

How to Preserve Appellate Rights in Your Arbitration Agreement

Tim Kowal November 09, 2023



The worst thing about arbitration is the risk of winding up with a decision contrary to law, facts, and common sense—and, because it's arbitration, having no meaningful

recourse. But that's just the tradeoff. Right?

Actually, that's not the case. Back in 2008, the California Supreme Court held in [Cable Connection, Inc. v. DIRECTV, Inc. \(2008\) 44 Cal.4th 1334](#) that parties agreeing to arbitration may also agree that the award be subject to judicial review on the merits. So that's just what the parties did in the recent case [Hous. Auth. of City of Calexico v. Multi-Housing Tax Credit Partners XXIX, L.P.](#) (D4d1 Aug. 28, 2023) No. D079967. But there was one thing the Supreme Court was not clear about: does the trial court have to review the arbitration award on the merits?

The trial court thought not. The trial court agreed that the parties had explicitly and unambiguously invoked their right to appellate review of the merits of the arbitration award. But the court still refused to review the merits, leaving that for the Court of Appeal. The trial court ruled that it was powerless to review the award on the merits, and it confined its review to the statutory grounds set forth in section 1286.2 of the Code of Civil Procedure, ruling that the merits review should be left to the appellate court's original jurisdiction.

That's not the way review works, said the Fourth District, Division One. The California Constitution vests original jurisdiction in the Superior Courts, and that cannot be changed by stipulation. If the courts were to allow parties to determine the manner and procedure of appellate review, parties might stipulate—and the courts would be bound to oblige—to review that proceeds “by flipping a coin or studying the entrails of dead fowl.” ([Cable Connection](#), at p. 1362 (maj. opn.), quoting in part [LaPine Technology Corp. v. Kyocera Corp. \(9th Cir.1997\) 130 F.3d 884, 891](#) (conc. opn. of Kozinski, J.).

Takeaway

Don't overlook the option in your arbitration agreements to make them subject to judicial review. This is an option not available under the Federal Arbitration Act, but it is available under the California Arbitration Act. ([Cable Connection](#), *supra*, 44 Cal.4th at p. 1339 (italics added), discussing [Hall Street Associates, L.L.C. v. Mattel, Inc. \(2008\) 552 U.S. 576, 578](#) (*Hall Street*) [“We hold that the statutory grounds are exclusive.”].) But the invocation of the right to merits review must be explicit and unambiguous.

Use this language in your arbitration clause if you want to make the award subject to full appellate review.

Here is the language the parties used successfully in *Housing Authority of Calexico* to make their arbitration award subject to full appellate review:

- “The Arbitrator ... shall endeavor to decide the controversy as though the arbitrator were a judge in a California court of law.”
- “The award ... and the findings of the Arbitrator shall be final, conclusive and binding upon the parties, and judgment upon the award and enforcement of any other judgment, decree or order of relief granted by the Arbitrator may be entered or obtained in any court of competent jurisdiction upon the application of any party.”
- “Notwithstanding the provisions herein, the parties hereto, by submitting the controversy or dispute to arbitration, do not waive or relinquish their rights of appeal and said Partners expressly agree that each Partner shall have the right of appeal as specifically provided in accordance with the laws relating to appeals then in effect in the State of California, as the same may be amended or superseded from time to time; and for such purposes, it is hereby expressly acknowledged and agreed that the parties desire to maintain their right of appeal as an integral part of this Agreement.”
- “Notwithstanding the applicable provisions of California law[,] ... the decision of the arbitrator and the [arbitrator's] findings of fact and conclusions of law shall be reviewable on appeal 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.”

This article was *originally published* on the website of [Kowal Law Group](#).

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