

A Ray Of Hope Or Just A Specific Fact Pattern?
Court Of Appeal Overturns Arbitration Award On The Basis That
The Arbitrator Refused To Consider Evidence Proffered By The Losing Party

By: Edward F. Morrison, Jr., Esq.
Brett C. Drouet, Esq.

For nearly 20 years, California case law has formally embraced the proposition that private arbitration awards entered in accordance with the California Arbitration Act, *see*, Code of Civil Procedure section 1280, *et seq.* - even ones which were improvidently ruled upon and inconsistent with California law, will not be the subject of judicial review.

This rule arises from the California Supreme Court decision in Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1 ("Moncharsh"). In Moncharsh, a case involving an arbitration award arising from an employment dispute between a law firm and a former associate of that law firm, the California Supreme Court reviewed the history of the California Arbitration Act and held:

"an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties."

The case law which has been created since Moncharsh has largely adhered to that rule. *See*, Hall v. Superior Court (1993) 18 Cal.App.4th 427 and Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal.4th 1334.

This has meant that arbitration awards, even ones with glaring errors on their face, are not subject to judicial scrutiny unless one of the limited statutory exceptions permitting judicial review is found to apply. The exceptions-permitting judicial scrutiny, are generally set forth in Code of Civil Procedure section 1286.2 which provides as follows:

"(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:

- (1) The award was procured by corruption, fraud or other undue means.
- (2) There was corruption in any of the arbitrators.

- (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
- (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
- (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor 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.
- (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives."

As set forth above, the exceptions to the rule generally surround instances of fraud, the arbitrator exceeding his or her powers or the refusal to consider evidence and have been construed narrowly by the courts. However, in the recent decision in Burlage v. Superior Court (2009) WL 3358169 ("Burlage"), the California Court of Appeal, Second District, ruled that the exception found in Code of Civil Procedure section 1286.2(5) applied where the arbitrator had wrongfully granted a motion in limine to preclude the introduction of evidence.

In Burlage, a case involving the sale of a single family home in a gated community adjacent to a country club, the purchasers sued the seller for fraud arising from the fact that a portion of the lot (including a portion of a swimming pool) encroached upon land owned by the country club. The matter went to binding arbitration before JAMS. Two years after the purchase, and before the arbitration, the title company paid the country club \$10,950 in exchange for a lot line adjustment that gave the plaintiff purchasers clear title to the encroaching land. Prior to the commencement of the arbitration, the plaintiff purchasers moved to preclude admission of any evidence concerning the lot line adjustment agreement arguing that damages must be measured from the date escrow closed.

The arbitrator granted the motion in limine.

At arbitration, the plaintiff purchasers put on evidence of the cost of having to move the swimming pool (which had been resolved by way of the lot line adjustment) and for diminution in fair market value due to the inaccurate description of the lot (which, again, had been resolved by way of the lot line adjustment). The arbitrator, which had ruled that the lot line adjustment could not be considered, awarded over \$552,750 in compensatory damages, \$250,000 in punitive damages and over \$732,570 in attorney's fees and costs for a total award of in excess of \$1,500,000-all for a lot line adjustment that cost less than \$11,000.

After the plaintiff purchasers moved to confirm the award and the seller defendant moved to vacate the award, the trial court ruled that the arbitrator's refusal to admit evidence of the lot line adjustment substantially prejudiced the seller defendant's ability to dispute the amount of damages and vacated the award.

On appeal, the plaintiff purchasers argued that the trial court could not review the arbitrator's award for errors of law, citing the Moncharsh case. In a 2 to 1 decision, the Court of Appeal ruled that the trial court could, indeed, consider the arbitrator's refusal to consider the evidence of the lot line adjustment and further held there was substantial prejudice to the seller defendant.

Burlage may or may not be a turning point.

The decision was the subject of a stinging dissent. Also, its facts are certainly egregious. Nevertheless, in the future, the party which has lost at arbitration should certainly analyze all evidence that the arbitrator refused to consider. Moreover, Burlage may be a precursor to more willingness by the courts to correct clearly error laden rulings. In that regard, it is noted that the California Supreme Court in Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal.4th 1334 ruled that the parties could agree that the award of the arbitrator can be the subject of judicial review under certain circumstances. Also, the Court in D.C. v. Harvard-Westlake School (2009) 176 Cal.App.4th 836 ruled that the arbitrator exceeded his powers in awarding arbitral expenses and attorney fees to a defendant in a hate crimes case brought under the Ralph Civil Rights Act (Civil Code section 51.7) and the Tom Bane Civil Rights Act (Civil Code section 52.1) - because the statutes prohibited the losing plaintiffs from being responsible for the very expenses and fees awarded by the arbitrator.

Therefore, there may indeed be a ray of hope.

About the Authors: Edward F. Morrison, Jr. is the founding partner and Brett C. Drouet is a partner of The Morrison Law Group, a professional corporation. Their biographies can be viewed at www.morrisonlawgroup.com.

Publication Note: The Morrison Law Group wishes to disseminate this publication to all clients and colleagues of the Firm who wish to receive it. Should any recipient desire to be removed from the distribution list, or wishes to have a colleague added, please contact Jim Van Dusen at The Morrison Law Group at 213 356-5504 or vandusen@morrisonlawgroup.com.

Disclaimer Note: The legal article presented above is intended to provide general information which may be of interest or use to clients and colleagues of The Morrison Law Group and should not be construed as legal advice on any matter.