

Correcting a California Contractual Arbitration Award

By

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Your client, a general contractor, has a contract with a sub-contractor that calls for arbitration to resolve disputes that might arise during the sub's performance of his contractual responsibilities. Unfortunately, a dispute does occur and, pursuant to the terms of the agreement, you are called upon to represent your client in the arbitration. After the arbitration hearing, an award is rendered but you are not pleased with the arbitrator's decision. Upon review, and after consultation with your client, you conclude that the arbitrator made certain errors in evaluating the evidence presented at the arbitration hearing and in calculating the damages awarded. In addition, the arbitration agreement provided for the prevailing party to recover its attorney's fees and costs and the arbitrator failed to include either in the award. What recourse do you have, under California law, if you think that an arbitrator's decision is wrong? Can the arbitrator's award be changed (i.e., corrected, modified or supplemented)? Can it be set aside (i.e., "vacated") so that the arbitration process can start anew, perhaps with a new arbitrator?

In light of what you perceive to be a deplorable and woefully inaccurate and inadequate arbitration award, should you now recommend to your client that it modify its existing sub-contracting agreements and alter the text of all future sub-contracting agreements to increase its opportunity to resolve disputes expeditiously and economically by requiring pre-arbitration mediation and, further, by expanding the level of judicial review of arbitration awards that are made for disputes that can not otherwise be settled (i.e., to the merits of the award)?

California has a well-established policy favoring arbitration as a speedy and inexpensive method for settling disputes [Hightower v. Superior Court (O'Dowd) (2001) 86 Cal. App. 4th 1415]. The present contractual arbitration law, the California Arbitration Act, is Title 9 of the California Code of Civil Procedure (hereinafter "CCP"), beginning with Section 1280. Enacted in 1961, it functions as a comprehensive scheme to promote and regulate contractual arbitrations [A. M. Classic Construction, Inc., v. Tri-Build Development Company (1999) 70 Cal. App. 4th 1470; Hightower v. Superior Court (O'Dowd), supra]. It provides two ways to challenge an arbitrator's award; a petition to correct an award or a petition to vacate an award (CCP Section 1285). In deciding which avenue of relief, if either, is available to you, you must first determine what it is about the award that you feel is incorrect. For example, is your complaint that the arbitrator exceeded the authority to make the award that was rendered? Did the arbitration award provide a remedy not authorized by law? Do you believe that the arbitrator failed to properly consider the evidence presented at the arbitration hearing? Perhaps, you discover that the arbitrator simply could not add,

subtract, multiply or divide the numbers admitted into evidence or omitted certain items presented at the arbitration hearing and, therefore, miscalculated the damages.

An arbitrator's award is not enforceable in and of itself. An arbitrator's award has no more force or effect than a contract in writing between the parties to the arbitration until it has been either confirmed or vacated by proceedings in the Superior Court (CCP Section 1287.6). Normally, therefore, what happens is that after the arbitrator has rendered an award either the prevailing party will petition the court to confirm the award or, if the losing party believes the award defective, it will petition the court to correct or vacate the award entirely.

Because the courts favor arbitration, awards in all private contractual arbitrations are subject to very narrow judicial review. In fact, some courts have held that arbitration awards are "immune" from judicial review [*Moncharsh v. Heily & Blase* (1992), 3 Cal. 4th 1]. Recognizing that arbitrators need not follow the law and may base their decisions on "broad principles of justice and equity," the courts have reasoned that limiting the grounds for judicial review effectuates the parties' intent when originally entering into an arbitration agreement (i.e., to have a quick, relatively inexpensive and final resolution of the dispute). A court, therefore, will not review the sufficiency of the evidence supporting the award or the validity of the arbitrator's reasoning [*Morris v. Zuckerman* (1968) 69 Cal. 2^d 686]. Furthermore, recent California Appellate Court decisions have held that parties to an arbitration agreement cannot contractually expand the level of judicial review to include a review on the merits of the award [*Crowell v. Downey Community Hospital Foundation* (2002) 95 Cal. App. 4th 730; *Oakland-Alameda County Coliseum Authority v. CC Partners* (2002) 101 Cal. App. 4th 635]. It is interesting to note that the court in *Crowell* specifically refused to follow the decision in *Lapine Technology Corp. v. Kyocera Corp.* 130 F. 3d 884 (9th Cir. 1997), in which the 9th U.S. Circuit Court of Appeals, in a sharply divided decision, allowed the parties to confer jurisdiction for appellate review of the arbitration award.

Therefore, unless you are certain that your client's matters are all subject to the jurisdiction of the federal courts, you might want to think twice before advising it to amend its sub-contracting agreements to expand the level of judicial review. In addition, in California, an unenforceable expanded judicial review provision may render the entire arbitration agreement void. In *Crowell* (2002, *supra*), the court found that the provision for judicial review of the merits of the award was so central to the entire arbitration agreement that it "could not be severed" and voided the entire agreement. However, in *Oakland-Alameda* (2002, *supra*), where there was a severance clause in the arbitration agreement, the court severed the expanded judicial review provision and enforced the remainder of the agreement.

Neither will a court review claimed errors of law by the arbitrator, no matter how gross. The California Supreme Court could not have been any more explicit when it held that "the existence of an error of law on the face of the award that causes substantial injustice does not provide grounds for judicial review." [*Moncharsh v. Heily & Blasé* (1992), *supra*]. Arbitrators may not, however, "exceed" their powers by rendering awards that they are not authorized by law to

do [Jordan v. Dept. of Motor Vehicles (2002) 100 Cal. App. 4th 431]. In Jordan, an arbitration award for attorney's fees in excess of that allowed by statute [Rev. & Tax. C. Section 6909(b)] was vacated by the trial court and, on appeal, was corrected to award the maximum allowed by law. The court held that any sum awarded in excess of that amount was an unconstitutional gift of public funds.

Where statutory grounds to vacate do exist, the reviewing court is required to set the arbitrator's award aside. Paraphrasing the statutory language, the California Arbitration Code (CCP Section 1286.2) states that the court "shall" vacate the arbitrator's award if it finds any of the following:

- (1) that the award was obtained through corruption, fraud, or other undue means or that any of the arbitrators were corrupted;
- (2) that the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision;
- (3) that the rights of the party challenging the award was substantially prejudiced by the arbitrator's refusal to continue the hearing upon sufficient cause being shown therefore or to hear evidence material to the controversy;
- (4) the misconduct of the neutral arbitrator or other conduct of the arbitrators contrary to the provisions of the Arbitration Code; or
- (5) that the arbitrator(s) failed to comply with the disclosure requirements set out in CCP Section 1281.9 (i.e., providing information regarding the arbitrator's participation in prior non-collective bargaining arbitrations, etc.)

Petitions to vacate are rarely successful. Most arbitrations are set through administrators who know and comply with the statutory disclosure requirements. Fraud, corruption or misconduct of either the arbitrator(s) or the proceeding itself hardly ever occurs and would be extremely difficult to prove. Since the parameters of the controversy, and thereby the limits of the arbitrator's decision discretion, are predetermined by the parties or their attorneys, it would be unusual for an arbitrator to render an award exceeding his or her powers that could not be corrected without affecting the merits of the decision. Lastly, arbitrators are in the business of rendering professional services. Because arbitrators usually are paid for cancelled pre-scheduled hearing time, it would be rare for an arbitrator to ever refuse to postpone a hearing upon sufficient cause being shown. There is also little incentive for an arbitrator to refuse to hear evidence material to the controversy. Unless, of course, the arbitrator does not want to ever be retained again, which, we all recognize, is seldom the case.

If there is merit to your complaint, however, and you act quickly, all is not lost. The other statutory remedy available, a petition to correct, may afford the relief that you seek. Under California law, the arbitrator may correct an award for errors in form not affecting the merits of the decision or where there is an "evident miscalculation" of figures or a mistake in the description of any person, thing or property referred to in the award (CCP Section 1286.6). An arbitrator cannot reconsider or reinterpret the evidence on which the award was based.

What, you ask, is an "evident miscalculation of figures?" In *Severtson v. Williams Construction Co.* (1985), 173 Cal.App.3d 86, the court was asked to determine

the meaning of those words as they apply to an arbitrator's authority to correct an award previously made. That case arose out of an arbitrated dispute between property owners and the contractor they hired to construct their residence. The arbitrator had based the award on a sub-contractor's bid he mistakenly thought included certain work. It did not. When presented with an application to correct to include the cost of the work omitted, he did so. The property owners characterized the original award as a miscalculation of figures subject to the arbitrator's correction. The defendant contractor argued that the arbitrator's original award was not a miscalculation, but was, instead, simply the arbitrator's misinterpretation of the evidence, not evident on the face of the award, for which there is no statutory right for relief. The court agreed with the contractor. The court found that, in examining the face of the original award, no miscalculation could be discerned. It was not clearly apparent that anything was amiss. The arbitrator's original award could just as well have reflected a deliberate choice to reject certain items of evidence and any conclusion that the figure in the original award was a miscalculation "would be suppositional rather than evident." The Severtson decision was subsequently cited by the California Supreme Court when it held that arbitrator's awards that are merely erroneous should be confirmed [*Moncharsh v. Heily & Blase*, (1992), *supra*].

On the other hand, appellate courts have held that arbitrators do "have the authority to amend an award to determine an inadvertently omitted question that must be decided in order to resolve the entire dispute" [*A.M. Classics Construction, Inc. v. Tri-Build Development Company* (1999), *supra*]. There, the arbitrator was called upon to resolve a dispute brought by a sub-contractor against the general contractor and, based upon a stop payment notice, the party for whom the construction was being done. The arbitrator issued his award granting the sub-contractor damages against the general contractor for breach of contract but, inadvertently, neglected to decide the claim against the remaining defendant. Upon request, an amended order was made by the arbitrator in favor of the plaintiff against the co-defendant. The court held that an arbitrator is permitted to amend an award to resolve an issue omitted from the original award because of the mistake, inadvertence, or excusable neglect of the arbitrator. Such a correction can only be made, however, if the arbitrator's amendment is made before judicial confirmation of the original award, is not inconsistent with other findings on the merits of the controversy, and does not cause demonstrable prejudice to the legitimate interests of any party. Further, in *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001), 86 Cal. App. 4th 865, in which the court acknowledged that sometimes "mistakes are made" by lawyers, courts "and even arbitrators," the court held that an arbitrator has the authority to modify or amend the award, after it had been issued but before confirmation by the trial court, to supply a ruling on an inadvertent omission. In that case, it was the arbitrator's failure to rule on the expressly submitted issue of plaintiff's claimed right to be awarded interest, costs and attorneys fees as the successful party in the arbitration.

While the arbitrator's award must be in writing (CCP Section 1283.4), it need not set forth findings of fact or a statement of reasons [*Sapp v. Barenfeld* (1949), 34 Cal.2nd 515]. And, an arbitrator's declaration to explain the reasons

for the award or the merits of the controversy are inadmissible [Trabuco Highlands Community Ass'n v. Head (2002) 96 Cal. App. 4th 1183]. Our discussion here focuses only on those situations where the arbitrator's decision was intended to be the final disposition of the matter. An award is "final" for confirmation purposes if it "resolves all issues submitted to arbitration, and determines each issue fully so that no further litigation is necessary to finalize the obligations of the parties." [Rocket Jewelry Box, Inc., v. Noble Gift Packaging, Inc. (2nd Cir. 1998), 157 F. 3^d 174]. It does not apply to an arbitrator's "interim award" or "preliminary orders."

After the arbitrator renders a final award, a petition to the court to vacate or correct an award must be served and filed no later than 100 days after a signed copy of the award is served on the petitioner (CCP Section 1288). If, however, the winning party to the arbitration files a petition with the court to confirm the arbitrator's award, the losing party's petition to correct must be filed within ten days after service of the petition to confirm or 30 days if service is made outside of California (CCP Section 1290.6). That time may be extended by an agreement in writing between the parties or, for good cause, by order of the court. To obtain such relief, the petitioning party must show that it was deprived of a fair adversary hearing, provide a satisfactory excuse for not having made its claim or defense in the original action and show diligence in seeking relief after discovery of the facts [DeMello v. Souza (1973), 36 Cal. App. 3^d 79].

As you can see from this short review, it may be difficult but not impossible, to challenge an arbitration award. A petition to vacate an arbitrator's defective award is not the only viable remedy for a party seeking relief. California's courts also recognize that, on occasion, an arbitrator may make a mistake. If so, that mistake can be corrected. Provided, of course, that you act quickly and appropriately.

As to amending existing arbitration agreements to require mediation as a condition precedent to arbitration, the court requires that such a modification, like any other alteration to an existing contract, must be mutually agreed to and be in writing [Magness Petroleum Co. v. Warren Resources of California, Inc. (2002) 103 Cal. App. 4th 901]. Courts will enforce such condition precedent to arbitration clauses [Kemiron Atlantic, Inc. v. Aquakem Int'l, Inc. (11th Cir. 2002) 290 F3d 1287]. In addition to the terms of any contractual agreement between your client and its sub-contractors, you should be aware of newly enacted Civil Code Section 895 et. seq., applicable only to residential projects that close escrow after January 1, 2003. That legislation establishes a list of construction defects for which builders, contractors and designers are legally responsible; creates a builder's right to repair such defects; limits damages recoverable by the owner for such defects; shortens the statute of limitations for actions seeking compensation for certain types of construction defects; imposes a mandatory negotiation and mediation regime; and rolls back *Aas v. Superior Court*, 24 Cal. 4th 627 (2000), which held that there is no tort remedy for construction defects that have not produced physical damage.

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