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Post-arbitration award procedures

THE CALIFORNIA ARBITRATION ACT RULES GOVERN HOW TO MAKE YOUR AWARD *FINAL,* ALLOWING IT TO BE ENTERED BY THE COURT AS A JUDGMENT. A LOOK AT PROCEDURES AND PITFALLS ALONG THE WAY

So, you've received the arbitration award. Maybe you won, maybe you lost. Now what? The answer depends on whether your case is governed by the California Arbitration Act, the Federal Arbitration Act, contractual rules agreed to by the parties, or the rules of arbitration services such as American Arbitration Association or JAMS. This article deals only with cases governed by the California Arbitration Act, and the place to start your research is Code of Civil Procedure section 1285. (All statutory references will be to the Code of Civil Procedure.)

When is an arbitration award final?

There are three kinds of arbitration awards: Final, Interim, and on Reserved issues. According to Code of Civil Procedure section 1283.4, a *final award* is one that includes "a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." In other words, if it conclusively determined the matter submitted and left nothing to be done except to execute and carry out terms of award, it's final. (*Trollope v. Jeffries* (1976) 55 Cal.App.3d 816, 823.)

An *interim award*, also known as a *partial final award*, is one where the arbitrator made a final determination of fewer than all the issues, intending to decide the remaining issues after further proceedings. This is permitted where either the parties have agreed to this procedure, or the arbitrator determined that the nature of the case justified it. The arbitrator's award will usually state that it is final as to one or more issues, but that jurisdiction is reserved as to the remaining ones. (*Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415.)

An *award on reserved issues* is one that either follows an *interim award* or which is related to a decision that could only be made after the determination of which side prevailed, such as for costs and attorney fees. Once those issues are determined and none remain, the award is *final*.

What post-award motions are made to the arbitrator?

If the arbitration agreement provides for an award of attorney's fees and costs, the arbitrator should be made aware so that the issue can be reserved after the rendition of the award. The procedure for seeking a post-award motion is similar to that for trials, namely, a motion that is supported by evidence. What about costs and interest pursuant to Code of Civil Procedure section 998? The statute says that the motion may be made to the court or the arbitrator. But in *Maaso v. Signer* (2012) 203 Cal.App.4th 362, 378, the Court of Appeal clarified that if the case was arbitrated, it is only the arbitrator who can make the award, and not the Superior Court, after a petition to confirm the award as a judgment under section 1285.

But what if the arbitrator issues a final award that provides that no costs are awarded to the prevailing party, and evidence of a section 998 offer had not been made during the hearing? That's what happened in *Heimlich v. Shivji* (2019) 7 Cal.5th 350, 357. There, a lawyer had sued his client for unpaid fees, and the arbitrator awarded the attorney his fees, but not costs. The attorney had served a section 998 offer that had been refused but did not present that evidence during the hearing, because he believed that it would have been unethical to do so. Less than 15 days after the final award had been served, the attorney brought a motion that sought the enhanced costs allowed by section 998. The arbitrator said, "Counsel, once I issued [my] Final Award I no longer [had] jurisdiction to take any further action in this matter. As discussed in the Award, whatever may have been costs, fees, etc. associated with the [court] litigation were to be borne by the parties and I didn't award either party attorneys' fees related to the arbitration." (*Id.* at 7 Cal.5th 350, 357.) The attorney then petitioned the Superior Court to confirm the award and submitted a memorandum of costs pursuant to section 998. The trial court, relying on *Maaso, supra,* refused to add the costs. In affirming, the Supreme Court found that the arbitrator incorrectly concluded that he had no jurisdiction, but that his error was not subject to reversal. More important, however, was their explanation of the procedures to follow in seeking post-award costs.

The Supreme Court explained that: (1) the arbitrator may be informed of a section 998 offer during the hearing, although a motion can be made for such costs within 15 days of the final award; (2) if a motion for costs is made within 15 days, the arbitrator retains jurisdiction thereafter to rule; (3) it was error for the arbitrator to refuse to consider the post-award motion, but such errors are not reviewable by the court, and (4) the court has no jurisdiction to award 998 costs. The Supreme Court explained that by not informing the arbitrator of the section 998 offer, the attorney "ran the risk that the arbitrator would erroneously refuse to award costs. . . ." The court also held that the refusal of the arbitrator to consider the motion or costs was not a refusal to hear evidence but, rather, a mistake of law, and that it was "within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible." (*Id.* at 7 Cal.5th 350, 370.)

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The lesson here is that arbitrators should be alerted prior to the close of the hearing that there was a section 998 offer so that they know that a post-award motion must be considered.

What if there are mistakes in the award?

Section 1284 provides that if a party submits a written application to the arbitrators within 10 days after service of a signed copy of the award, the arbitrators may correct the award on any of the grounds set forth in section 1286.4, i.e., "an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award" and "non-substantive matters of form that do not affect the merits of the controversy." (*Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal. App.4th 865, 877.) What if the arbitrator, after serving the final award, is alerted that he had made factual mistakes due to misunderstanding the evidence? That's what happened in *Severtson v. Williams Construction Co.* (1985) 173 Cal.App.3d 86. After serving the final award, one of the parties filed an application to correct the award, pointing out the factual error by the arbitrator. The arbitrator agreed that he had erred and increased the amount of the award. The trial court vacated the amended award and reinstated the original award. The Court of Appeal affirmed, holding that the statute allows correction of the award only if the miscalculation is "evident" and appears on the face of the award. Here, there was no evident miscalculation. In other words, the arbitrator can't change his or her mind after issuing a final award. (*Id.* at 173 Cal.App.3d 86, 94.)

Are there procedures for requesting reconsideration?

As discussed above, an arbitrator can't reconsider a final award. Once the final award is served, the arbitrator lacks jurisdiction to reconsider the decision, exceeds its powers by rendering a different award, and the court can vacate the reconsidered award and restore the original award. (*Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1.) However, if the arbitrator inadvertently failed to decide one of the issues required for a determination of the complete controversy, which is pointed out by one of the parties who applies for correction of the award, the arbitrator may issue a *supplemental award* so long as it is not inconsistent with other findings on the merits of the controversy. (*Century City Medical Plaza*, *supra*, 86 Cal.App.4th 865, 881.)

How does an arbitration award become an enforceable judgment?

After service of the final award, a party to the arbitration can ask the court to *confirm* the award and have it entered as a judgment no sooner than 10 days, and no later than four years. The rules are found at section 1285 through 1285.6. It is not a motion, but a *petition* which names as *respondents* all parties to the arbitration or anyone bound by the award. The petition must attach a copy of the arbitration agreement, name the arbitrator(s), and either set forth or attach a copy of the award and the opinion. The respondent may oppose the petition by asking the court to dismiss the petition, correct or vacate the award. (These issues will be discussed, *infra*.) If the petition is granted, section 1287.4 explains its effect:

> If an award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification.

Can the court correct mistakes in the award?

Section 1286.6 delineates the power of the court to correct an arbitration award:

> [T]he court . . . shall correct the award and confirm it as corrected if the court determines that:
>
> (a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> (b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or
>
> (c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

What if one of the parties discovers a mathematical error that the arbitrator made in rendering the final award, but *after* the expiration of the ten-day period to apply for a correction of the award under section 1284? That's what happened in *Lopes v. Millsap* (1992) 6 Cal.App.4th 1679, 1687. The trial court corrected the error and entered judgment on the correct award, and the Court of Appeal affirmed, holding that the trial court was empowered to correct the award if there was an "evident miscalculation, capable of correction without affecting the merits of the controversy."

Can the trial court correct obvious errors of fact or law?

What if you are convinced and even have proof that the arbitrators disregarded the law, disregarded the facts, made egregious evidentiary rulings that allowed inadmissible evidence, and then considered that inadmissible evidence in arriving at their decision? Surely there must be a remedy for this injustice! Unfortunately, not. In the landmark case of *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, the Supreme Court held that an arbitration decision could not be challenged on the ground that the arbitrator committed errors of fact or law that, if made by a judge, would be grounds for reversal. The Court reasoned that "it is within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like

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judges, are fallible." In dissent, Justice Kennard, joined by Justice Mosk, wrote:

> I will not agree to a decision inflicting upon this state's trial courts a duty to promote injustice by confirming arbitration awards they know to be manifestly wrong and substantially unjust. Nor can I accept the proposition, necessarily implied although never directly stated in the majority opinion, that the general policy in favor of arbitration is more important than the judiciary's solemn obligation to do justice.

(*Id*., 3 Cal.4th 1, 33-34.)

But, nearly 30 years later, and despite the fact that most arbitrations are neither more economical nor speedy than Superior Court litigation, *Moncharsh* remains the law.

What are the grounds for vacating an award?

Section 1288 requires that a motion to vacate or correct an award must be filed no later than 100 days from service of the final award. Section 1286.2 provides that the court may vacate an arbitration award if it finds corruption, fraud or other undue means, misconduct by an arbitrator, that the arbitrators exceeded their powers, prejudicial refusal to postpone a hearing, refusal to hear material evidence, or an arbitrator's failure to disclose grounds for disqualification.

There is abundant case law that explores what are or aren't grounds to vacate an award for any of the foregoing "sins" of omission or commission. However, the author was involved in an arbitration where there was a particularly egregious example of corruption, resulting in an award that was vacated, and the Court of Appeal affirmed in the published case of *Maaso v. Signer* (2012) 203 Cal.App.4th 362. The story of that case is both interesting and instructive. But appellate opinions don't include all of the facts. Here is the whole story of the plaintiff in *Maaso*, whose case established important law regarding improper conduct by the defense-party arbitrator and post-award procedures.

What happened to Per Maaso

I was retained in 2004. My client was Per Maaso (pronounced *Pair Moss-oh*.) He had been an accountant with a sharp mind and was quite adept with numbers and calculation. But, in 2001, he began experiencing memory problems. Unbeknownst to him, he had neurosyphilis, a disease that attacks the brain. In May, 2002, he was laid off by his employer and began consulting physicians because of increasing cognitive problems. In August, 2002, his condition rapidly deteriorated, and he was admitted by Dr. Stephen Signer (pronounced *Sig-ner*) to the mental health unit at Palomar Medical Center in San Diego, pursuant to Welfare & Institutions Code section 5150. Dr. Signer, a psychiatrist, was the medical director of the facility. Dr. Signer appropriately recognized that one of the possible causes of Mr. Maaso's condition could be neurosyphilis, and he included it as part of his differential diagnosis. Specifically, he wrote "rule out neurosyphilis" which means that tests must be performed before he could eliminate it as a cause. Dr. Signer observed a movement disorder, and his written treatment plan included a consultation with a neurologist.

Neurosyphilis can be diagnosed with a serum blood test known as an RPR (rapid plasma reagin) which identifies antibodies that are present in the blood of people who have the disease. Dr. Signer ordered the RPR on the day of admission, August 6, 2002. The RPR result is typically available within 24 hours. However, the hospital lab never received the RPR order, and the test was not done.

Dr. Signer believed that Mr. Maaso's rapid mental decline and dementia were due to an organic disease affecting his brain. However, during Mr. Maaso's six-day hospitalization, Dr. Signer did nothing to follow up on the missing lab results that could identify whether the cause of the rapid-onset mental deterioration was neurosyphilis. He never brought in a neurologist to consult on the case; he never followed up on any of the lab tests that he had ordered. At the time Maaso was discharged on August 12, 2002, Dr. Signer was aware that the lab tests had not been returned, but made no reference to that fact in his discharge summary. He discharged the patient with the diagnosis of "dementia - unknown etiology" and a recommendation that he follow up with his neurologist. Dr. Signer's discharge summary made no mention of neurosyphilis or anything that he had done to rule out any of the possible causes of Mr. Maaso's condition.

Mr. Maaso then came under the care of a neurologist. He reviewed the Admission and Discharge summaries that Dr. Signer had written and assumed that because "rule out neurosyphilis" and other possible causes had appeared in the Admission Summary but did not appear in the Discharge Summary, that Dr. Signer had excluded these possible causes. He ran no tests to rule out other possible causes and made a presumptive diagnosis of Alzheimer's Disease. During the next nine months, while under the care of this neurologist, Mr. Maaso's condition deteriorated to the point where he became unable to walk or talk and was incontinent. His family moved him to their home in North Carolina where physicians immediately made the diagnosis of neurosyphilis and began appropriate treatment with high-dose antibiotics. Shortly after treatment began, Mr. Maaso's condition dramatically improved; he became able to walk, talk coherently and perform many activities of daily living. MRI studies showed, however, that his brain had undergone significant deterioration. Ultimately, his mental condition began to deteriorate, and he required repeated antibiotic re-treatments. The disease progressed into his spine and he now required full-time custodial care.

When Dr. Signer admitted Mr. Maaso to the hospital pursuant to Welfare and Institutions Code § 5152, he was entitled to receive "whatever treatment and care

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his ... condition requires for the full period that he ... is held." His condition required diagnostic investigation that would dictate appropriate treatment. Dr. Signer's negligence prevented the timely diagnosis and treatment of neurosyphlis which, if treated, would have resulted in a "reversal of dementia" and returned Per Maaso's ability to live independently. But because the disease was not diagnosed in August 2002, the infection smoldered and caused destruction in Mr. Maaso's brain for another 12 months before he was properly diagnosed and treated in July 2003 by his physicians in North Carolina.

Partial settlement and then arbitration injustice

The case against the neurologist who had failed to properly test, diagnose and treat Mr. Maaso was settled for $450,000. Because Per Maaso had signed an arbitration agreement when he had been admitted to Dr. Signer's facility, the case against Dr. Signer proceeded to arbitration with two party arbitrators and a neutral arbitrator, retired judge Alan Haber (now deceased.) The case was presented over several days and then submitted to the three arbitrators for their deliberation and decision.

Plaintiff's party arbitrator was Jeffrey A. Milman, an Orange County trial lawyer. The defense party arbitrator was the late P. Theodore Hammond. After the first round of deliberations, on March 3, 2008, Hammond faxed a five-page letter arguing his position that there was no causation. The letter included a "cc" to Mr. Milman, but the copy of the letter was *mailed* to Mr. Milman at his old address. (Milman had informed Hammond during the hearing that he had moved his offices five months earlier and had given Hammond his card with the new address.) On March 13, 2008, Judge Haber issued his decision, finding no causation, and Hammond quickly concurred. Mr. Milman dissented. Four days later, on March 17, 2008, Hammond's letter was finally received by Mr. Milman who immediately sent a letter to Hammond and Judge Haber by mail and facsimile. (Note: Email communications with attachments were not yet commonplace.) Jeffrey Milman expressed his strong objection that the "letter was sent surreptitiously behind my back without permitting nor even addressing a discussion of the issues!" Hammond responded the next day that Mr. Milman's business card never made it into his files.

The petition to confirm the award and the motion to vacate it

Dr. Signer's lawyer filed a petition to confirm the arbitration award, and I filed a motion to vacate, based on section 1286.2, arguing that the award had been procured by "corruption, fraud or other undue means." My motion was supported by the declaration of Jeffrey Milman stating that had he been aware of Hammond's post-arbitration letter brief, he would have immediately responded to each and every point argued. Dr. Signer submitted the declaration of Judge Haber, but I objected to that portion of his declaration regarding his decision-making process because it violated Evidence Code section 703.5. ("The merits of the controversy, the manner in which evidence was weighed or the mental processes of the arbitrators in reaching their decision are not subject to judicial review.")

The trial judge was Patrick Madden in Long Beach. During the hearing, I argued that Hammond had acted intentionally, and that it wasn't an oversight that he did not fax his post-arbitration letter brief to Mr. Milman. Judge Madden voiced his agreement and said, "that's part of my finding," indicating that he had found that Hammond's conduct in not faxing a copy of his letter to Mr. Milman was intentional. Judge Madden also remarked:

> The fact that one arbitrator chose to use facsimile for the neutral and mail to the other and sent it to the wrong address, maybe it was a mistake. But it's very, very suspicious in the context of what took place, and I'm just going to say it stinks. It goes to the integrity of the decision-making process in the context of this case. . . . I've had several petitions to confirm arbitration awards. They have always been approved. . . . This is the first time in my judicial experience that I have entertained a motion to vacate and not confirm an arbitration award. And I've thought a lot about the case, and I'm very troubled about it. . . . The problem that I have is that the way the decision came about, it's more than just troubling, to me it goes to the very essence of the way legal affairs should be conducted. I think it was an ex parte communication. . . . I've never seen anything quite like it. . . . I think the process is extremely troubling.

Judge Patrick Madden then found that the arbitration award had been procured by "corruption, fraud or other undue means," vacated the award, and ordered a new hearing.

The second arbitration with a different neutral arbitrator

Dr. Signer sought writ review by the Court of Appeal which denied the writ. (There is no right to appeal of an order that vacates an arbitration award and orders a new hearing.) The party arbitrators then chose attorney Darrell A. Forgey of Judicate West to act as the neutral arbitrator for the second arbitration, which took place between February 2 and 5, 2010. At the outset of the arbitration, Mr. Forgey, who was made aware of the circumstances surrounding the vacating of the first award, told both party arbitrators that there would be no substantive communication with him whatsoever unless all three arbitrators were present. After submission of the case and deliberation between the arbitrators, all three arbitrators agreed that Dr. Signer had been negligent, and Mr. Milman and Mr. Forgey found causation and awarded economic damages of $794,243 (reduced to $594,243 because of credit from the prior settlement.) The prior settlement's allocation of $250,000 for non-economic damages was the maximum allowed by law, so no additional amount could be awarded. (Civil Code 3333.1.)

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The case goes to the Court of Appeal

After a petition to confirm the award was granted by the trial court, Dr. Signer appealed from the order that had vacated the first arbitration award. The Court of Appeal held that the trial judge was justified in vacating the arbitration award, and affirmed, stating that "ex parte communication between a party's representative (whether counsel or party arbitrator) and a neutral arbitrator is not part and parcel of the business of litigation." (*Maaso v. Signer* (2012) 203 Cal.App.4th 362, 373.) The Court then commented as follows:

> Hammond never answered the question of why he did not fax a copy of his letter brief to Milman when he faxed the letter to the neutral arbitrator. Indeed, at the hearing on the parties' cross-petitions, the trial court directly asked Signer's attorney [Susan Schmid of Schmid & Voiles] this question, to which she responded she was unsure whether Hammond had Milman's fax number. We agree with the trial court that an ex parte communication between a party arbitrator and the neutral arbitrator while the outcome of the case is still under consideration undermines the fairness and integrity of the arbitration process.

(*Id.* at 203 Cal.App.4th 362, 375.)

Win some issues, lose some issues

The *Maaso* opinion was not a complete win. I had served a section 998 offer that was for less than the award, informed the arbitrators that there had been a 998, but the award did not address the issue, and instead provided that the parties would bear their own costs. Because section 998 included the phrase, *"the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs . . . ,"* I reasoned that the law authorized a trial court, after confirming and entering an award as a judgment, to then rule on a motion for section 998 costs and section 3291 prejudgment interest. I thought it was a reasonable interpretation since the court now had jurisdiction and the awarding of section 998 costs was always post-judgment.

The Court of Appeal disagreed and held that if the case was arbitrated, it is only the arbitrators who can make the award. On the one hand, it was disappointing to lose on that issue; however, the law was clarified and is now the oft-cited authority for many of the post-award procedures discussed in this article, including (1) what is a "mistake" subject to correction by the arbitrators or the court, (2) how section 998 issues should be handled, (3) what is admissible evidence in bringing a motion to vacate, and (4) the nature of *corruption* that will justify vacating an arbitration award.

The *Maaso* case, which I had begun in 2004, finally came to an end in 2012. What happened to Per Maaso? Because of the limitations on recovery of non-economic damages in medical malpractice cases, he received only a fraction of what he was entitled to. But he was able to live comfortably and was taken care of until a few years later when, sadly, his airway was blocked when he choked while eating a sandwich, and died shortly afterward.

Conclusion

Arbitration is like a trial, except that if the arbitrators don't follow the law or ignore the facts, there is no judicial review. Some obvious clerical-type mistakes can be corrected by the arbitrators or by the court, but it is rare that awards are vacated. There are some exceptions, including when arbitrators act beyond their powers, fail to disclose material facts that would disqualify them, or when their actions corrupt the process. Because arbitrations might be governed by different rules, whether state, federal or contractual, you must thoroughly understand the specific rules or statutes that apply in your case.

John P. Blumberg has been practicing since 1976, specializing in medical and legal malpractice cases. He is AV-rated, and has four board certifications: as a Trial Lawyer by the National Board of Trial Advocacy, Board-Certified separately in Medical Malpractice and Legal Malpractice by the American Board of Professional Liability Attorneys, and a Certified Specialist in Legal Malpractice by the California State Bar, Board of Legal Specialization. He was accepted into ABOTA in1991, served on its national board for seven years, and earned the rank of Advocate, now with over 65 jury trials to verdict. Mr. Blumberg currently serves on the Board of Governors of the Consumer Attorneys Association of Los Angeles, acting also as its parliamentarian, and on the Board of Governors of the American Board of Professional Liability Attorneys. His firm, Blumberg Law Corporation, *is located in Long Beach.*

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