

## RESOLUTION 7-08-2002

### DIGEST

#### Arbitration Awards: Vacating for Errors of Law

Amends Code of Civil Procedure section 1286.2 to allow the superior court to vacate an arbitration award based upon the arbitrators' prejudicial error of law.

### RESOLUTION COMMITTEE RECOMMENDATION

#### APPROVE IN PRINCIPLE

#### Reasons

This resolution amends Code of Civil Procedure section 1286.2 to allow the superior court to vacate an arbitration award based upon the arbitrators' prejudicial error of law. This resolution should be approved in principle because it would enhance the quality of the results of arbitration by requiring that the awards comply with the substantive law of the area being arbitrated.

Existing law denies the superior court jurisdiction to vacate an arbitration award even when the award is based upon a manifest error in the interpretation or application of the substantive field of law of dispute arbitrated. (*Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1.) That case held, among other things, that the parties to an arbitration award entered into it freely knowing the consequences, that there is a strong public policy in California favoring arbitration, and that arbitrators need not follow existing law but, instead, can follow equity and good sense in making an award.

Whether parties enter into arbitration agreements freely and voluntarily is the subject of much debate. Moreover, the premise that parties agree to arbitration with the understanding that the award need not be based on either the law or the evidence is doubtful at best. Besides, requiring the superior court to confirm arbitration awards that are violative of substantive law and that cause substantial harm subverts the ultimate end of the law: to achieve justice. (See Justice Kennard's dissent in *Moncharsh v. Heily & Blasé*, *supra*.)

### SECTION/COMMITTEE REPORTS

#### COMMITTEE ON ADMINISTRATION OF JUSTICE

Recommend: Disapprove

#### Reasons:

This proposal would add a subpart to section 1286.2 of the Code of Civil Procedure to mandate that a court must vacate an arbitration award if the court determines that the arbitrator or arbitrators made a prejudicial error of law.

Existing law provides: "[A]rbitration awards are generally immune from judicial review . . ." (*Nogueiro v. Kaiser Foundation Hospitals* (1988) 203 Cal.App.3d 1192, 1195.) (*Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 11.) "[I]t is the general rule that, 'The merits of the controversy between the parties are not subject to judicial review.' [Citations.] More specifically, courts will not review the validity of the arbitrator's reasoning." (*Ibid.*; see *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal. 4th 362.) "The arbitrator's decision should be the end, not the beginning, of the dispute. [Citation.] Expanding the availability of judicial review of such decisions 'would tend to deprive the parties to the arbitration agreement of the very advantages the process is intended to produce.' " (*Moncharsh v. Heily & Blasé*, *supra*, 3 Cal.4th at pp. 10–11.) "Moreover, '[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision on broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.' (*Sapp v. Barenfeld* (1949) 34 Cal.2d 515, 523 . . . ) As early as 1852, this court recognized that, 'The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].' (*Muldrow v. Norris* (1852) 2 Cal. 74, 77.) 'As a consequence, arbitration awards are generally immune from judicial review. . . .' (*Nogueiro v. Kaiser Foundation Hospitals* (1988) 203 Cal.App.3d 1192, 1195. . . .)" (*Moncharsh v. Heily & Blasé*, *supra*, 3 Cal.4th at pp. 10–11.)

This proposal would subject many arbitration awards to judicial review for errors of law. Since arbitrators in many arbitration contexts are not attorneys, many awards could be challenged because they do not follow "principles of dry law." This proposal would provide a mechanism that would increase the cost of arbitration and deprive the parties of finality after an expeditious and inexpensive arbitration proceeding. The Committee accordingly

recommends disapproval.

California State Bar Committee on Alternative Dispute Resolution

Recommend: DISAPPROVE

Reasons:

The California State Bar Committee on Alternative Dispute Resolution recommends that the Conference of Delegates “Disapprove” Resolution No. 07-08-2002. This Resolution seeks to expand the grounds upon which a court may vacate an arbitration award under the California Arbitration Act. The Committee believes that the proposed changes would completely undermine the Act and eliminate the system of arbitration that was envisioned by the Legislature. The Committee’s recommendation to “Disapprove” the Resolution is based on the following:

- 1) The Resolution fails to take into account that arbitration under the California Arbitration Act was never intended to replace the judicial process. Arbitration was designed to be an “alternative” form of dispute resolution. In *Moncharsh*, the Supreme Court’s most expansive discussion of the review of arbitration awards, the Court reviewed nearly 150 years of legal history in California. In so doing, it observed that arbitrators are not ordinarily constrained to decide according to the rule of law. The proposed Resolution fails to recognize an arbitrator’s discretion to use his or her experience or particular knowledge of the parties interests to fashion an equitable award.
- 2) The legislative intent of the California Arbitration Act is to provide a less costly form of resolution without the delays often experienced through the court system. A benefit of the Act is that it provides needed relief to an already overburdened court system. The proposed resolution would have the opposite effect by negating the finality of arbitration decisions and increasing costs. Those unhappy with their arbitration awards would be marching to the court house steps for relief. Parties will request review as a matter of delay or to negotiate a different settlement. Arbitration proceedings would become more costly as parties demand court reporters to be present in preparation for later court review.
- 3) If adopted into legislation, the proposed Resolution would effect a fundamental change to what arbitration was intended to be. Access to relief for disenfranchised groups and individuals will be severely impacted. Those with limited resources who have traditionally had no access to the court system will now be left without access to arbitration as well.
- 4) The Committee agrees with the Supreme Court decision in *Moncharsh*. It supports the Court in its finding that the California Arbitration Act represents a comprehensive statutory scheme regulating private arbitration in this state, and that a court cannot set aside an arbitrator’s award to correct an error of law. The Court acknowledged that one of the clear purposes of the Act is to encourage those who wish to avoid delays to obtain relief in a tribunal of their own choosing. The expansion of the availability of judicial review of arbitration decisions would deprive parties of the very advantages the process is intended to produce.

For the reasons stated above, the State Bar Committee on Alternative Dispute Resolution recommends that the Conference of Delegates “Disapprove” the Resolution 07-08-2002.

**TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 1286.2 as follows:

- 1 §1286.2
- 2 (a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the
- 3 following:
- 4 (1) The award was procured by corruption, fraud or other undue means.
- 5 (2) There was corruption in any of the arbitrators.
- 6 (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
- 7 (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the
- 8 merits of the decision upon the controversy submitted.

9 (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to  
10 postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear  
11 evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this  
12 title.  
13 (6) An arbitrator making the award either: (A) failed to disclose within the time required for  
14 disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to  
15 disqualification upon grounds specified in Section 1281.9, but failed upon receipt of timely demand to  
16 disqualify himself or herself as required by that provision. However, this subdivision does not apply to  
17 arbitration proceedings conducted under a collective bargaining agreement between employers and  
18 employees or between their respective representatives.  
19 (7) The arbitrator or arbitrators made a prejudicial error of law.  
20 (b) Petitions to vacate an arbitration award pursuant to Section 1285 are subject to the provisions  
21 of Section 128.7

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

#### STATEMENT OF REASONS

Existing Law: Under existing law, the Superior Court has no jurisdiction to correct a prejudicial error of law by an arbitrator. *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4<sup>th</sup> 1; *Alexander v. Blue Cross of California* (2001) 88 Cal. App.4<sup>th</sup> 1082.

This Resolution: If the Superior Court is allowed to review awards for a prejudicial error of law, most arbitrations, like most trials, will end where they begin. Only in the most egregious cases will a petition to vacate be filed. Our entire legal system is based on layers of review to ensure that prejudicial errors of law can be corrected and public policy enunciated for the benefit of all the citizens. For the average citizen, arbitration is currently a maze that ends in a cul-de-sac of arbitrariness. There should be relief available for those instances when the arbitrator makes a prejudicial error of law. It's only fair.

The Problem: Arbitration was sold wholesale to the public and the legal profession as a quick, efficient, low-cost way to resolve disputes. In return, the public gave up important rights, e.g., the right to a jury trial and the right to appeal. The subsequent reality is an arbitration industry that threatens to overwhelm traditional methods of dispute resolution. It has turned out to be neither quick, efficient nor inexpensive. Many of the most competent members of the judiciary have abandoned the courts for the more lucrative field of arbitration. Because of the Supreme Court's abhorrence of increased case loads, justice is blind to the most heinous perversions.

#### IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Robert H. Lynn, Lynn, Stock & Stephens, LLP, 2445 Fifth Avenue, St. 330, San Diego, CA 92101, (619) 234-5488, rlynn@lsslawfirm.com

RESPONSIBLE FLOOR DELEGATE: Robert H. Lynn

#### COUNTERARGUMENT

##### ORANGE COUNTY BAR ASSOCIATION

The Arbitration Act was enacted to provide a format for parties to resolve their disputes expeditiously and without the expense involved in litigated court proceedings. Arbitration is intended to be informal and binding. In order to accommodate the purposes of this alternative to litigation, the legislature has limited the bases upon which an award may be vacated. This proposal would make the arbitration merely a preliminary step to a litigation. In order to establish a basis to prove a prejudicial error of law, the proceeding will have to be transcribed and a detailed

decision with references to the evidence and legal principals will be required of all arbitrators. The arbitration proceeding will lose its informality and the costs and expenses will increase exponentially. Moreover, there are not many litigators who are unable to find a prejudicial error of law upon which to base an application to vacate, which will serve to delay the ability to enforce the award. It is recommended that the proposed resolution be denied.