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## Appealing adverse arbitration awards

### STATUTORY BASES SOMETIMES PRESENT A NAVIGABLE PATH FORWARD

Courts have long resolved that the merits of a controversy submitted to arbitration are immune from judicial review. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 (*Moncharsh*)). California courts, like federal courts, cannot review the validity of an arbitrator's reasoning, the sufficiency of the evidence supporting the award, or any factual or legal errors that appear in the award. (*Ibid.*; see *Biller v. Toyota Motor Corp.* (9th Cir. 2012) 668 F.3d 655, 662 (*Biller*)) ["Neither

erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award . . ."])

The rationale for this stringent standard is that "the parties to an arbitral agreement knowingly take the risks of error of fact or law committed by the arbitrators and that this is a worthy "trade-off" to obtain speedy decisions by experts in the field whose practical experience and worldly reasoning will be accepted

as correct by other experts." (*Moncharsh*, at p. 12; see also *id.* at pp. 11-12 [arbitrators need not follow the law and may base their decisions on "broad principles of justice and equity. . ."])

But what can counsel do if their client loses at arbitration? Is the client consigned to accepting defeat? In this article, we explore the narrow state and federal legal bases for challenging and potentially vacating adverse arbitration awards.

### Preserving the statutory bases for vacating an arbitration award

Judicial review of an arbitration award is limited to “circumstances involving serious problems with the award itself, or with the fairness of the arbitration process.” (*Moncharsh, supra*, 3 Cal.4th at p. 12.) In California, review of state-court arbitration awards is restricted to the grounds set forth in Code of Civil Procedure section 1286.2 (statutory references are to the Code of Civil Procedure, unless otherwise stated); the federal bases for vacating arbitration awards are set forth in Title 9 United States Code section 10.

In general, to preserve an appellate challenge on the statutory bases, i.e., to avoid a claim of forfeiture or waiver, the losing party must both raise the legal issue before:

(1) the arbitrator (see *Comerica Bank v. Housam* (2012) 208 Cal.App.4th 790, 829-830 [defendant forfeited legal challenge that award exceeded amount allowable in default judgment by withdrawing from the arbitration]; *Blatt v. Farley* (1990) 226 Cal.App.3d 621, 629 [arbitration agreement did not limit damages and objection that demand should have been amended was waived]; *Marino v. Writers Guild of America, East, Inc.* (9th Cir. 1993) 992 F.2d 1480, 1484 [party’s claim it was fundamentally unfair to keep arbitrators’ identities confidential waived by failure to protest procedure before arbitrators were selected and began performing tasks]), and (2) the trial court by way of a petition to correct or vacate the award (§§ 1285, 1288; 9 U.S.C. § 12). For the most part, a challenge cannot be brought for the first time on appeal. (See *Louise Gardens of Encino Homeowners’ Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 659 [failure to make motion to vacate on basis that arbitrator should have disqualified himself or been disqualified waived argument on appeal]; *Knass v. Blue Cross of California* (1991) 228 Cal.App.3d 390,

392-393 [party precluded from seeking reversal of judgment on appeal after failing to challenge arbitration award]; *Biller, supra*, 668 F.3d at p. 663 [party waived contention that California Arbitration Act, rather than Federal Arbitration Act, governed by failing to object in district court]; *White v. Mayflower Transit, LLC* (C.D. Cal. 2007) 481 F.Supp.2d 1101, 1104.)

### Assessing whether the parties have agreed to arbitrate their dispute

The gateway issue in contractual arbitration is whether an arbitration agreement even applies to the dispute. Although the law favors arbitration, “there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. . . .” (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.) Thus, a fundamental challenge counsel should evaluate is whether arbitration should have been required at all. (*Remedial Construction Services, LP v. AECOM, Inc.* (2021) 65 Cal.App.5th 658, 663 [“Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived”].)

Section 1281.2 “requires the superior court to order arbitration of a controversy [o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate . . . if it determines that an agreement to arbitrate the controversy exists.” (*Trinity v. Life Ins. Co. of North America* (2022) 78 Cal.App.5th 1111, 1119-1120.)

Whether the parties have agreed to arbitrate a particular dispute is decided by the court, not the arbitrator, unless the parties have agreed otherwise. (*Jackpot Harvesting, Inc. v. Applied Underwriters, Inc.* (2019) 33 Cal.App.5th 719, 730; *BG Group PLC v. Republic of Argentina* (2014) 572 U.S. 25, 34.) Likewise, “what issues [a party] must arbitrate, [are] a matter to be determined by the court, and a party

cannot be forced to ‘arbitrate the arbitrability question.’” (*Litton Financial Printing Div., a Div. of Litton Business Systems, Inc. v. N.L.R.B.* (1991) 501 U.S. 190, 208.)

Interpretation of an arbitration provision is a question of law, subject to independent review, if no conflicting extrinsic evidence was introduced in the trial court pursuant to a petition to arbitrate. (*Trinity v. Life Ins. Co. of North America* (2022) 78 Cal.App.5th 1111, 1120; *Cape Flattery Ltd. v. Titan Maritime, LLC* (9th Cir. 2011) 647 F.3d 914, 917 (*Cape Flattery*).) A trial court’s factual determination on the threshold issue of arbitrability is reviewed for substantial evidence. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1360; *Cape Flattery*, at p. 917.)

### Determining whether your case fits into the statutory box for vacating, or opposing confirmation of, an arbitration award

After the arbitrator renders an adverse award, counsel for a losing party who wants to challenge the award must file a petition/motion to vacate and/or oppose a motion to confirm the award. In state court, a petition is filed if the case originated in arbitration; a motion is filed if the case originated as a judicial proceeding and was sent to arbitration. (§§ 1285, 1288.) In federal court, a motion is filed. (9 U.S.C. § 12.)

State and federal bases for challenging an arbitration award include the following:

#### **Fraud/corruption ground**

An arbitration award may be vacated if “procured by corruption, fraud or other undue means,” “corruption in any of the arbitrators,” or the arbitrator’s “misconduct.” (§ 1286.2, subd. (a)(1)-(3); see also 9 U.S.C. § 10(a)(1)-(2).) These grounds apply where either the arbitrator or a party commits extrinsic fraud. (*Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138, 1147, fn. 3.)



Extrinsic fraud's "essential characteristic is that it has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense." (*Pour Le Bebe, Inc. v. Guess? Inc.* (2003) 112 Cal.App.4th 810, 828 (*Pour Le Bebe*); see *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290 ["[e]xtrinsic fraud [sufficient to set aside a judgment] occurs when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented from fully participating in the proceeding"].)

To vacate a judgment on the ground of extrinsic fraud, the party seeking such equitable relief must show "(1) a meritorious defense; (2) a satisfactory excuse for not presenting a defense in the first place; and (3) diligence in seeking to set aside the [judgment] once discovered." (*Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1025.)

In the context of vacating arbitration awards, "undue means" includes behavior that is "immoral, if not illegal . . . 'something wrong, according to the standards of morals which the law enforces.'" (*A.G. Edwards & Sons, Inc. v. McCollough* (9th Cir. 1992) 967 F.2d 1401, 1403-1404.) To vacate an award on this basis, the "undue means" could not have been discoverable upon the exercise of due diligence prior to the arbitration and materially related to an issue in the arbitration. (*Ibid.*)

"Undue means" includes an "improper ex parte communications between an arbitrator and a litigant" (*Baker Marquart LLP v. Kantor* (2018) 22 Cal.App.5th 729, 739), representation of a party where an attorney is operating under a conflict of interest (*Pharmacy v. Western Pharmacy Group LLC* (S.D. Cal. 2022) 640 F.Supp.3d 985, 991, citing

*Pour Le Bebe, supra*, 112 Cal.App.4th at pp. 813, 825-833), and a party directing a witness on how to respond to cross-examination questions (*NuVasive, Inc. v. Absolute Medical, LLC*. (11th Cir. 2023) 71 F.4th 861, 875-878).

#### **Disqualification ground**

By statute, neutral arbitrators are required to disclose matters that could reveal potential bases for disqualification or conflicts of interest. (§ 1281.9; see also § 1281.91 [statute requiring arbitrators to disqualify themselves]; *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40, 61, 73 (*Kors*); *Casden Park La Brea Retail LLC v. Ross Dress For Less, Inc.* (2008) 162 Cal.App.4th 468, 476-478.) An arbitrator is required to disclose any "matter that: [¶] . . . Might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. . . ." (*Kors*, at p. 63.) Thus, for example, a fee-arbitration award was reversed when the chief arbitrator failed to disclose his representation of large law firms in similar cases, including representation of a law firm in a fee dispute with a client and of another law firm in a malpractice action against it. (*Id.* at pp. 51, 73.)

Likewise, an arbitration award was reversed when the arbitrator failed to disclose that the prevailing party was a member of the dispute-resolution organization conducting the arbitration. (*Gray v. Chiu* (2013) 212 Cal.App.4th 1355, 1366.) Parties to an arbitration agreement cannot waive their statutory rights to disqualify an arbitrator under sections 1281.9 and 1281.91. (*Roussos v. Roussos* (2021) 60 Cal.App.5th 962, 974-975.)

If the mere doubt of an arbitrator's impartiality warrants vacating an arbitration award, a fortiori so does an arbitrator's actual bias. "[D]ecisions biased by discriminatory considerations of race, ethnicity or gender are not tolerated by the adjudicatory process, whether in the courts or in alternative forums for dispute resolution. Given the

strong public policy against discrimination on the basis of race, ethnic origin, gender, etc. . . . , appellant's right to a hearing free from such bias is not in dispute." (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 922-923.)

Thus, in *FCM Investments, LLC v. Grove Pham, LLC* (2023) 96 Cal.App.5th 545, 549, 556-560, the Court of Appeal vacated an arbitration award when the arbitrator's credibility determinations were based on a party's "English proficiency and language acquisition." (*Id.* at p. 558; see also *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 249 [court's credibility determination based on gender stereotypes].)

#### **Substantial-prejudice ground**

A reviewing court can vacate an arbitration award if it finds "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor . . . ." (§ 1286.2, subd. (a)(5); see also 9 U.S.C. § 10(a)(3).) These statutory provisions allow a court to intercede when an arbitrator has prevented a party from fairly presenting its case. (*SWAB Financial, LLC v. E\*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196 (*SWAB*); *Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439 (*Hall*); see *Uddin v. TD Ameritrade, Inc.* (N.D. Cal. 2024) 740 F.Supp.3d 975, 982.)

To vacate an award on this basis, a losing party must prove that its rights were substantially prejudiced by the arbitrator's erroneous refusal to delay the hearing or hear evidence. (*SWAB*, at p. 1198; *Hall*, at p. 439; cf. *U.S. Life Ins. Co. v. Superior Nat. Ins. Co.* (9th Cir. 2010) 591 F.3d 1167, 1171-1172, 1174.) An appellate court reviews the trial court's order de novo when the facts are undisputed and for substantial evidence when the facts are disputed. (*SWAB*, at p. 1196.)

#### **Excess-of-powers ground**

The scope of arbitration is a matter of agreement between the parties and

the arbitrator's powers "derive from, and are limited by, the agreement to arbitrate." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 375 (*Advanced Micro Devices*)). "Arbitrators may exceed their powers when they act in a manner not authorized by the contract or by law, act without subject matter jurisdiction, decide an issue that was not submitted to arbitration, arbitrarily remake the contract, uphold an illegal contract, issue an award that violates a well-defined public policy, issue an award that violates a statutory right, fashion a remedy that is not rationally related to the contract, or select a remedy not authorized by law." (*Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840, 868; accord *Pharmacy v. Western Pharmacy Group LLC* (S.D. Cal. 2022) 640 F.Supp.3d 985, 991.)

An arbitrator's award, however, will not be overturned "as long as the arbitrator is even arguably . . . acting within the scope of his authority." (*Advanced Micro Devices, supra*, 9 Cal.4th at p. 378.) Nor may a court vacate an arbitration award "merely because it disagrees with the arbitrator's choice of remedy." (*Taylor v. Van-Catlin Construction* (2005) 130 Cal.App.4th 1061, 1066.) Indeed, "[a]rbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact," and courts ordinarily do not vacate arbitral awards due to such error because "[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement." (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1360-1361 (*Cable Connection*); accord *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 917.)

An arbitrator's failure to determine all issues necessary to resolve the submitted matter, as required by section 1283.4, is a ground for vacating an arbitration award as an act in excess of the arbitrator's jurisdiction. (*Mossman v.*

*City of Oakdale* (2009) 170 Cal.App.4th 83, 88; *Colthron v. Interinsurance Exchange* (1980) 103 Cal.App.3d 853, 859-860.) So too, arbitrators exceed their power by making an award that fails to comply with the terms of the arbitration agreement. (*Emerald Aero, LLC v. Kaplan* (2017) 9 Cal.App.5th 1125, 1140-1142; *Western Employers Ins. Co. v. Jefferies & Co., Inc.* (9th Cir. 1992) 958 F.2d 258, 262.) Likewise, courts may vacate an award when the arbitrator's remedy is unauthorized or the decision is on an unsubmitted issue. (*Advanced Micro Devices, supra*, 9 Cal.4th at p. 375.)

Moreover, an arbitration award may be vacated when subject-matter jurisdiction is absent. (*National Union Fire Ins. Co. v. Stiles Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1724.) And, an arbitration award based on an illegal contract exceeds the arbitrator's power. (*Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 610 ["award springing out of an illegal contract, which no court can enforce, cannot stand on any higher ground than the contract itself"].)

#### **Public-policy ground**

Arbitrators have also been found to exceed their powers, and their awards vacated, when the award violates an explicit, well-defined and dominant public policy, ascertained by reference to "positive law." (*Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17* (2000) 531 U.S. 57, 63; see also, e.g., *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 680 [vacatur of arbitration award that is inconsistent with "statutory rights"].)

Thus, in *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1247, 1245-1246, the Court of Appeal affirmed the trial court's order striking an employer's fee award for, in effect, defeating an employee's overtime claim, an award barred by Labor Code section 1194; the trial court properly construed the arbitrator's award as a violation of the employee's statutory rights.

In *Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 24, 36-40, the Court of Appeal vacated an arbitration award in which the arbitrator refused to make an unlicensed contractor disgorge all compensation, a ruling in violation of Business and Professions Code section 7031.

Similarly, in *Aldea Dos Vientos v. CalAtlantic Group, Inc.* (2020) 44 Cal.App.5th 1073, 1077, the trial court confirmed the dismissal of an arbitration because the homeowner's association had commenced arbitration prior to obtaining a vote of its members. The Court of Appeal reversed, finding the arbitrator exceeded his power in that the award violated the parties' unwaivable statutory rights and contravened our Legislature's public policy of insuring housing free of substantial construction defects (Health & Saf. Code, § 50001) and the Davis-Sterling Act.

The Court of Appeal reviews de novo whether an arbitration award contravenes an unwaivable statutory right or public policy. (*Department of Human Resources v. International Union of Operating Engineers* (2020) 58 Cal.App.5th 861, 873.)

#### **Similar federal grounds**

The Federal Arbitration Act sets forth grounds for vacating an arbitration award that approximate but do not precisely equate to California's statutory bases. (9 U.S.C. § 10; compare § 1286.2.)

Notably, the Ninth Circuit, like some other federal courts, recognizes a "manifest disregard of the law" as a ground for challenging an arbitration award, a basis not available under state law. (See *Lagstein v. Certain Underwriters at Lloyd's, London* (9th Cir. 2010) 607 F.3d 634, 641 & fn. 5 (*Lagstein*); but see *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 672, fn. 3 [leaving open the question of whether "manifest disregard" as an independent ground continues to exist].) "Manifest disregard

of the law' means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law." [Citation.]

To vacate an arbitration award on this ground, "[i]t must be clear from the record that the arbitrators recognized the applicable law and then ignored it." [Citation]. (*Lagstein*, at p. 641; see also *Sanchez v. Elizondo* (9th Cir. 2018) 878 F.3d 1216, 1221-1222 [Award is "completely irrational," or "exhibits a 'manifest disregard of law'"].)

#### **Evaluating whether the parties expanded the state bases for judicial review in California**

Under California law, the parties to an arbitration agreement may expand the judicial review available. Thus, for example, the parties can agree that the "award may be vacated or corrected on appeal to a court of competent

jurisdiction for any such error.'" (*Cable Connection, supra*, 44 Cal.4th at p. 1340.)

In contrast to state law, the Federal Arbitration Act precludes parties from expanding the scope of judicial review beyond the statutory grounds set forth in Title 9 United States Code section 10. (*Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, 586-587.) Accordingly, in state court, counsel can evaluate whether the arbitration agreement provides for such expanded review and, if so, demonstrate broader grounds are available to vacate an adverse arbitration award.

#### **Conclusion**

We are not purporting to say that vacating an adverse arbitration award is an easy or frequently accomplished task. In both state and federal courts, the grounds for vacatur are circumscribed and limited. Nevertheless, although arbitration is designed to provide

finality, potential challenges to adverse arbitration awards can arise when procedural errors, jurisdictional disputes, or public policy concerns are identified.

Understanding the legal framework and grounds for vacatur is crucial when a client seeks to challenge an arbitration award. By navigating the statutory and case law principles effectively, counsel can assess options, prepare legal strategies, and hope to safeguard their client's interests in arbitration proceedings.

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