

By Rena E. Kreitenberg

A Cloud over Arbitration Decision Appeals

A state court ruling changes the calculus when considering contractual arbitration clauses

Until recently, it was a generally held belief that parties to a contract for binding arbitration in California could preserve their right to judicial review provided that the right was expressly stated and adequate consideration existed. While that belief remains well grounded if the arbitration agreement is subject to Ninth Circuit interpretation of the Federal Arbitration Act (FAA),¹ it is now misplaced for agreements interpreted pursuant to California law. In other words, when counseling clients on arbitration agreements, a new variable has arisen: What court will likely interpret the agreement?

The recent decision by the California Court of Appeal in *Crowell v. Downey Community Hospital Foundation*² has eliminated the right to contract for judicial review of arbitration awards governed by California state law. The court's ruling, however, flies in the face of California precedent, makes no logical sense, is contrary to Ninth Circuit law, and creates significant ambiguity for practitioners. This will only serve to deepen what parties fear most about arbitration: that an arbitrator will act capriciously or without regard to the law.

In California, private arbitration, as provided in Code of Civil Procedure Sections 1280 et seq., is a creature of contract.³ The majority in *Crowell* nevertheless held that negotiated contractual provisions allowing for judicial review are unenforceable because the Code of Civil Procedure specifically excludes review outside the grounds set forth in the code. Unfortunately, these grounds are very narrow, involve serious misconduct or outright fraud on the part of the arbitrator, and are rarely, if ever, applicable. In essence, the court in *Crowell* held that because strong public policy favors finality of judgment, the use of private arbitration presumes nonjudicial review of a decision.

The court ignores, however, the fact that private contractual arbitration is a matter of agreement between the parties whereby the powers of the arbitrator are necessarily determined by agreement or stipulation. The court also ignores that parties may agree to expand or constrict statutory rights.

The dissenting opinion in *Crowell* provides a more thorough and practical application of California law, including persuasive Ninth Circuit federal authority, which the *Crowell* majority refused to consider.⁴ As a result, the dissenting opinion provides a logical rationale as to why the courts, when faced with this issue in the past, have qualified their rulings limiting judicial review provisions in contractual arbitration. By basing such findings upon the "intentions of the parties, as expressed" in the particular agreement, the courts recognize that the parties should be allowed to freely contract for judicial review of arbitration awards.⁵

The dissenting opinion focuses on this critical issue when it correctly states: "At the core of binding arbitration is the parties' freedom to contract for resolution of disputes in a forum and pursuant to rules

of their choosing. Absent the parties' agreement, binding arbitration cannot occur because it involves the decision to waive fundamental constitutional rights, including the right to trial by jury."⁶

The sad truth is, the majority ruling in *Crowell* forces parties to choose between their right to freely contract and their right to a quick, economical, and fair forum outside the civil court system. The dissenting opinion recognized this conundrum and noted that it raises the fear that parties will refuse binding arbitration as an option because the cost becomes too high if a capricious arbitrator issues an award that is unsupported by law or evidence. Given that the current statutory scheme does not require arbitrators to follow the law, it seems that binding arbitration is now far too risky an endeavor. Parties can just as easily preserve their rights to appeal by opting for a bench trial while at the same time saving the cost of an arbitrator.

When disputes are governed by federal law, a practitioner could avail the client of the broader provisions for judicial review in the FAA as provided in current Ninth Circuit law. However, this option could prove impractical and ineffective unless the contract includes a choice of forum provision that would require application of law from a jurisdiction (such as the Ninth Circuit) favorable to broader judicial review, since precedents disallowing judicial review exist in other federal circuits. Even more troubling, in multiple-party arbitrations crossing numerous jurisdictions, some parties may have the right to judicial review while other parties to the very same agreement would not.

Regardless of how we feel about the current state of the law, we must now carefully counsel our clients on all aspects of binding arbitration and clearly explain the significant rights they could be waiving before recommending the "cheaper and quicker" alternative to the civil court process. With binding arbitration, it seems more and more that you get what you pay for. ■



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¹ *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F. 3d 884 (9th Cir. 1997).

² *Crowell v. Downey Cmty. Hosp. Found.*, 2002 Daily Journal DAR 1013 (2d App. Dist. 2002), 95 Cal. App. 4th 730 (2002).

³ *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992).

⁴ *Crowell*, 2002 Daily Journal DAR at 1015; see also *id.* at 1018 (dissenting op.).

⁵ *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* 45 Cal. App. 4th 631, 637; see also *Crowell*, 2002 Daily Journal DAR at 1018 (dissenting op.).

⁶ *Crowell*, 2002 Daily Journal DAR at 1020.