ARBITRATION AFTER *BURLAGE*: A SECOND TAKE

By John Taylor

Two months ago, *Citations* ran an article by Editor **Wendy Lascher** about a recent arbitration decision, *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524. Ms. Lascher, who represented the losing parties on appeal, has graciously agreed to publish a different take on the *Burlage* decision from my perspective as appellate counsel for the prevailing party, Martha Spencer.

Presiding Justice **Arthur Gilbert**'s majority opinion began: "It is not often that a trial court vacates an arbitration award and an appellate court affirms the order." *Burlage*, 178 Cal.App.4th at 526. The opinion then detailed an arbitration process that appeared so patently unfair that, in the court's view, "should the award be affirmed, arbitration itself would be suspect." *Id.* at 530. Far from undermining arbitration as a useful means of alternative dispute resolution, the Court of Appeal reinforced the integrity and utility of arbitration by approving a principled construction of a narrow statutory exception to the general rule against judicial review of arbitration awards.

The Facts That Made The Court of Appeal's Decision Easy

The Burlages purchased a house from Spencer, but later discovered that the pool and fence encroached on unusable hillside property abutting the adjacent country club's golf course. The title insurer worked with the country club to correct the encroachment, purchasing the affected property for $10,950 (at no cost to the Burlages) in exchange for a lot-line adjustment that gave the Burlages clear title to the encroached-upon land.

Problem solved? No, the Burlages pursued a claim against Spencer for alleged diminution in value and construction costs they ***might*** have incurred had the encroachment not been fixed.

In the ensuing arbitration, the Burlages moved in limine to exclude evidence of the lot-line adjustment, which showed the Burlages were not damaged by the encroachment. Without offering any legal reasoning or explanation, the arbitrator granted the motion, excluding evidence regarding the financial effect of the lot-line adjustment on the Burlages' damages. Ultimately, he issued a $1.5 million award that was almost as much as the $1.75 million the Burlages paid for the house.

Ventura County Superior Court Judge **William Liebmann** granted Spencer's motion to vacate the award, and the Court of Appeal affirmed, noting that by refusing to hear "crucial evidence" that "the problem was 'fixed' and there are no damages," "the arbitration assumed the nature of a default hearing in which the Burlages were awarded $1.5 million in compensatory and punitive damages they may not have suffered." *Burlage*, 178 Cal.App.4th at 530. The Supreme Court denied the Burlages' petition for review, although Justice Baxter and Justice Corrigan voted in favor of review.

Did the Court of Appeal's Decision Violate *Moncharsh*?

Associate Justice **Steven Perren** dissented, urging that the majority decision was contrary to the Supreme Court's decision in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1. He interpreted *Moncharsh* to stand for the proposition that legal errors by arbitrators are absolutely insulated from review. He expressed concern that the majority decision "cuts the heart out of *Moncharsh*" and that "great mischief can and will result from the majority's holding," *Burlage*, 178 Cal.App.4th at 534, a view similarly articulated by Ms. Lascher.

But predictions that the *Burlage* decision dooms the efficiency and predictability of arbitration seem to be premature. The court implemented the plain language of a statute (Cal. Civ. Proc. Code §1286.2(a)(5)) that was not at issue in *Moncharsh*, and that will not likely be invoked in many cases. The Federal Arbitration Act contains an almost identical statutory protection, 9 U.S.C. §10(a)(3), that has been interpreted the same way the Court of Appeal interpreted California's counterpart, and yet only a handful of federal decisions have vacated arbitration awards based on that provision. None of those few decisions has weakened the efficacy of federal arbitrations.

Code of Civil Procedure section 1286.2 enumerates several grounds on which arbitration awards are subject to judicial review. The subdivision at issue in *Burlage*, section 1286.2(a)(5), provides that an arbitration award must be vacated where the exclusion of material evidence has substantially prejudiced a party. Justice Perren's dissent suggests that, after *Moncharsh*, section 1286.2(a)(5) applies only when the refusal to hear evidence was based on something other than a legal ruling. But that reading of *Moncharsh* would also foreclose review of arbitration awards for "corruption in any of the arbitrators" – another ground for review listed in section 1286.2 – if an arbitrator's corruption led to an improper legal ruling.

Fortunately, *Moncharsh* does not go so far. In that case, the Supreme Court disapproved only a ***court-made*** rule that, going ***beyond*** the statutory grounds for judicial review of an arbitration award, had allowed courts to vacate awards when a legal error appeared on the face of arbitration award. In so holding, the Supreme Court went out of its way to affirm that judicial review of arbitration awards still remains available based on the statutory

grounds enumerated in section 1286.2 – including subdivision (a)(5), the ground the trial court relied on in *Burlage*. *Moncharsh,* 3 Cal. 4th at 12-13.

The Supreme Court explained that the risk of erroneous arbitration decisions can be tolerated precisely because the legislature has reduced the risk of error "by providing for judicial review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process." *Moncharsh,* 3 Cal. 4th at 12. Consequently, in *Hall v. Superior Court,* 18 Cal.App.4th 427, 439 (1993), Justice Chin (then a First District appellate justice) wrote that even after *Moncharsh,* section 1286.2(a)(5) functions "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."

The *Burlage* decision thus does not represent any deviation from *Moncharsh.* Nor is the decision likely to result in the dire consequences predicted by Justice Perren's dissent. For section 1286.2(a)(5) to apply, there must be not only a refusal by an arbitrator to hear evidence, but also a finding by the trial court that the unheard evidence was *material* and the refusal to hear it was ***substantially prejudicial.*** Those criteria will rarely be met. Indeed, the fact that section 1286.2(a)(5) has been on the books for over 150 years, and *Burlage* is only the third published decision regarding its application, shows how infrequently the statutory requirements for judicial review of an arbitration award based on the arbitrator's refusal to hear evidence will ever be established.

Far from making bad law, then, the facts of the *Burlage* case show how important it is to have this statutory "safety valve" for those rare fundamental miscarriages of justice that, if uncorrected, would erode public confidence in the very concept of nonjudicial dispute resolution.

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