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PERSPECTIVE

Heimlich shut the 'back door' to vacating arbitration awards

By Stephen L. Raucher

In December 2009, I co-wrote an article which appeared in the Daily Journal titled "Vacating Arbitration Awards, Now Less Daunting of a Task?" The article examined a case out of the 2nd District Court of Appeal, *Burlage v. Superior Court*, 178 Cal. App. 4th 524 (2009), which affirmed an order vacating an arbitration award based on an in limine ruling by the arbitrator. The in limine ruling established the date on which damages should be measured, thereby precluding evidence of subsequent, mitigating events and materially affecting the ultimate award. The court vacated the award pursuant to Code of Civil Procedure Section 1286.2(a)(5), which provides that an award should be vacated if the rights of a party were substantially prejudiced by the refusal of an arbitrator to hear evidence material to the controversy.

The *Burlage* case was arguably a departure from precedent such as *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992), in which the California Supreme Court found that "with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law," and "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." Id. at 11, 33. My article suggested *Burlage* created a "back door" around precedent like *Moncharsh*, and could be cited by hopeful parties looking to vacate a purportedly flawed arbitration award. Indeed, the dissent in *Burlage* viewed the majority holding as creating a slippery slope, predicting that the decision would lead to "every ruling resulting in witness preclusion attributable to a legal or evidentiary ruling" being "rendered suspect and subject to challenge."

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The Supreme Court expressed concern over the 'slippery slope' that began with Burlage, noting that allowing vacation of an arbitration award under Section 1286.2(a)(5) based on an incorrect evidentiary ruling could 'swallow the rule that arbitration awards are generally not reviewable on the merits.'

However, on May 30, 2019, in *Heimlich v. Shivji*, 7 Cal. 5th 350 (2019), the Supreme Court conclusively shut the back door opened in *Burlage*, and restored the dominance of the reasoning from cases such as *Moncharsh*. While the *Heimlich* case has received attention primarily for its clarification of how the cost-shifting provisions of Code of Civil Procedure Section 998 apply to arbitration, its significance for the review of arbitration awards should not be overlooked.

Heimlich involved a dispute over attorney fees between a client and a law firm which was subject to a binding arbitration clause. The client served settlement offers for $30,001 and, later, $65,001 pursuant to Section 998, which authorizes an award of post-offer costs to a party that made a pretrial settlement offer when their opponent rejects that offer and later achieves a less favorable ruling. The arbitrator eventually made an award of $0.00 to both sides, and ruled that each side was to bear their own attorney fees and costs.

The arbitration award was made on March 5, 2015, and on March 11, 2015, the client informed the arbitrator of the earlier Section 998 offers rejected by the other party. The client argued he was entitled to costs because the award of $0.00 to the law firm was far less than the 998 settlement offers. However, the arbitrator found that once the final award was made, he no longer had jurisdiction to take any further action in the matter. The trial court confirmed the award, and did not allow any costs, relying on *Maaso v. Signer*, 203

Cal. App. 4th 362 (2012), which held that a request for Section 998 costs in connection with an arbitration must be dealt with by the arbitrator.

The Court of Appeal held that the client's post-award request for costs to the arbitrator was timely, and that the trial court could vacate the award because the arbitrator refused to hear material evidence under Code of Civil Procedure Section 1286.2(a) (5), similar to the approach taken in *Burlage*. The Supreme Court granted review.

The Supreme Court ruled that the arbitrator had not lost jurisdiction to rule on costs, and that a request for costs under Section 998 is timely if filed with the arbitrator within 15 days of a final award. However, turning the client's victory into a Pyrrhic one, the Supreme Court then held that the arbitrator's denial of costs was subject to only limited judicial review, and thus could not be vacated, disapproving *Burlage* in the process.

In ruling against the client, the Supreme Court found that even though the arbitrator was incorrect regarding his purported lack of jurisdiction to handle the fees/costs issue, this sort of ordinary error in ruling on costs is not subject to correction or vacation. Citing *Moncharsh*, the court reiterated that a legal or factual error by an arbitrator regarding which side prevailed cannot be reversed.

In rejecting the client's argument under Code of Civil Procedure Section 1286.2(a)(5), the court noted that the statutory exceptions to limited review of arbitration awards under Section 1286.2 are only to "protect against error that is so egregious as to constitute misconduct or so profound as to render the process unfair." The basis to vacate an arbitration award under Section 1286.2(a) (5) has to be more than a mistake in applying the rules of evidence or procedure. Rather, the exception only comes into play when an arbitrator, without justification, has prevented a party from fairly presenting his case.

The Supreme Court expressed concern over the "slippery slope" that began with *Burlage*, noting that allowing vacation of an arbitration award under Section 1286.2(a)(5) based on an incorrect evidentiary ruling could "swallow the rule that arbitration awards are generally not reviewable on the merits." As the court explained, "There is a difference between a legal conclusion that jurisdiction is lacking and an arbitrary refusal to hear relevant evidence on an issue properly before the arbitrator." The *Heimlich* court was further concerned that the *Burlage* case could damage the efficacy of arbitration in quickly and efficiently resolving a matter with a high degree of finality. Thus, the court explicitly disapproved *Burlage*, instead endorsing the dissenting opinion in that case.

But was this the correct policy choice? It should be noted that the *Burlage* holding never really "caught on" as a successful basis on which to vacate. In fact, the only published California decisions which cited *Burlage* and vacated an arbitration award under Code of Civil Procedure Section 1286.2 were the appellate court iteration of *Heimlich* (*Heimlich v. Shivji*, 12 Cal. App. 5th 152 (2017)) and *Royal Alliance Associates, Inc. v. Liebhaber*, 2 Cal. App. 5th 1092 (2016) (affirming vacation of arbitration award expunging broker misconduct allegation where arbitrators refused to hear complainant's evidence and barred cross-examination). This suggests that, even in light of the "back door" opened by *Burlage*, California courts always have been and will continue to be quite resistant to vacating arbitration awards. But at least the *Burlage* decision created a potential "safety valve" in situations where patently incorrect rulings had the effect of precluding crucial evidence, severely prejudicing a party. Though not very many parties actually walked through this "back door," it was nonetheless open. However, the *Heimlich* court has now conclusively closed the back door, locked it and thrown away the key. ■

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