File 2/6/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

GRAFTON PARTNERS LP, et al., **Petitioners,** **v.** **THE SUPERIOR COURT OF ALAMEDA COUNTY,** **Respondent;** **PRICEWATERHOUSECOOPERS LLP,** **Real Party in Interest.**	**A102790** **(Alameda County Super. Ct. No. 2002-056106)**

Are contractual *predispute* jury waivers in civil actions enforceable under California law? The parties in this case knowingly entered into such a waiver and the trial court enforced it, relying on *Trizec Properties, Inc. v. Superior Court* (1991) 229 Cal.App.3d 1616 (*Trizec*). A careful review of California's relevant constitutional history has convinced us, however, that *Trizec* was wrongly decided. Since its enactment more than 150 years ago, the California Constitution has provided that only the Legislature may prescribe the method for waiving a civil jury. In Code of Civil Procedure section 631, the Legislature has enacted the sole means for selecting a court rather than a jury trial in a civil case. Since neither this section nor any other statute suggested by real party in interest authorizes contractual predispute jury waivers, the parties' agreement is unenforceable.

BACKGROUND

Petitioners[1] retained real party in interest, PricewaterhouseCoopers (PwC), to perform an independent audit on the accounting records of two limited partnerships, Grafton and Allied. The parties' engagement letter contained the following predispute jury waiver: "In the unlikely event that differences concerning [PwC's] services or fees should arise that are not resolved by mutual agreement, to facilitate judicial resolution and save time and expense of both parties, [Grafton and Allied and PwC] agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to [PwC's] services and fees for this engagement."

A dispute later arose and petitioners sued PwC, alleging claims for breach of contract, active concealment, professional negligence, and aiding and abetting and conspiracy to breach fiduciary duty. Petitioners demanded a jury trial, and PwC moved to strike the demand based on the waiver clause in the engagement letter. Petitioners opposed the motion, asserting that predispute jury waivers are not authorized by statute and, therefore, are invalid under article I, section 16 of the California Constitution. Relying on *Trizec,* the trial court granted PwC's motion, striking the jury demand. This writ petition followed.

DISCUSSION

I. *The Propriety of Writ Review*

A ruling denying a party's claim to trial by jury is reviewable by writ or on appeal from the judgment. (*Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 522-523.) Since the improper denial of the right to jury trial is reversible error per se (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698), writ review is appropriate to save the time and resources that otherwise would be expended in a needless and

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[1] Petitioners consist of Grafton Partners LP (Grafton), Allied Capital Partners LP (Allied), Six Sigma LLC, and its members, by Richard M. Kipperman, trustee in Bankruptcy; and Tom Frame, Bruce Miller and Ronald G. VandenBerghe, for themselves and as representatives of a class of investors.

unwarranted court trial. (*Selby*, at pp. 522-523; *Turlock Golf etc. Club v. Superior Court* (1966) 240 Cal.App.2d 693, 695.)

II. *The California Constitutional Right to a Jury Trial in Civil Cases*

The California Constitution, as originally adopted in 1849, set out the right to a jury trial in the strongest possible terms: " '[T]he right of trial by jury shall be secured to all, and remain inviolate for ever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.' " (*Exline v. Smith* (1855) 5 Cal. 112, 112 (*Exline*), quoting Cal. Const. of 1849, art. I, § 3.) Soon after the Constitution's adoption, the Legislature enacted a statute that set out specific situations in which a civil jury is deemed waived and then added, " 'The Court may prescribe by rule what shall be deemed a waiver in other cases.' " (*Exline*, at p. 112, quoting § 179 of the Cal. Civil Practice Act [Stats. 1851, ch. 5, § 179, p. 78].)[2]

In *Exline* the Supreme Court considered a jury waiver that arose under a court rule adopted pursuant to the statute (§ 179 of the Cal. Civil Practice Act). The Supreme Court concluded that our Constitution forbids the creation of judicial rules of waiver, even if such rules are promulgated pursuant to a legislative delegation of such power to the judiciary. The court interpreted the phrase "prescribed by law" within article I, section 3, of the California Constitution of 1849, to mean that the Legislature, alone, had the power to determine the circumstances under which a jury could be waived. "The Constitution has imposed the power as well as the necessity upon the Legislature, of determining in what cases a jury trial may be waived, which cannot be transferred or delegated to any other department of Government. The words 'prescribed by law,' look to actual legislation upon the subject, and in no just sense can be extended to a permission of the

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2 Section 179 of the California Civil Practice Act provided: "Trial by jury may be waived by the several parties to an issue of fact, in actions arising on contract; and with the assent of the Court in other actions, in the manner following: [¶] 1st. By failing to appear at the trial: [¶] 2d. By written consent, in person or by attorney, filed with the Clerk. [¶] 3d. By oral consent in open Court, entered in the minutes. [¶] The Court may prescribe by rule what shall be deemed a waiver in other cases."

exercise of this power to others. [¶] . . . [T]he power to 'prescribe by law' is legislative, and cannot be conferred on judicial officers . . . ." (*Exline, supra*, 5 Cal. at pp. 112-113.)

Since *Exline,* the constitutional requirement that the Legislature prescribe the methods for a civil jury waiver has become firmly rooted. Our Supreme Court has, on numerous occasions, stricken trial court rules and disapproved of appellate court decisions creating nonstatutory waivers. (See *People v. Metropolitan Surety Co.* (1912) 164 Cal. 174, 177-178 [invalidating local rule setting out nonstatutory basis for waiver]; *Biggs v. Lloyd* (1886) 70 Cal. 447 [same]; see *Robinson v. Puls* (1946) 28 Cal.2d 664, 666 [disapproving District Courts of Appeal cases finding waiver when party with legal and equitable claims failed to specify jury issues in its jury demand].)

Post-*Exline* efforts to modify the California Constitution have reinforced the holding of that case. In the Constitutional Convention of 1878-1879,[3] it was proposed that the requirement of legislative action be deleted and the authority to waive a civil jury be granted to the parties on their own or acting with judicial approval.[4] The primary argument advanced on behalf of the proposed amendments was that the parties should have the freedom to agree to waive a right that belonged to them. Yet, the Convention rejected these proposals and reenacted the jury waiver provision without material change. In relevant part, the new provision stated: "A trial by jury may be waived . . . in civil actions by the consent of the parties, signified in such manner as may be prescribed by

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[3] Comments made during the debate at a Constitutional Convention, including failed motions to amend, may properly be referenced for the light they shed on provisions actually enacted. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1261-1262; *id*. at p. 1265 (conc. opn. of Baxter, J.); *Moss v. Superior Court* (1998) 17 Cal.4th 396, 419.)

[4] During the 1878-1879 Constitutional Convention, various delegates made proposals to amend the Constitution's jury provision to give parties the express power to waive a jury, or to make jury waiver subject to judicial approval. The proposals were voted down. (1 Debates & Proceedings, Cal. Const. Convention 1878-1879, pp. 253, 255, 303-305.)

Petitioners' request for judicial notice of transcript excerpts of debates at the 1878-1879 Constitutional Convention related to the right to jury trial is granted. (E.g., *Foxgate*

law." (Cal. Const. of 1879, art. I, § 7.) Because the Constitutional Convention of 1878-1879 reenacted the "prescribed by law" terminology contained in the former versions of the California Constitution, it effectively incorporated *Exline*'s construction of that phrase. (See *Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 8.)

Nearly a century later, in 1970, the California Constitution Revision Commission considered the impact of the right to jury trial on overcrowded court dockets, but concluded it lacked the expertise to prescribe significant changes, while other, more capable bodies were studying the problem.[5] (Transcript, Cal. Const. Revision Com. meeting of July 23, 1970, pp. 97-98.) The commission did adopt one pertinent modification, further clarifying that only the Legislature may prescribe the manner in which parties may consent to a civil jury waiver: "In a civil cause a jury may be waived by the consent of the parties expressed as prescribed *by statute*." (Minutes, Cal. Const. Revision Com. meeting of Oct. 8-9, 1970, pp. 5-7, italics added.) Later, the Legislature submitted this revision to the voters, who approved it in November 1974. (Ballot Pamp., Gen. Elec. (Nov. 5, 1974) Proposed Amends. to Cal. Const. with arguments to voters, pp. 26, 70.) The current jury waiver provision, now contained in article I, section 16 of the California Constitution, retains this language.

Hence, California constitutional history reflects an unwavering commitment to the principle that the right to a civil jury trial may be waived only as the Legislature prescribes, even in the face of concerns that the interests of the parties and the courts would benefit from a relaxation of this requirement.

Homeowners' Assn. v. Bramalea California, Inc. (2001) 26 Cal.4th 1, 15, fn. 12; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1.)

[5] Some of the organizations referenced were the California Conference of Judges, the Legislature, the Judicial Council of California, the State Bar of California and local bar associations.

Petitioners' request for judicial notice of materials of the 1970 California Constitution Revision Commission relating to revision of article I, section 7 of the then state Constitution is granted. (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495-496.)

When it upheld a contractual predispute jury waiver, the *Trizec* court never addressed this constitutional history. In *Trizec*, the trial court had upheld the tenant's constitutional challenge to a predispute jury waiver provision contained in a commercial lease. *Trizec* reversed, but its analysis was limited to the comment, "[A]rticle I, section 16, of the California Constitution cannot be read to prohibit individuals from waiving, in advance of any pending action, the right to trial by jury in a civil case." (*Trizec, supra,* 229 Cal.App.3d at p. 1618.) The court went on to hold, "We do not mean to imply that contractual waivers of trial by jury will be upheld in all instances, or that such rights will be taken away from a party who unknowingly signs a document purporting to exact a waiver. The right to trial by jury in a civil case is a substantial one not lightly to be deemed waived. On the other hand, in many commercial transactions advance assurance that any disputes that may arise will be subject to expeditious resolution in a court trial would best serve the needs of the contracting parties as well as that of our overburdened judicial system." (*Trizec*, at pp. 1618-1619.)

We have no quarrel with the policy behind *Trizec's* rule permitting parties to a commercial contract to knowingly and voluntarily enter into a contractual predispute jury waiver. We do question its provenance, however. This judge-made rule reflects the *court's* balancing of the policy factors it considered determinative. *Trizec* does not suggest any statutory source for the rule. As our recitation of California's constitutional history reveals, unless the Legislature prescribes a jury waiver method, we cannot enforce it.

III. *Code of Civil Procedure Section 631*

By its express terms, Code of Civil Procedure[6] section 631 is the lone statute authorizing waiver of a civil jury trial in favor of a court trial. (See *Parker v. James Granger, Inc.* (1935) 4 Cal.2d 668, 679; *People v. Metropolitan Surety Co., supra,* 164 Cal. at p. 177; *De Castro v. Rowe* (1963) 223 Cal.App.2d 547, 552.) Section 631, subdivision (a) now provides: "The right to a trial by jury as declared by Section 16 of

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6 All undesignated section references are to the Code of Civil Procedure.

Article I of the California Constitution shall be preserved to the parties inviolate. In civil cases, a jury may only be waived pursuant to subdivision (d)."[7] Subdivision (d) sets forth six specific means through which such a waiver can occur: "A party waives trial by jury in any of the following ways: [¶] (1) By failing to appear at the trial. [¶] (2) By written consent filed with the clerk or judge. [¶] (3) By oral consent, in open court, entered in the minutes. [¶] (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation. [¶] (5) By failing to deposit with the clerk, or judge, advance jury fees as provided in subdivision (b). [¶] (6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in subdivision (c)."

PwC contends that the waiver in the engagement letter complies with section 631, subdivision (d)(2), because PwC filed the written waiver "with the clerk or judge" as an exhibit to PwC's motion to strike the demand for jury trial. PwC correctly argues in its brief that nothing in the language of section 631 or its legislative history explicitly provides for a "temporal limitation on <u>when</u> the 'written consent' referred to in [section 631, subdivision (d)(2)] should have been executed." (Underscoring in original.) Thus, according to PwC, a written, predispute jury waiver filed following the commencement of a civil lawsuit is valid.

We conclude that the Supreme Court's construction of section 631, and the language of and policies underlying article 1, section 16 of the California Constitution compel a different result. In *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699 (*Madden*), the Supreme Court determined that only parties to a pending civil action may utilize the jury waiver methods set out in section 631. There, a party had challenged

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[7] At the time the March 11, 1999 engagement letter was drafted, section 631, subdivision (a) provided: "Trial by jury may be waived by the several parties to an issue of fact in any of the following ways . . . ." (Stats. 1998, ch. 931, § 83.) The current language was adopted by an amendment in 2002 described by the Legislature as "technical and clarifying." (Assem. Conc. Sen. Amends. to Assem. Bill No. 3027 (2001-2002 Reg. Sess.) Aug. 30, 2002, p. 1.)

the validity of an arbitration agreement, entered into pursuant to the California Arbitration Act (CAA) (§ 1280 et seq.) arguing that since arbitration implicitly waived a jury trial, the agreement had to comply with section 631. (*Madden*, at pp. 712-713.) In rejecting this contention, the court held that section 631 does not apply to a predispute arbitration agreement and that each of the waiver methods prescribed by that section "presupposes a pending action, and relates only to the manner in which a party to such action can waive his [or her] right to demand a jury trial instead of a court trial."[8] (*Madden*, at p. 713.) If only parties to a pending action may waive a jury under section 631, then it is logical to conclude that both the *execution* of the written consent and the *filing* of that consent must occur during the pendency of the civil action. In fact, *Trizec* relied on *Madden's* reasoning to hold that section 631 did not authorize predispute jury waivers. (*Trizec, supra,* 229 Cal.App.3d at p. 1618.) It is noteworthy that every other method to effectuate waiver set out in section 631 requires an act or omission in the midst of an *ongoing* lawsuit. We see no good reason to adopt PwC's anomalous interpretation of section 631, subdivision (d)(2).[9]

Additionally, the plain language of, and policies implicit in article I, section 16 of the California Constitution preclude us from adopting PwC's construction of section 631

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[8] Since it was first enacted, the prefatory language to section 631 has limited the right to waive a civil jury to parties to a pending civil action. At the time *Madden* was decided, this section began, "(a) Trial by jury may be waived by the several *parties* to an issue of fact in any of the following ways: . . . ." (Italics added.) Section 179 of the California Civil Practice Act (fn. 2, *ante*), the predecessor to section 631 contained the same language. In 2002, a "technical and clarifying" amendment by the Legislature (see fn. 7, *ante*) modified section 631 to read, "(a) . . . In civil cases, a jury may only be waived pursuant to subdivision (d). [¶] . . . [¶] (d) A *party* waives trial by jury in any of the following ways: . . . ." (Italics added.)

[9] This conclusion is bolstered by applying the established principle of statutory construction *noscitur a sociis* (it is known by its associates). Under this principle, a court should adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make the item markedly dissimilar to other items listed within the same statute. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391 & fn. 14.)

to authorize predispute civil jury waivers. Article I, section 16 requires that the legislature "prescribe" the manner in which a jury may be waived. "Prescribe" means "to lay down a rule: DICTATE." (Webster's Collegiate Dict. (10th ed. 2000) p. 919.) It is manifest that the timing of the waiver may be significant, given the importance of the right involved. Depending upon their level of sophistication, parties considering a jury waiver postdispute may be far more aware of the consequences of such a decision and, therefore, exercise more care than when the initial contract was executed. The lack of legislative direction in section 631 on the enforceability of predispute jury waivers hardly constitutes the legislative *prescription* required by our Constitution. We decline to read into section 631, subdivision (d)(2) an authorization for predispute jury waivers that the Legislature has not provided.

As we have previously explained, despite modification efforts, the California Constitution has always "imposed the power as well as the necessity upon the Legislature" to specify the manner in which a civil jury may be waived. (*Exline, supra,* 5 Cal. at pp. 112-113.) Consequently, it is the job of the Legislature, not the courts, to evaluate competing policy concerns and, then, select the applicable rules. Section 631 simply does not contemplate enforcement of a contractual predispute jury waiver. Even though we recognize that good policy arguments can be made to support or oppose contractual predispute jury waivers,[10] the Constitution denies us the ability to fashion a

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10 For example, a predispute jury waiver, like the one here, knowingly entered into between business entities armored with legal representation may be unassailable. On the other hand, as pointed out by amici California Employment Lawyers Association and Consumer Attorneys of California, adoption of PwC's interpretation of section 631 of the Code of Civil Procedure would seem to entail approval of such waivers in employee and consumer contracts as well, even if the contracts are adhesive. While unconscionable contracts are unenforceable (Civ. Code, § 1670.5), an adhesive contract is binding unless it is also substantively unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114; *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486-487.) Though unnecessary to resolve in the instant case, it can be argued that a predispute jury waiver clause similar to the one challenged here would be enforceable, even if it were buried in a prolix employment or consumer contract or

waiver procedure on a case-by-case basis. We may not validate the instant waiver entered into by sophisticated business entities, while reserving judgment on other contractual waivers until cases properly present them for review. As yet, the Legislature has not made the difficult policy choices involved, and "[w]e will not, and cannot, do what the Legislature could have, but did not do." (*People v. Castille* (2003) 108 Cal.App.4th 469, 490.)

IV. *The California Arbitration Act*

The CAA effectively permits parties to waive a jury trial by agreeing to arbitrate, and these agreements may be entered into before any dispute has arisen. (§ 1281.) As discussed in part III, in *Madden* it was argued that such agreements violate article I, section 16 of the California Constitution because the procedure set out in the CAA fails to conform to section 631. The Supreme Court rejected this argument, concluding that the CAA and section 631 are fundamentally different: "Section 631 . . . relates only to the manner in which a party to [an] action can waive his right to demand a jury trial *instead of a court trial*. It does not purport to prevent parties from avoiding jury trial by not submitting their controversy to a court of law in the first instance." (*Madden, supra,* 17 Cal.3d at p. 713, italics added.)

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contained in a contract imposed on a "take it or leave it" basis by a party with superior bargaining power. (Cf. *Armendariz*, at pp. 115-119.)

On the other hand, having an alternative to both jury trials and arbitration could prove beneficial. One commentator has suggested that because court trials have significant cost and procedural benefits, *employers* should prefer them to arbitration. (Appell, *Bench Trials May Prove Better for Employers than Arbitration,* S.F. Daily J. (Apr. 24, 2003) p. 5.)

Agreements to resolve future disputes by court trial may alleviate fears of excessive jury awards while providing greater procedural protections than arbitration in many respects, including discovery, securing an impartial factfinder, and appeal, among others. It is noteworthy that the reduction of such rights in the arbitral forum, as well as the unique costs imposed by arbitration, have troubled California courts, at least when plaintiffs rely on unwaivable public claims. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076-1085; *Armendariz, supra,* 24 Cal.4th at pp. 99-113.) Thus, permitting predispute jury waivers, even in adhesive contracts, could be an attractive middle ground between jury trials, on the one hand, and arbitration, on the other.

In its brief analysis of the jury waiver issue, *Trizec*[11] found that *Madden's* approval of predispute arbitration agreements "supported" the conclusion that the parties' contractual predispute jury waiver was enforceable. (*Trizec, supra,* 229 Cal.App.3d at p. 1618.) PwC adopts this position and argues that the right to enter into a predispute jury waiver, like the one challenged here, is implicit in the CAA.[12] This argument turns *Madden* on its head. In *Madden,* the Supreme Court's decision hinged on the *distinction* between an agreement opting for a court trial in the judicial forum, which is governed by section 631, and an agreement opting out of the judicial forum entirely. Yet, *Trizec* and PwC would have us ignore that fundamental distinction and conclude that the two types of agreements are so similar that the Legislature's approval of one necessarily implies its approval of the other.

Jury trials are unique to the judicial system. The Legislature's authorization of agreements to resolve disputes in a *nonjudicial* forum, which leads to the loss of a

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11 PwC refers us to two other appellate courts that have cited *Trizec* with approval. In *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, the court considered whether an employer could properly refuse to hire an applicant who declined to execute a predispute arbitration agreement. In the course of its decision, the court reviewed the range of situations in civil and criminal cases where a person could waive the right to a jury trial. Citing *Trizec*, *Lagatree* stated: "As for waiver in civil actions, one court has noted" that parties can enter into a prelitigation jury waiver. (*Lagatree*, at p. 1117.) In *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, the court evaluated the enforceability of a predispute arbitration agreement and quoted *Trizec* for the proposition that "to be enforceable, a contractual waiver of the right to a jury trial 'must be clearly apparent in the contract and its language must be unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties.' " (*Badie*, at pp. 803-804.) Thus *Trizec* remains the only California case to directly address whether predispute jury waivers are enforceable. In addition, the out-of-state authorities cited by PwC are not germane to our analysis, since none involves the precise set of California constitutional and legislative provisions that govern our result. (*Parker v. James Granger, Inc., supra,* 4 Cal.2d at p. 679.)

12 In its opposition brief, PwC argues that by authorizing a predispute jury waiver in the CAA "the Legislature has also approved of written prelitigation agreements not to demand a jury trial." "Such agreements, after all, preserve all of the other due process and procedural protections of a trial in a court of law that one loses by agreeing to arbitration."

package of procedural rights, does not necessarily imply approval of agreements to modify the *judicial* forum to eliminate one of those rights. PwC's argument also overlooks a public policy difference that may explain the Legislature's disparate treatment of these two dispute resolution systems. There is both a federal and state public policy in favor of enforcing an agreement to arbitrate disputes (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9), at least if the agreement is nonadhesive. There is no comparable state policy favoring court trials in the judicial forum. To the contrary there exists a longstanding public policy in favor of trial by jury. (Cal. Const., art. I, § 16; *Massie v. AAR Western Skyways, Inc.* (1992) 4 Cal.App.4th 405, 411.)

Finally, the argument that the CAA provides the statutory authorization for predispute jury waivers lacking in section 631 is incompatible with the language of section 631 itself. As discussed above, that section provides that the right to a jury trial in a civil case is inviolate and may "*only be waived pursuant to subdivision (d)*." (§ 631, subd. (a), italics added.) The Legislature's intent that section 631, subdivision (d) provide the *exclusive* means by which parties may waive their right to a civil jury trial is unambiguous. (See 7 Witkin, Cal. Procedure (2003 supp.) Trial, § 114, p. 29.) We conclude that the plain language of section 631 precludes the interpretation that the CAA was intended to authorize, sub silentio, alternate means to effectuate civil jury waivers in the judicial forum.

V. *The Freedom to Contract*

PwC argues that by its codification of the freedom to contract, the Legislature has " 'prescribed by statute' one way in which parties can validly '[express]' their 'consent' to waive their civil jury trial right." PwC relies on certain provisions in the Civil Code enacted in 1872 (Civ. Code, §§ 1549, 1550, 1556) that permit parties to enter into binding, bargained-for agreements "to do or not . . . do" anything not proscribed by law. This argument is meritless. First, at the same time the Legislature enacted the provisions PwC relies on, it enacted Code of Civil Procedure section 631, which approved specified agreements to waive a jury. This specification would be rendered meaningless if all other

agreements to waive a jury were authorized under the referenced Civil Code sections. In addition, PwC's argument fails to explain why numerous Supreme Court cases, decided after enactment of these laws, have consistently referred to Code of Civil Procedure section 631 as the *sole* method for waiving a jury in favor of a court trial. (*People v. Metropolitan Surety Co., supra,* 164 Cal. at p. 177; *Biggs v. Lloyd, supra,* 70 Cal. at pp. 448-449.) Finally, it would be illogical to conclude that the Legislature intended the very broad grant of contractual authority in the Civil Code to permit an alternative means for jury waivers, when the specific code provision devoted to that subject matter, Code of Civil Procedure section 631, is expressly designated as the sole authority for such waivers.[13]

CONCLUSION

PwC forecasts dire consequences from this decision, predicting "thousands" of such waiver agreements will be rendered unenforceable, imposing greater burdens on the already overburdened court system. PwC suggests we adopt a practical solution by deferring to *Trizec's* holding and leaving it to the Legislature to prescribe any additional requirements for the waiver of jury trials, if it sees fit to do so. PwC's prediction is nothing more than conjecture. There is no factual basis in the record before us for concluding that significant numbers of additional jury trials will actually result. During the ordinary course of civil proceedings, parties entitled to a jury frequently elect to

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13 PwC's reliance on our decision in *Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 196, 199-201 for support is unavailing. In *Intershop* we upheld a forum selection clause transferring a case from California to the Federal Republic of Germany. PwC informs us that Germany does not provide jury trials in such cases. There is no mention of this in *Intershop* for the perfectly good reason that the case never considered or decided whether an agreement to litigate in a non-California forum, which does not provide a jury trial, implicates article 1, section 16 of the California Constitution. *Intershop* cannot provide support for a point not raised, considered or resolved therein. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57-58 & fn. 8.) The present case does not involve an agreement to select a foreign forum or a foreign set of laws. (See, e.g., *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal.App.4th 1546.) Thus, we need not consider the effect of article I, section 16 on such an agreement when that agreement impacts the parties' right to a civil jury trial.

forego this right and opt to resolve their claims through settlement, arbitration or court trial. Moreover, PwC's prediction, even if accurate, is not a sufficient basis to overcome the language and history of our Constitution and legislative enactments related to the right to jury trial. In 1970, the California Constitution Revision Commission recognized the problem of overcrowded courts and declined to alter the Constitution to make civil jury waivers more readily available. We decline, as we must, PwC's invitation to play the activist role, and we leave to the Legislature the determination whether any change to existing law is warranted.

DISPOSITION

The order to show cause is discharged. Let a peremptory writ of mandate issue directing respondent to set aside its order granting real party's motion to strike the demand for jury trial, and directing respondent to enter a new and different order denying the motion. Petitioners are awarded their costs incurred in bringing this petition. (California Rules of Court, rule 56.4, subd. (a).)

SIMONS, J.

We concur.

JONES, P.J.

GEMELLO, J.

(A102790)

Superior Court of the County of Alameda, No. 2002-056106, Ronald M. Sabraw, Judge.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Jerome B. Falk, Jr. and Steven L. Mayer; Bartko, Zankel, Tarrant & Miller, John J. Bartko, Christopher J. Hunt and Allan N. Littman for Petitioners Grafton Partners LP, Allied Capital Partners LP, Six Sigma LLC, and its members, by Richard M. Kipperman, Trustee in Bankruptcy; and Tom Frame, Bruce Miller and Ronald G. VandenBerghe, for themselves and as representatives of a class of investors.

McGuinn, Hillsman & Palefsky and Cliff Palefsky for California Employment Lawyers Association as Amicus Curiae on behalf of Petitioners.

Law Offices of Public Advocates, Inc., and Richard A. Marcantonio for Public Advocates, Inc., as Amicus Curiae on behalf of Petitioners.

The Sturdevant Law Firm and James C. Sturdevant for Consumer Attorneys of California as Amicus Curiae on behalf of Petitioners.

Gibson, Dunn & Crutcher LLP, Scott A. Fink, Daniel S. Floyd, Theodore J. Boutrous, Jr., and Julian W. Poon for Real Party in Interest PricewaterhouseCoopers LLP