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PERSPECTIVE

Arbitrator awards are extended great deference... usually

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As most litigators are aware, the overwhelming majority of courts manifest substantial deference to arbitrator's decisions in order to avoid undermining the traditional finality and efficiency of arbitration. Among the small number of cases arguably featuring the level of arbitrator "misconduct" necessary to vacate an award under the Federal Arbitration Act (FAA), however, no clear analytical standard is discernable. A recent case underscores that reality.

In February, a U.S. District Court in New Jersey took the rare step of vacating an arbitration award under the FAA. See *ICAP Corporates LLC v. Drennan*, 2016 U.S. Dist. LEXIS 18892 (D.N.J. Feb. 17, 2016). In *Drennan*, U.S. District Judge Jose Linares adopted a magistrate judge's report and recommendation, which found that the exclusion of evidence pertinent and material to the controversy rendered the award subject to vacatur.

At issue in *Drennan* was whether the arbitrators' handling of the proceedings amounted to "misconduct in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of the party have been prejudiced." The thrust of the motion to vacate was that the panel deprived ICAP of a fair proceeding by shortening the time allotted for hearing and significantly compromised ICAP's ability to present its case by limiting the testimony of some witnesses and precluding others altogether.

The report said the panel unfairly pressed ICAP "to have a key witness available on day three, instead of day four," and later interrupted ICAP's cross-examination of Drennan to request an offer of proof as to five of ICAP's seven identified witnesses. After being denied a request to consult notes and outlines related

to the identified witnesses, ICAP's counsel gave an incomplete proffer, which resulted in the exclusion of two witnesses. The magistrate found that the arbitrators failed to provide ICAP with an adequate opportunity to present its evidence, "not only because they prohibited key witnesses from testifying and limited the testimony of other witnesses, but also because the process by which they reached their decision to do so was itself remarkably unfair." In essence, "the Panel set the rules of the game and then, midway through the third quarter, and without prior notice, it changed them, cancelling the fourth." The procedural failures ultimately made it impossible to determine whether the panel's evidentiary exclusions were proper, and required vacatur based on the principle that "improperly excluded relevant evidence undermines any claim of rational decision making."

While noteworthy, *Drennan* ultimately is an outlier in federal jurisprudence and unlikely to significantly impact the deferential review of awards under either the FAA or state counterparts such as the California Arbitration Act (CAA). Indeed, other recent decisions dealing with arbitrators' refusal to accept certain evidence illustrate the absence of clear instruction from the courts.

In *LJL 33rd St. Assocs. LLC v. Pitcairn Props.*, 725 F.3d 184 (2d Cir. 2013), the 2nd U.S. Circuit Court of Appeals reversed District Judge Jed Rakoff's decision that an arbitrator's exclusion of Pitcairn's hearsay evidence was sufficient to vacate the award. The district court had concluded that the exclusion of evidence, which consisted of four expert reports valuing a property significantly above LJL's valuation, rendered the proceedings fundamentally unfair. The 2nd Circuit, however, took a holistic view of fairness, explaining that admission of the hearsay evidence — which was based on complex mathematical

calculations — without the opportunity for cross-examination would have severely prejudiced LJL. The 2nd Circuit further characterized any prejudice Pitcairn suffered as self-inflicted and curable by calling the experts who created the reports as witnesses. Therefore, the exclusion of the evidence was "within the bounds of the arbitrator's permissible discretion."

More recently, in *Attia v. Audionamix Inc.*, 2015 U.S. Dist. LEXIS 127330 (S.D.N.Y. Sept. 21, 2015), the district court found that an arbitrator's decision to strike Attia's affidavit from an accompanying written submission rendered the proceeding fundamentally unfair and, therefore, vacated the award. In *Attia*, the arbitrator made a ruling on alleged evidence spoliation without live expert testimony, but she invited the parties to supplement their written arguments with expert declarations. The arbitrator excluded Attia's non-expert declaration, believing a party could not act as an expert. The court determined this position had no basis in law and concluded that the exclusion, which left the opposing expert's opinion unchallenged, severely prejudiced Attia.

Closer to home, Code of Civil Procedure Section 1286.2(a)(5) provides for vacatur of an award when the arbitrator's refusal to hear evidence material to the controversy substantially prejudices the rights of a party. This standard has made vacatur extremely rare. Indeed, despite a dissenting lament in *Burlage v. Superior Court*, 178 Cal. App. 4th 524 (2009), that "great mischief can and will result" from courts' willingness to criticize an arbitrator's exclusion of evidence, subsequent case law has shown no such mischief is afoot.

California courts uniformly agree that Section 1286.2(a)(5) operates as a "safety valve" permitting judicial intervention only when "an arbitrator has prevented a party from fairly

presenting its case." Before vacating an award, the court must first make a threshold finding of substantial prejudice by "accepting the arbitrator's theory and concluding the arbitrator might well have made a different award had the evidence been allowed."

As of this publication, *Burlage* has been cited a mere 28 times, and only once in a published decision dealing with vacatur under Section 1286.2(a)(5). In that one case, *Epic Medical Management LLC v. Paquette*, 244 Cal. App. 4th 504 (2015), the court confirmed the arbitration award. The only California decision post-*Burlage* where the court vacated an award was the unpublished *Baoliang Wang v. Sun Led Sign Supply*, 2011 Cal. App. Unpub. LEXIS 6213 (2011). There, the Court of Appeal found that an award based solely on an in-camera review of pertinent records was "inimical to justice."

The New Jersey court's recent affirmation of procedural integrity is notable, but it is unlikely to signal an overhaul of judicial scrutiny of arbitration awards. Rather, courts in California and across the country will likely continue to extend great deference to arbitrators' evidentiary rulings.

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