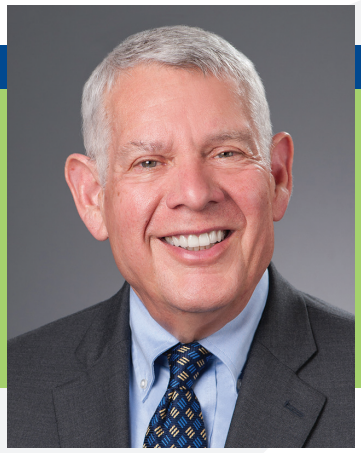

Beyond Boilerplate Language: How Non-Standard Arbitration Clauses Can Cause Different Results

By Joel M. Grossman, Esq.

Lawyers who practice in California are familiar with the notion, set forth by the California Supreme Court in *Moncharsh v. Heily & Blase*,[1] that an arbitrator's determination of a case before him or her is subject to very limited judicial review, and will not be vacated because of the arbitrator's errors of fact or law. As the court later stated in *Cable Connection, Inc. v. DIRECTV, Inc.*,[2] this rule is "consistent with the usual expectations of parties to arbitration agreements, who accept the risk of legal error in exchange for the benefits of a quick, inexpensive, and conclusive resolution."[3] In other words, parties who submit a dispute to the arbitrator for resolution must hope he or she gets it right, because courts will vacate the award under only narrow and limited circumstances.

But what if the parties want the benefits of arbitration, but are unwilling to live with the risk that the arbitrator could reach an incorrect conclusion that they would be helpless to appeal? Should they decide to do so, the parties may include additional, non-standard terms in the arbitration agreement to protect themselves from such a risk. For example, in *Cable Connection*, the court held that terms of an arbitration agreement that go beyond the standard boilerplate by requiring the arbitrator to follow the law and allowing for judicial review of the arbitrator's award for legal error are valid and enforceable: "If the parties constrain the arbitrator's authority by requiring a dispute to be decided according to the rule of law, and make plain their intention that the award is reviewable for legal error, the general rule of limited review has been displaced by the parties' agreement."[4]

The exception to limited review of arbitration awards recognized by the supreme court in *Cable Connection* was central to the court of appeal's recent holding in a commercial case called *Harshad & Nasir Corp. v. Global Sign Systems, Inc.*[5] The facts of the case are much too long to summarize here, but the issue on appeal was whether the court could review the matter on its merits. The court paid attention to the specific and unique language of the arbitration agreement. Specifically, the agreement stated: "[T]he arbitrator shall apply California law as though he were obligated by applicable statutes and precedents and case law… and shall endeavor to decide the controversy as though he were a judge in a California court of law." The agreement went on to say that either party may object to the award "on the basis that the statement of facts and the conclusions of law

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do not support the decision and award, and/or that the law was incorrectly determined or applied." This language would allow for a result far different from the *Moncharsh* rule that an arbitration award cannot be vacated even if the arbitrator was wrong on the facts or the law.

In addition to requiring the arbitrator to follow the law, the *Global Sign Systems* arbitration clause directly provided for an appeal: "The parties agree that the decision of the arbitrator and/or the findings of fact and conclusions of law shall be reviewed on appeal to the trial court and thereafter to the appellate courts upon the same grounds and standards of review as if said decision and supporting findings of fact and conclusions of law were entered by a court with subject matter and present jurisdiction." In spite of this language, when the losing parties petitioned the superior court to vacate the award, it refused because the arbitration agreement did not "explicitly and unambiguously" provide for expanded judicial review, as the parties did in *Cable Connection*. The court of appeal reversed, holding that the exact language of Cable Connection need not be used, stating: "[T]he Supreme Court did not require the use of any particular words to provide for expanded judicial review; what matters is that the parties 'make plain their intention that the award is reviewable for legal error.'" The court of appeal reasoned that when the arbitration agreement evidences the parties' clear intention to take the matter out of the *Moncharsh* rule and treat the award as reviewable, courts must enforce that language.

A recent employment case, though quite different from *Global Sign Systems,* also shows how a departure from standard arbitration provisions can make a significant difference in the enforcement of the arbitration itself. In *Oto, L.L.C. v. Kho,*[6] the unusual terms of the arbitration agreement were key to the court of appeal's ruling that the arbitration agreement was not unconscionable.

Before analyzing the *Oto* decision, some case law background information is in order. A current or former employee who believes he is owed wages may bring a claim before the Labor Commissioner, who then may conduct a hearing under Labor Code § 98(a), which is known as a Berman Hearing. Several years ago, in *Sonic-Calabasas A, Inc. v. Moreno, (Sonic I)*[7] the California Supreme Court held that an employer may not force an employee to arbitrate the wage claim and give up his or her right to a Berman Hearing; such an arbitration agreement was deemed unconscionable and unenforceable. However, in light of the U.S. Supreme Court's ruling in *AT&T Mobility v. Concepcion,*[8] the California Supreme Court in *Sonic-Calabasas A, Inc. v. Moreno (Sonic II)*[9] changed its position and held that an arbitration agreement purporting to extend to wage claims in place of a Berman Hearing was not per se unconscionable. In deciding whether the waiver of a Berman Hearing was enforceable, a trial court would need to look at "the totality of the agreement's substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided."[10] The court stressed that an arbitration agreement that does not provide an employee with "an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability."[11]

Turning back to *Oto*, there the court of appeal noted that *Sonic II* did not provide guidance on what type of provisions in an arbitration agreement would meet the test of an "affordable and accessible" procedure. It was therefore up to the court to make that determination, based on the language of the arbitration agreement. As noted, the agreement was not boilerplate—it provided, in very small print, some of, but definitely not

all of, the terms cited above in the *Global Sign Systems* case. For instance, the agreement to arbitrate stated that the parties would have all mandatory and permissive rights to discovery in the California Arbitration Act, going beyond the "sufficient discovery" required by *Armendariz v. Foundation Health Psychcare Services, Inc.*[12] Further, the arbitration provision in *Oto* provided: "To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8." Along with these expansive procedural provisions, the agreement went on to state that the arbitrator's determinations "[s]hall be based solely on the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including but not limited to notions of 'just cause') for his or her determinations other than such controlling law." In other words, the parties apparently agreed to take this arbitration provision out of the *Moncharsh* rule that whatever the arbitrator says must be affirmed. In fact, the parenthetical reference in the agreement to "notions of just cause" appears to be a direct reference to a passage in *Moncharsh* stating that the arbitrator may make an award based on what is "just and good."[13]

Unlike the court in *Global Sign Systems*, the court in *Oto* was not ruling on whether the arbitration award could be viewed more broadly than under *Moncharsh* because of the requirement that the arbitrator follow the controlling law. But this provision of the agreement was important to the court for another reason; namely, determining whether the agreement could require the employee to arbitrate wage claims under the terms approved by the supreme court in *Sonic II*. In its ruling, the court explained that the agreement "anticipates a proceeding very much like ordinary civil litigation, with no special procedural features that would tend to favor One Toyota [the employer]—any more, at least, than the complexity and expense of civil litigation naturally tends to favor a party with greater sophistication and financial resources."

The court went on to examine the terms of the agreement with an eye toward the *Sonic II* requirements that the procedure be both affordable and accessible. As to affordability, the court noted that the agreement did not expressly state that the employer, One Toyota, would pay the cost of arbitration. However, the employer acknowledged that it must pay the cost of the arbitration, as required by the California Supreme Court in *Armendariz*. Because the employer would assume the cost of the arbitration, the arbitration agreement met the affordability requirement.

The Labor Commissioner (who intervened in the case) argued that the agreement did not meet the affordability requirement because the employee would have to retain counsel for the arbitration, while at a Berman Hearing there would be no need for counsel. The court of appeal noted that the employee could proceed *pro per* and would not necessarily require a lawyer. The court also noted that the arbitration agreement by its terms implicitly incorporated the provisions of Labor Code § 218.5, by which the employee could recover his or her attorneys' fees if the employee prevails. Therefore, even if the employee chooses to retain counsel, the attorneys' fees provision can satisfy the affordability requirement.

As to the accessibility requirement, the court held that by patterning the arbitration procedure to be similar to a trial in court, the arbitration procedure is "no more complex than will often be required to resolve a wage claim under

the Berman procedures. Such a proceeding is presumably not inaccessible for purposes of *Sonic II*." Having found the procedure outlined in the arbitration agreement both affordable and accessible, the court ruled that it could be enforced and the employee could be required to waive a Berman Hearing and arbitrate his wage claims.[14]

Global Sign Systems and *Oto* are very recent examples of how parties may go beyond standard boilerplate arbitration agreements to obtain a desired result. In *Global Sign Systems*, the parties clearly did not want to submit the dispute to arbitration with little chance of obtaining a court review of the arbitrator's decision. They made it clear that the arbitrator must follow the law, and expressly provided for an appellate review of the award if either party thought that the arbitrator did not. In *Oto*, the agreement established a process much like a trial in court, and that persuaded the court that it met the requirements of *Sonic II* to require arbitration of a wage claim. Parties who wish to avoid having to live with an arbitration award that is wrong on the facts or the law, or both, should review these cases for guidance.

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Endnotes

1. 3 Cal. 4th 1 (1992).
2. 44 Cal. 4th 1334, 1360 (2008).
3. The arbitrator's award can be vacated by a court under the narrow exceptions set forth in Cal. Civ. Proc. Code § 1286.2.
4. *Cable Connection, Inc.*, 44 Cal. 4th at 1355.
5. 14 Cal. App. 5th 523 (2017).
6. 14 Cal. App. 5th 691 (2017).
7. 51 Cal. 4th 659, 680 (2011).
8. 563 U.S. 333 (2011).
9. 57 Cal. 4th 1109 (2013).
10. *Id.* at 1146.
11. *Id.*
12. 24 Cal. 4th 83, 106 (2000).
13. *Moncharsh*, 3 Cal. 4th at 11.
14. The case also describes alleged procedural unconscionability, which the court recognized as substantial. However, because it found no substantive unconscionability, as discussed above, it enforced the agreement. In the interest of brevity, and because it is not germane to the subject of this article, the issue of procedural unconscionability is not discussed.