

Vacating Arbitration Awards, Now Less Daunting of a Task?

Any lawyer who has sought to vacate an arbitration award knows it is a daunting task. Arbitration awards are rarely vacated, even when a party has been severely prejudiced by an arbitrator's errors. Despite clear statutory language requiring vacation of awards under various circumstances, case law has severely limited this authority, and judges tend to view confirmation of an award as the safe option.



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A recently published case may provide an opening, however, for practitioners seeking to vacate arbitration awards. In *Burlage v. Superior Court*, 178 Cal.App.4th 524 (2009), in a 2 to 1 decision, the 2nd District Court of Appeal affirmed an order vacating an arbitration award because, according to the majority, the arbitrator refused to hear evidence that materially affected the calculation of actual damages suffered. This decision departs from the prevailing tendency of courts to confirm arbitration awards almost uncritically, even when grounds for vacation appear to be present. In an indication of how unique the *Burlage* decision is, the strongly worded dissent suggests that "great mischief can and will result from the majority's decision."



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Based on the Code alone, one would expect that arbitration awards would be vacated at least occasionally. Code of Civil Procedure Section 1286.2 provides six different grounds for which a court "shall" vacate an arbitration award, including if the award was procured by corruption or fraud, if the arbitrators exceeded their powers, or if a party was substantially prejudiced by the



arbitrators' refusal to postpone the hearing or to "hear evidence material to the controversy." Nevertheless, courts faced with motions to vacate have by and large shown nearly unfettered deference to arbitrators' decisions. As stated in the seminal case of *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 11, 33 (1992), "with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law," and even "the existence of an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review."

Burlage is important, therefore, because it re-establishes that "arbitrators have a great deal of power, but not absolute power." The subject of the underlying arbitration in *Burlage* was the purchase of a house. The *Burlages* claimed that the defendant in the arbitration, Spencer, had sold them the house knowing that the swimming pool and a fence encroached on an adjacent country club, and that she failed to disclose this information.

Two years after the purchase, but before the arbitration, a title company paid the country club \$10,950 for a lot line adjustment, giving the *Burlages* clear title. Nevertheless, the *Burlages* argued in the arbitration that damages should be measured only from the date that escrow closed, and that evidence of the later lot line adjustment was thus inadmissible. The arbitrator, a retired

judge, agreed, and granted the *Burlages*' motion in limine, excluding any evidence concerning the financial effect of the lot line adjustment. He thereafter awarded the *Burlages* \$552,750 in compensatory damages, \$250,000 in punitive damages, and \$732,570 in attorney's fees.

Spencer moved to vacate the award in the Superior Court, basing her motion on Code of Civil Procedure Section 1286.2(a)(5), which

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requires vacation of an award when "the rights of the party were substantially prejudiced by... the refusal of the arbitrators to hear evidence material to the controversy." Finding that that arbitrator's refusal to admit evidence of the lot line adjustment substantially prejudiced Spencer's "ability to dispute the amount of damage suffered," the Superior Court vacated the arbitration award.

The *Burlages* filed a petition for writ of mandate. The Court of Appeal initially denied the petition, but then granted a petition for rehearing. After the rehearing, the Court of Appeal again denied the petition and affirmed the trial court's order vacating the award, issuing a published decision.

In its decision, the Court recognized that judicial review of an arbitration award is extremely limited, and that the merits of the controversy and the arbitrator's reasoning may not be reviewed. The Court further noted that arbitrators do not ordinarily exceed their authority by deciding an issue of law or fact incorrectly, and that parties to arbitration agree to be bound by an arbitrator who is, like a judge, fallible. But, according to the decision, "tolerance for fallibility has its limits."

The Court quoted *Hall v. Superior Court*, 18 Cal.App.4th 427, 439 (1993), which stated that Section 1286.2(a)(5) "has been interpreted as 'a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case.'" Thus, because the Burlage arbitrator refused to hear evidence that the lot line problem had been "fixed" and that there were no actual damages suffered, Spencer's rights were substantially prejudiced and vacation was required. According to the majority, the issue was not whether the arbitrator correctly determined the proper date to measure damages - this decision was not subject to judicial review. Rather, the primary issue was the arbitrator's exclusion of the evidence showing that there were no actual damages, and an arbitrator "must consider this evidence to make an informed decision."

The dissent, obviously, did not agree with the

majority's reasoning. While acknowledging that the arbitrator's decision to preclude the consideration of evidence of mitigation following the close of escrow thereby led to the exclusion of actual evidence of showing no damages, the dissent characterized this decision as a "legal ruling." And, since it was a legal ruling, whether right or wrong, judicial review was precluded.

In closing, the dissent argued that, due to the majority's decision, "[i]n effect, every ruling resulting in witness preclusion attributable to a legal or evidentiary ruling will be rendered suspect and subject to challenge." Thus, the "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution" "will be rendered illusory and chimerical."

The dissent may be correct that valuing damages at close of escrow and disregarding later events was a legal decision. It is also likely that there may now be an increase in the amount of motions to vacate that get filed, as lawyers use the Burlage decision to argue that their clients' rights were substantially prejudiced by arbitrators' refusal to hear material evidence. But, maybe this isn't such a bad thing. Section 1286.2 must have some substantive effect. Prior to Burlage it had very little, since almost every decision of an arbitrator - even a blatantly wrong or unethical decision - can be characterized as a "legal ruling" and therefore beyond

the scope of judicial review. A line must be drawn somewhere, and the Burlage decision is refreshing in that it actually makes an attempt to draw that line.

Burlage may provide trial courts with greater leeway to examine the decisions of arbitrators, and to actually vacate awards when appropriate under Section 1286.2. Burlage enunciates a rule that courts should not just disregard exclusion of material evidence by an arbitrator, even though that exclusion is arguably based on a legal determination. This result is more in keeping with the statutory language of 1286.2, which does not contain an exception allowing an arbitrator to refuse to hear material evidence, even when done under the guise of a legal determination.

Nor should the decision severely undercut the authority of arbitrators. An arbitrator still has discretion to weigh evidence, and evidence that legally must be precluded is likely not "material." Furthermore, even if an arbitrator refuses to hear material evidence, vacation of an award is not proper unless a party's rights were "substantially prejudiced."

Although arbitration awards are granted deference and generally should be confirmed, there are occasions when vacating an award is the only proper course. Burlage represents a step toward giving some teeth to Section 1286.2 and shaking the rubber stamp mentality that has developed in the trial courts.

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