

**RECENT DECISION AFFIRMING THE TRIAL COURT'S
VACATION OF A PRIVATE ARBITRATION AWARD ON THE
GROUNDS THAT THE ARBITRATOR'S EXCLUSION OF
EVIDENCE SUBSTANTIALLY PREJUDICED A PARTY**

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In Burlage v. Superior Court (Spencer) (August 31, 2009) 09 C.D.O.S. 11206, Division Six of the Second Appellate District held the decision of a private arbitrator may properly be vacated by a trial court when the arbitrator excludes material evidence that substantially prejudices a party. In denying the Burlage's petition for a writ of mandate and affirming the order of the trial court vacating the arbitration award, the appellate court said "arbitrators have a great deal of power, but not absolute power."

Petitioners Roger and Cheryl Burlage purchased a home in a gated community next to a country club from Real Party in Interest Martha Martinez Spencer. After close of escrow, the Burlages learned that their newly acquired pool and fence encroached on land owned by the club. The Burlages claimed Spencer knew about these encroachments at the time of the sale, but fraudulently withheld information about them. The parties agreed to arbitrate their property dispute privately with a JAMS arbitrator.

Two years after the purchase of the home, but before the arbitration was held, the title company paid the country club approximately \$10,000 in exchange for a lot-line adjustment that gave the Burlages title to the land in question. In spite of this, the Burlages went forward with their arbitration, claiming their damages were fixed at the time of the close of escrow and the changed lot lines giving them title to the land at issue made no difference to the fraud cause of action. Indeed, they moved *in limine* to exclude evidence of the lot-line adjustment so that Spencer could not show that the Burlages were not damaged to the extent they claimed because the encroachment issue had been resolved. Spencer argued that later circumstances "can and should be considered in measuring damages."

The arbitrator agreed with the Burlages and prevented Spencer from submitting any evidence that the encroachment had been resolved. On the other hand, the Burlages were allowed to offer expert opinion testimony about how much it was going to cost them to move their pool and their fence—two things that never happened and no longer needed to happen since the lot-line adjustment. The arbitrator found that Spencer knew about the lot line problem, did not disclose this to the buyers and the encroachment "materially affected the property's value." He then awarded the Burlage's over \$1.5 million dollars in compensatory and punitive damages, and attorney fees.

When the Burlages moved to confirm the award in court, Spencer moved to vacate it. She argued that CCP section 1286.2 required vacation of the award because her interests were “‘substantially prejudiced’ by the arbitrator’s refusal to hear ‘evidence material to the controversy.’” The trial court agreed and ruled the arbitrator’s refusal to consider evidence of the lot-line adjustment “substantially prejudiced Spencer’s ‘ability to dispute the amount of damage suffered by’ the Burlages” and vacated the award. The Burlages petitioned the court of appeal for a writ of mandate.

The appellate court noted that arbitration awards cannot be disturbed for errors of law, “even when an error of law is apparent on the face of the award and causes substantial injustice.” However, an arbitrator’s power and “infallibility” have their limits. This is so because CCP section 1286.2 states a court “‘shall’ vacate an award when a party’s rights ‘were substantially prejudiced...by the refusal of the arbitrator[] to hear evidence material to the controversy....’ This section has been interpreted as a ‘safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case.’”

The court went on to explain that the private arbitrator’s determination of what the proper date was for the fixing of damages is not subject to judicial review; however, his exclusion of evidence that the title company had solved the problem before plaintiffs had actually suffered any damages “was more than a mere erroneous evidentiary ruling. The ruling substantially prejudiced Spencer and undermined the fundamental principle embodied in section 1286.2, subdivision (a)(5) that an arbitrator must consider material evidence.” It went on to say an “arbitrator must consider this evidence to make an informed decision” and that if the award in this case were to be affirmed, “arbitration itself would be suspect.”

The dissenting justice he would have granted the petition and direct confirmation of the award. He said the majority was wrong in that the arbitrator’s decision was based on the legal issue of when damages were fixed—something the majority said it would not and could not disturb. “[C]orrect or not, the arbitrator had ruled both at the time the motions in limine were made and in his ‘Amended Final Award,’ that damages would be computed at the time of the close of escrow. This was his *legal* conclusion. As such it is not subject to judicial review.” The dissenting justice predicted that this decision will be the beginning of “great mischief.” (Emphasis added.)

On September 15, petitioners filed a petition for rehearing, and on September 18, 2009, Real Party filed a request to answer the petition which will be due 8 days from filing.