in a case brought by another Grant administrator arising out of the Plan (the *Kitamura* case), but in that case there was no demand for arbitration. (*Kitamura et al. v. Twin Rivers Unified School District* (C070343, app. pending) (*Kitamura*).)

The trial court invited further briefing on whether the language in the Plan providing that the letters of resignation were presumed to be conditional on the receipt of the promised

severance payments "runs afoul of Education Code [section] 44930 . . . and related case law."¹ The court also invited briefing on whether plaintiffs could seek arbitration under the arbitration clauses in their employment agreements if the conditional language in the Plan did run afoul of Education Code section 44930.

In June 2011, the trial court denied the petition to compel arbitration, reasoning that even though plaintiffs did not receive the promised severance payments, their resignations pursuant to the Plan nonetheless "were effective in terminating plaintiffs' original employment agreements, the very agreements which contain the arbitration clause[s] on which the present motion is expressly based. Because such employment agreements are therefore no longer valid and binding, the Court is unable to find any valid and binding arbitration clause on which to grant this motion to compel arbitration."

Plaintiffs timely appealed the order denying their petition to compel arbitration.

¹ "a) Governing boards of school districts shall accept the resignation of any employee and shall fix the time when the resignation takes effect, which, except as provided by subdivision (b), shall not be later than the close of the school year during which the resignation has been received by the board.

"(b) Notwithstanding any other provision of law, an employee and the governing board of a school district may agree that a resignation will be accepted at a mutually agreed upon date not later than two years beyond the close of the school year during which the resignation is received by the board."
(Ed. Code, § 44930.)

DISCUSSION

I

Code Of Civil Procedure Section 1281.2

As pertinent here, Code of Civil Procedure section 1281.2 provides as follows:

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

"(a) The right to compel arbitration has been waived by the petitioner; or

"(b) Grounds exist for the revocation of the agreement.

"(c) 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. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. . . .

"If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such

controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

"[¶] . . . [¶]

"If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

II

The Existence Of An Agreement To Arbitrate The Controversy

In denying plaintiffs' petition to compel arbitration, the trial court essentially determined under Code of Civil Procedure section 1281.2 that an agreement to arbitrate the controversy did not exist because plaintiffs' "voluntary, 'irrevocable' resignations were effective in terminating plaintiffs' original employment agreements, the very agreements which contain the arbitration clause on which the present motion is expressly based." In reaching this conclusion, the trial court erred.

"[A] party's contractual duty to arbitrate disputes may survive termination of the agreement giving rise to that duty."

(*Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 545 (*Ajida Technologies*)).) If this were not so, then a claim for wrongful termination of a contract could never be arbitrated under an arbitration provision contained in the contract, but such claims *have* been ordered to arbitration. (See, e.g., *Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 104-106 [claims of wrongful termination of contract were subject to arbitration under arbitration clause in contract requiring arbitration of "[a]ny controversy or claim arising out of or relating to this agreement, or the breach thereof"].)

For purposes of plaintiffs' demand for arbitration, it does not matter whether plaintiffs are still employed under the employment agreements that contain the arbitration clauses they seek to enforce. That is the *substantive* question raised by plaintiffs' claims for reinstatement and back pay, which cannot be reached at this point. (See Code Civ. Proc., § 1281.2 ["If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit"].) All that matters for our purposes, in determining whether an agreement to arbitrate exists, is whether the controversy falls within the broad language of the arbitration clauses that are contained in the employment agreements.

Citing *Ajida Technologies*, Twin Rivers contends that "[w]hile parties to a contract providing for arbitration may

agree the obligation to arbitrate survives termination of the contract, . . . there is no such provision in the employment agreements" here. But nothing in *Ajida Technologies* requires specific language to secure an arbitration clause's survival beyond the termination of a contract. By its plain language, an arbitration clause like those here represents an agreement between the parties to the contract that if there is a claim or controversy between the parties that arises from or relates to the contract, that claim or controversy will be settled in arbitration. By its terms, the clause is not limited in application to claims or controversies that arise while the contract is otherwise in effect -- i.e., during the term of the employee's employment. Stated another way, there is nothing in the language of the arbitration clause that prevents it from operating even after the employment that is the main purpose for the contract ends. *Whenever* the claim or controversy arises, as long as it arises out of or is related to the employment agreement, the claim or controversy is arbitrable. If the parties wanted to limit the application of the arbitration clause to only those claims and controversies arising *during* the term of employment, they could have included language to that effect in the arbitration clause. They did not do so, and we cannot read such additional language into their agreement under the guise of interpreting it. (See Code Civ. Proc., § 1858 ["In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in

substance contained therein, not to insert what has been omitted, or to omit what has been inserted"].)

Based on the foregoing reasoning, the issue of how Education Code section 44930 applies in this case, to which the trial court devoted much of its attention, is immaterial at this point in the case. The trial court concluded that because, with one exception not applicable here, Education Code section 44930 requires an employee's resignation to take effect no later than the close of the school year in which the resignation was received, the resignations plaintiffs tendered pursuant to the Plan *had* to be effective at the end of the 2007-2008 school year, notwithstanding the "'conditional'" language in the Plan. And, the trial court reasoned, because the resignations were effective notwithstanding the fact that plaintiffs did not receive the payments to which they were entitled under the Plan, plaintiffs' employment agreements -- including the arbitration clauses contained in them -- were "no longer valid and binding." We have already explained, however, that this is not correct. Whether or not plaintiffs were still entitled to employment under their employment agreements because they were not paid as promised under the Plan, plaintiffs were entitled to invoke the arbitration clauses in their employment agreements to seek resolution of any controversy falling within the scope of those clauses.

Twin Rivers contends the Plan constituted a novation, which "extinguished" all of plaintiffs' rights under their employment

agreements, including their rights under the arbitration clauses in those agreements. Not so.

“Novation is the substitution of a new obligation for an existing one.” (Civ. Code, § 1530.) The substitution is by agreement and with the intent to extinguish the prior obligation. . . . ‘Novation is made by contract, and is subject to all the rules concerning contracts in general.’ (Civ. Code, § 1532.) A novation thus amounts to a new contract which supplants the original agreement and ‘completely extinguishes the original obligation’ [¶] It must “clearly appear” that the parties intended to extinguish rather than merely modify the original agreement.” (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431-432.)

Here, Twin Rivers points to nothing in the Plan that suggests an intent to extinguish the rights arising under the arbitration clauses in the employment agreements. The obvious purpose of the Plan was to provide for the early termination of the employment of those employees who resigned under the Plan in exchange for the promised severance pay. Thus, the Plan (to the extent an employee chose to participate in it) may have constituted a novation with respect to the employee’s obligation to provide services to Twin Rivers (as the successor to Grant) and with respect to Twin Rivers’ obligation to pay the employee. There is nothing in the Plan, however, to suggest *either* side was giving up the right to seek arbitration under the arbitration clauses in the employment agreements should a claim or controversy relating to those agreements arise at a later

date. Absent evidence of a specific intent to extinguish the right to arbitration provided by the arbitration clauses in the employment agreements, which we do not find here, there is no basis to conclude that the right to arbitration has been vitiated by the Plan operating as a novation.

As to whether the controversy here falls within the scope of the arbitration clauses in plaintiffs' employment agreements, Twin Rivers contends it does not, raising two points. First, Twin Rivers insists the controversy arises out of the Plan, which does not contain an arbitration clause, rather than out of the employment agreements, which do contain arbitration clauses. Twin Rivers argues that "when parties enter into separate contracts that do not specifically incorporate terms from one to the other, an arbitration clause governing one contractual relationship will not be imposed on the other." But even if the controversy here can be deemed to arise out of the Plan, that does not mean the controversy does not also arise out of or relate to the employment agreements. The controversy here centers on whether plaintiffs are entitled to employment with Twin Rivers under their employment agreements with Grant because they did not receive the payments to which they were entitled under the Plan in exchange for their resignations. As a matter of plain logic, that controversy relates to *both* the Plan *and* the employment agreements. For our purposes, however, all that matters is that the controversy relates to the employment agreements, because that fact brings the controversy within the scope of the arbitration clauses in those agreements.

Second, Twin Rivers argues that "when there are successive agreements and the later agreement does not contain an arbitration clause, there must be evidence the later agreement was not intended to supersede the earlier agreement." The opposite is true, however. When, as here, the parties to a contract have agreed to arbitrate any claim or controversy arising out of or relating to that contract, a subsequent contract between the parties will not supersede that arbitration agreement unless an intent to supersede the arbitration clause can be found in the later contract. As we have concluded already in rejecting Twin Rivers' novation argument, Twin Rivers points to no language in the Plan evidencing an intent to supersede the arbitration clauses in the employment agreements.

Because the controversy raised here over plaintiffs' entitlement to continued employment with Twin Rivers under their employment agreements with Grant relates to those employment agreements, the controversy falls within the scope of the arbitration clauses in those agreements, and consequently the trial court erred in concluding that an agreement to arbitrate the controversy did not exist.

III

Waiver

Under subdivision (a) of Code of Civil Procedure section 1281.2, an agreement to arbitrate a controversy is not enforceable if the party seeking arbitration has waived the right to arbitrate. Twin Rivers contends plaintiffs waived the right to arbitrate here. We disagree.

"Although a court may deny a petition to compel arbitration on the ground of waiver ([Code Civ. Proc.,] § 1281.2, subd. (a)), waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof. [Citations.]

"Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration. [Citations.] "In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the 'bad faith' or 'wilful misconduct' of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citations.]" [Citations.]

"In *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, the Court of Appeal referred to the following factors: 'In determining waiver, a court can consider "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested +arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant

seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party.'" (*Sobremonte v. Superior Court, supra*, 61 Cal.App.4th at p. 992, quoting *Peterson v. Shearson/American Exp., Inc.* (10th Cir.1988) 849 F.2d 464, 467-468.) We agree these factors are relevant and properly considered in assessing waiver claims.

"Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.]

'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.'"

(*Saint Agnes Medical Center v. PacificCare of California* (2003) 31 Cal.4th 1187, 1195-1196.)

Here, Twin Rivers asserts that plaintiffs waived their right to arbitrate because they "resigned in 2008" and "chose litigation over arbitration" "[b]y filing and pursuing *Polster*." On this point, Twin Rivers notes that "*Polster* went through hearings, judgment, appeal, and a second judgment before [plaintiffs] raised arbitration."

This argument has no merit. As Twin Rivers itself acknowledges, *Polster* involved a petition for a writ of mandate by three of the four plaintiffs here in which they unsuccessfully sought to compel the Sacramento County

Superintendent of Schools to approve the payroll warrants necessary for them to receive the severance pay they were promised under the Plan. It was the failure of that effort that gave rise to plaintiffs' claims against Twin Rivers in this action, because it was not until plaintiffs exhausted their remedies in *Polster* that they knew for certain they were not going to be receiving the compensation they had been promised in exchange for their resignations under the Plan. It was not unreasonable for the plaintiffs to await the outcome of the litigation in *Polster* before pursuing their present claims against Twin Rivers (as the successor to Grant), inasmuch as success in *Polster* (which they originally achieved in the trial court, before reversal by this court) would have obviated any basis for seeking relief from Twin Rivers at all.

On the facts here, Twin Rivers has not demonstrated any sufficient basis for concluding that plaintiffs waived their right to arbitration.

IV

Illegality

Under subdivision (b) of Code of Civil Procedure section 1281.2, an agreement to arbitrate a controversy is not enforceable if grounds exist for revocation of the agreement. Twin Rivers contends "[o]ne ground for revocation of an agreement is that it is illegal," and that principle applies here based on the following chain of reasoning:

(1) Plaintiffs "were parties to employment agreements with arbitration clauses";

(2) "[T]hey resigned their employment[,] . . . thereby terminating any right to arbitration";

(3) They "now seek to rescind those resignations based on the 'conditional' resignation provisions of the [Plan] so that they can assert a contractual right to arbitration"; and

(4) "[T]he 'conditional' resignation language in the [Plan] . . . is contrary to statute and case law."

Based on this reasoning, Twin Rivers contends "[t]he agreement to arbitrate . . . is illegal and cannot be enforced" because it "is dependent upon an illegal condition of 'conditional' resignation."

We disagree. To support its claim of illegality, Twin Rivers relies on *Loving & Evans v. Blick* (1949) 33 Cal.2d 603 (*Loving*), but the principles expressed in that case have no application here. In *Loving*, the Supreme Court explained that "[s]ection 1281 of the Code of Civil Procedure . . . does not contemplate that the parties may provide for the arbitration of controversies arising out of contracts which are expressly declared by law to be illegal and against the public policy of the state. So it is generally held that 'a claim arising out of an illegal transaction is not a proper subject matter for submission to arbitration, and that an award springing out of an illegal contract, which no court can enforce, cannot stand on any higher ground than the contract itself.'" (*Loving*, at p. 610.)

Nothing about the employment agreements between plaintiffs and Twin Rivers, which contained the arbitration clauses invoked

here, constituted an illegal transaction or contract within the meaning of *Loving*. Nor can Twin Rivers conjure up a claim of illegality to preclude arbitration by asserting that the "conditional" language in the Plan was illegal. Even if Twin Rivers is correct (a point we do not reach), at best that conclusion may defeat the *substance* of plaintiffs' claims here. Any illegality in the Plan, however, does not render the employment agreements illegal such that the arbitration clauses in those agreements cannot be enforced. As we have already concluded, plaintiffs were entitled to invoke the arbitration clauses in their employment agreements whether or not they were still entitled to employment under those agreements. Because plaintiffs' resignations did not terminate their right to arbitrate, as Twin Rivers asserts, the "conditional" language in the Plan has no bearing on their right to arbitrate, and any illegality in the former does not taint the latter. For this reason, Twin Rivers' illegality argument has no merit.

V

Public Policy

Twin Rivers contends the trial court's order refusing to enforce the arbitration clauses should be upheld because "[e]nforcing [those] clause[s] would violate several important public policies," raising four points. Once again, however, we are not persuaded.

In some circumstances, strict enforcement of an arbitration provision may be precluded as a matter of public policy -- for example, where the parties in a dissolution proceeding agree to

binding arbitration of child support. (*In re Marriage of Bereznak* (2003) 110 Cal.App.4th 1062, 1067-1070.) But nothing like that appears here.

Twin Rivers first contends the arbitration clauses at issue here cannot be enforced because that "would raise the possibility [that Education Code section 44930] could be nullified without any possibility of judicial review." In other words, Twin Rivers believes arbitration would be against public policy here because the arbitrator might not correctly apply Education Code section 44930, and Twin Rivers could not get judicial review of the arbitrator's misapplication of the law. If that argument were sufficient to defend against a petition for arbitration, however, no arbitration clause would ever be enforceable, because the possibility of unreviewable legal error always exists.

Twin Rivers secondly contends it would be against public policy to enforce the arbitration clauses here because plaintiffs are seeking a result -- "reinstatement to their former positions" -- that is "contrary" to various provisions of the Education Code. Again, this argument is not a valid one for avoiding arbitration. Even if plaintiffs are pursuing a remedy to which they are not entitled, that does not mean they cannot seek that remedy through arbitration. It just means they ought to lose in arbitration.

Twin Rivers thirdly asserts "the arbitration agreement is unenforceable as it would violate the rights of other Twin Rivers employees who would be subjected to layoffs to make room

for [plaintiffs]" if they win. But again, this is not a valid challenge to *arbitration*. Instead, Twin Rivers is challenging the legitimacy of the *substance* of plaintiffs' claims and the remedies they seek. But, as section 1281.2 of the Code of Civil Procedure makes clear, "an order to arbitrate [a controversy within the scope of an agreement to arbitrate] may not be refused on the ground that the petitioner's contentions lack substantive merit."

This same principle defeats Twin Rivers' argument that, in particular, arbitration as to Whitfield, Grant's former general counsel, cannot be allowed because reinstatement, which is "[t]he relief he seeks through arbitration[,] is contrary to Twin Rivers' unfettered right to terminate him and, as here, to refuse to re-hire him, with or without cause." Again, Twin Rivers cannot avoid arbitration as against public policy just because the relief sought may not be lawful. Whether the relief is lawful, as well as justified under the circumstances, is an issue the arbitrator will decide (if the case is ultimately ordered to arbitration).

Fourthly, Twin Rivers posits that arbitration would be against public policy here because the subject of the litigation is a matter of public interest that should be subject to the transparency of a court proceeding, with a resolution that will "have more than a transitory impact." There is utterly no support in the law for this argument. Even if "[i]mplicit statutory schemes require public entities to conduct their business in public," there is no public policy that favors

public entities like school districts avoiding agreements to arbitrate into which they have voluntarily entered because arbitration proceedings are not as public as court proceedings.

For all of these reasons, we reject Twin Rivers' argument that enforcing the arbitration clauses would violate public policy.

VI

Possibility Of Conflicting Rulings

The final issue we come to arises because there are two other cases in which Grant administrators who elected to resign under the terms of the Plan have brought legal action against Twin Rivers because the payments promised under the Plan were not made.² As we have noted, under subdivision (c) of Code of Civil Procedure section 1281.2, an arbitration agreement does not have to be enforced if "[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." Based on this provision, Twin Rivers argues that "[t]he order [denying plaintiffs' petition to compel arbitration]

² We have noted already the *Kitamura* case, which Twin Rivers relied on in the trial court to support this argument. On appeal, Twin Rivers also asks us to take judicial notice of a second case -- the *Roberts* case -- arising out of the Plan. We grant that request (which is unopposed). (*Roberts v. Twin Rivers Unified School District* (Super. Ct. Sacramento County, No. 34-2011-00100425-CU-CO-GDS, pending.)

should be affirmed . . . because of the possibility of conflicting rulings."

Plaintiffs do not deny that the factual predicate for invoking this provision exists here; instead, they argue that "the possibility of inconsistent results does not automatically result in a denial of arbitration, but rather requires a further analysis and exercise of discretion, an exercise which the trial court declined to undertake" here. We agree. The statute gives the court several options "[i]f the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c)." (Code Civ. Proc., § 1281.2.) Specifically, "the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

Here, the trial court never had occasion to exercise its discretion under this provision because the court decided (erroneously) that an agreement to arbitrate the controversy did not exist. We cannot review for abuse of discretion a decision the trial court never made. Further, neither side contends on appeal that there was only one reasonable way for the court to

exercise its discretion. To the extent Twin Rivers' argument can be construed in that manner, we conclude that denial of the petition to compel arbitration was certainly not the only reasonable course of action. For example, now that the *Kitamura* case is on appeal, the trial court could consider staying arbitration here pending the outcome of that appeal, as the appeal could result in a precedential published opinion on a dispositive issue.³ On the other hand, to serve the goal of expediency, the court could order this matter to arbitration immediately, without waiting for a decision in *Kitamura*, given the substantial delay already occasioned by the need to pursue this appeal of the trial court's original erroneous denial of the petition to compel arbitration. We do not intend to suggest which course of action the trial court should take. Instead, we mention these alternatives only to show that there are choices to be made, and the trial court is entitled to make them in the

³ In *Kitamura*, the trial court sustained a demurrer without leave to amend on essentially the same basis that it denied the petition to compel arbitration here -- the court reasoned that because the conditional language in the Plan was contrary to Education Code section 44930, the employee's resignation was effective notwithstanding the nonpayment of the promised severance pay and therefore the employee could not sue for breach of contract or breach of statutory duty. An appeal of the resulting judgment of dismissal is now pending in this court.

In *Roberts*, a different judge reached the opposite conclusion, overruling a similar demurrer because he concluded Education Code section 44930 did *not* prevent the employee's resignation from being conditioned on the receipt of the promised severance payment.

first instance. For that reason, we will remand this case to the trial court to exercise its discretion on what to do with this case given the other related litigation that is pending.⁴

DISPOSITION

The order denying the petition to compel arbitration is reversed, and the matter is remanded to the trial court with directions to exercise its discretion under Code of Civil Procedure section 1281.2 in light of the *Kitamura* and *Roberts* cases. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ROBIE, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.

⁴ To the extent Twin Rivers asks us to take judicial notice of certain legislative material, a criminal indictment, and the minutes of certain meetings of its Board of Trustees we decline that request on the ground that the subject documents are irrelevant to our determination of this appeal.