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Efficient Injustice: The Demise of teh Substantial Injustice Exception to Arbitral Finality - Moncharsh v. Heily & (and) Blase

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EFFICIENT INJUSTICE: THE DEMISE OF THE "SUBSTANTIAL INJUSTICE" EXCEPTION TO ARBITRAL FINALITY

Moncharsh v. Heily & Blase[1]

I. INTRODUCTION

Judicial review of an arbitrator's decision has been a point of much controversy and discussion among jurisdictions. Many state legislatures have enacted arbitration statutes that list the grounds for review of an arbitrator's decision. However, over time, the courts have also developed some common law grounds for judicial review. Conflict often arose when a state's statute did not provide for review on the same grounds as common law. This Note examines how the California Supreme Court dealt with the difference in the statutory and common law grounds for judicial review of an arbitrator's decision.

II. FACTS AND HOLDING

Appellant, Philip Moncharsh, an attorney, was hired by the law firm of Heily & Blase (H & B), appellee, on June 16, 1986.[2] Moncharsh signed an agreement containing provisions governing his employment.[3] One provision (paragraph X-C) provided that if Moncharsh terminated his employment and took any of H & B's clients with him, Moncharsh would give H & B 80 percent of the fees generated by those clients.[4]

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1. 832 P.2d 899 (Cal. 1992) (en banc).
2. *Id.* at 900.
3. *Id.*
4. *Id.* at 900-01. The provision regarding fees stated:
   In the event that any FIRM client should terminate the attorney-client relationship with FIRM and substitute EMPLOYEE-ATTORNEY or another attorney or law firm who[m] EMPLOYEE-ATTORNEY suggested, recommended or directed as client's successor attorney, then, in addition to any costs which client owes FIRM up to the time of such substitution, as to all fees which EMPLOYEE-ATTORNEY may actually receive from that client or that client's successor attorney on any such cases, BLASE will receive eighty percent (80%) of said fee and EMPLOYEE-ATTORNEY will receive twenty percent (20%) of said fee.

On February 29, 1988, Moncharsh quit working for H & B.[5] DeWitt Blase, senior partner at H & B, contacted nearly 30 of Moncharsh's clients and told them that they had signed a retainer agreement with the firm and that he, and not Moncharsh, would be handling their cases from that point forward.[6] Five clients whom Moncharsh had represented before commencing employment at H & B and a sixth client, who had retained Moncharsh less than two weeks prior to his quitting the firm, decided to continue their representation through Moncharsh.[7]

Upon learning Moncharsh had received fees generated by the six clients, Blase instituted an action to recover a share of the fees in quantum meruit as well as a percentage of the fees pursuant to the employment agreement.[8] Moncharsh extended an offer to settle only the quantum meruit share of the fees, which Blase rejected.[9] The parties then submitted the case to an arbitrator pursuant to the arbitration clause of the employment contract.[10]

In his brief submitted to the arbitrator, Moncharsh contended that: (1) H & B was entitled only to the quantum meruit share of fees;[11] (2) an oral agreement between Moncharsh and Blase provided that clients Moncharsh brought with him would be treated differently;[12] (3) the employment agreement was unenforceable because it had been terminated;[13] (4) the employment agreement was adhesionary and unenforceable;[14] and (5) provision X-C violated "public policy, the Rules of Professional Conduct of the State Bar, . . . and is inconsistent with *Fracasse v. Brent* and *Champion v. Superior Court*."[15]

Id. at 901.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* The arbitration clause provided that:

> Any dispute arising out of this Agreement shall be subject to arbitration under the rules of the American Arbitration Association. No arbitrator shall have any power to alter, amend, modify or change any of the terms of this agreement. The decision of the arbitrator shall be final and binding on firm and employee-attorney.

Id. n.1.

11. *Id.* at 901.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* In Fracasse v. Brent, 494 P.2d 9 (Cal. 1972), the court held that an attorney who is terminated, with or without cause, is entitled to recover the reasonable value of his or her services. *Id.* at 14. In Champion v. Superior Court, 247 Cal. Rptr. 624 (Ct. App. 1988), the court held that an employment contract clause providing that all fees and clients were to remain the property of the firm was an agreement to collect an unconscionable fee and violated the Rules of Professional Conduct. *Id.* at 626. In addition, the agreement reviewed by the *Champion* court denied clients their choice of counsel. *Id.* at 627. The court also held that the firm could recover in quantum meruit for the value of the firm's contribution to the case. *Id.* at 628.

H & B, in its brief to the arbitrator, contended that provision X-C (1) was clear and unequivocal,[16] (2) was not unconscionable,[17] and (3) represented a reasonable attempt to avoid litigation and was thus akin to a liquidated damages provision.[18] H & B also alleged that Moncharsh had solicited the six clients to remain with him because, in part, financial settlements of those six clients' cases were near.[19] In contrast, H & B alleged that Moncharsh failed to pursue the clients whose cases required substantial legal work.[20]

The arbitrator ruled in favor of H & B, stating that the oral agreement was never documented, and, therefore, the written agreement controlled.[21] The arbitrator further ruled that, because Moncharsh was a "mature, experienced attorney" when he signed the employment contract and could have refused or negotiated a different contract, provision X-C was not unconscionable with respect to the first five clients.[22] The arbitrator did hold that provision X-C was unconscionable with respect to the sixth client because that client was obtained so close to the termination of Moncharsh's employment.[23]

Subsequently, Moncharsh petitioned the superior court to vacate and to modify the award, and H & B petitioned to have the court confirm the award.[24] The superior court ruled that "the arbitrator's finding on questions of both law and fact are conclusive. A court cannot set aside an arbitrator's error of law no matter how egregious."[25] The court did note an exception to this general rule where the error appears on the face of the award.[26] The court, however, did not find any such error and ruled in favor of H & B.[27]

On appeal, the court of appeals noted the same general rule and exception.[28] The court added to the exception the requirement of a result of substantial injustice.[29] According to the appellate court, a court can review an arbitrator's decision only if there is error on the face of the decision and that

16. *Moncharsh*, 832 P.2d at 901.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 901-02.
23. *Id.* at 902.
24. *Id.*
25. *Id.*
26. *Id.* Error on the face of the award is error that is objected to during the arbitration and then embodied in the report of the referee or made part of the report by being properly certified to the referee. *Id.* at 907 (citing Tyson v. Wells, 2 Cal. 122, 131 (1852)).
27. *Id.* at 902.
28. *Id.*
29. *Id.* Substantial injustice in the context of judicial review of an arbitrator's decision occurs when an arbitrator's decision affects the substantial rights of a party on the merits of the case. Utah Constr. Co. v. Western Pac. R.R., 162 P. 631, 634 (Cal. 1917).

error results in substantial injustice.[30] The court of appeals affirmed the trial court's holding.[31]

On writ of certiorari, the California Supreme Court affirmed the lower court and held: (1) an arbitrator's award, reached pursuant to a contractual agreement to arbitrate, is not subject to judicial review, except where authorized by statute;[32] and (2) an error of law appearing on the face of an arbitration award which causes substantial injustice does not provide grounds for judicial review.[33]

III. LEGAL HISTORY

In California, the issue of arbitral finality arose prior to the existence of any statutes governing arbitration.[34] In 1852, the California Supreme Court, in *Muldrow v. Norris*,[35] examined its ability to review an arbitrator's award.[36] The *Muldrow* court created an exception to arbitral finality and allowed review of an arbitrator's award under certain circumstances.[37]

The *Muldrow* court recognized that a court of equity could set aside awards for fraud, mistake, or accident, whether the issue involved fact or law.[38] The court also recognized that arbitrators are not constrained to award on the basis of law and can decide the matter before them based on equity and good conscience.[39] However, if an arbitrator purports to decide according to the law and mistakes the law, the *Muldrow* court held that courts can set the award aside.[40] When an arbitrator makes the point a "matter of judicial inquiry by spreading it upon the record, and [he or she] mistake[s] the law in a palpable and material point," a court may set aside the arbitrator's award.[41] Arbitrators who explain their award are assumed to decide according to the law, and, therefore, judicial review is permitted.[42] The award could be set aside because the arbitrator intended to decide according to the law, and if he or she mistook the law, the award would not be what they actually intended.[43]

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30. *Moncharsh*, 832 P.2d at 902.
31. *Id.*
32. *Id.* at 919.
33. *Id.*
34. *Id.* at 906.
35. 2 Cal. 74 (1852).
36. *See id.* at 77.
37. *Id.* at 77-78. The *Muldrow* court allowed judicial review if an arbitrator purported to decide according to the law and then mistook the law. *Id.*; *see infra* notes 40-43 and accompanying text.
38. *Muldrow*, 2 Cal. at 77.
39. *Id.*
40. *Id.* at 77-78.
41. *Id.* at 78.
42. *Id.*
43. *Id.*

Less than a month later, in *Tyson v. Wells*,[44] the California Supreme Court recognized that an arbitrator's award may be set aside if the error complained of appears on the face of the award.[45] The *Tyson* court cited *Muldrow* as authority but did not include the requirement that the mistake be on a palpable and material point.[46]

The requirements for judicial review in California changed again six months later in *Headley v. Reed*.[47] The *Headley* court held that to set aside an award there must be "fraud or gross error of law or fact apparent upon its face."[48] Thus the *Headley* court, while purporting to rely on *Muldrow*, further changed the test by requiring gross error on the part of the arbitrator.[49]

Concurrently to the *Muldrow*, *Tyson*, and *Headley* cases, the California legislature enacted the Civil Practice Act of 1851.[50] That act specified the grounds upon which a court could vacate an arbitrator's award.[51] The act did not provide for vacation of an arbitrator's award due to gross error on the face of the award.[52]

In 1854, the California Supreme Court heard *Peachy v. Ritchie*,[53] the first case to interpret this act. The *Peachy* court held the act to be no more than a reaffirmation of the common law.[54] The court went on to hold that an award could not be set aside except in the circumstances set out in *Muldrow*.[55]

Five years later, in *Carsley v. Lindsay*,[56] the California Supreme Court began to shift toward the view that the grounds outlined in the statute were required to set aside the award of an arbitrator.[57] The *Carsley* court did not

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44. 2 Cal. 122 (1852).
45. *Id.* at 131.
46. *See id.* at 131-33.
47. 2 Cal. 322 (1852).
48. *Id.* at 325.
49. *Id.*; *see Moncharsh*, 832 P.2d at 907.
50. *See Moncharsh*, 832 P.2d at 907; 1851 Cal. Stat. ch. CXXIII.
51. *See Moncharsh*, 832 P.2d at 907. The act allowed vacation of an award on the following grounds: (1) that the award "'was procured by corruption or fraud,'" *id.* (quoting 1851 Cal. Stat. ch. CXXIII, § 386); (2) that "'the arbitrators were guilty of misconduct or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced,'" *id.* at 907-08 (quoting 1851 Cal. Stat. ch. CXXIII, § 386); (3) that "'the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed,'" *id.* at 908 (quoting 1851 Cal. Stat. ch. CXXIII, § 386).
52. *Id.*
53. 4 Cal. 205 (1854).
54. *Id.* at 207.
55. *Id.*
56. 14 Cal. 390 (1859).
57. *See id.* at 394.

recognize at common law, nor by statute, error of law as a ground for vacating an arbitrator's award.[58]

The trend toward strict statutory construction continued in 1872, when the Civil Practice Act was codified as section 1287 of the California Code of Civil Procedure.[59] In 1900, this statute was addressed by the California Supreme Court in *In re Connor*.[60] The *Connor* court held that the only grounds for vacating an arbitrator's award were those stated in section 1287.[61] However, the court went on to state that gross error was also a ground for vacating an award, although it was not included in section 1287.[62] Subsequently, the California Supreme Court seemed to withdraw from its strict interpretation stance. In 1917, the court, in *Utah Construction Co. v. Western Pacific Railway*,[63] allowed for vacation of an award if an error of law appeared on the face of the award and caused substantial injustice.[64]

In 1927, the California legislature recodified and renumbered section 1287 as section 1288.[65] The changes in the new statute were that an award could be vacated "when the award was procured by undue means and . . . [when the arbitrators] so improperly executed [their powers] that a mutual, final and definite award . . . was not made."[66]

In 1946, the California Supreme Court addressed judicial review under section 1288 in *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*[67] The *Pacific Vegetable Oil* court twice stated the grounds for vacation, both times reciting the grounds listed in section 1288.[68] Neither time did the court mention error on the face of the award as causing substantial injustice as grounds for vacating the award.[69] The California Supreme Court addressed the statute again in *Crofoot v. Blair Holdings Corp.*[70] The *Crofoot* court concluded that the 1927 statute was intended to be the exclusive grounds for vacating an arbitrator's award and that all common law doctrines were abolished.[71] The court further held that, without an express provision in the arbitration agreement, questions of fact or law would not be reviewed except as provided for in the statute.[72]

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58. *See id.*
59. *Moncharsh*, 832 P.2d at 909; *see* CAL. CIV. PROC. CODE § 1287 (West 1872).
60. 60 P. 862 (Cal. 1900).
61. *Id.* at 862.
62. *Id.* at 863.
63. 162 P. 631.
64. *Id.* at 633.
65. *See Moncharsh*, 832 P.2d at 911.
66. *Id.* (citing 1927 Cal. Stat. ch. 225, § 9).
67. 174 P.2d 441 (Cal. 1946).
68. *See id.* at 445, 448.
69. *See generally id.*
70. 260 P.2d 156 (Cal. 1953).
71. *Id.* at 169.
72. *Id.* at 172.

Section 1288 was subsequently slightly altered and renumbered section 1286.2 in 1927.[73] Currently, a majority of California jurisdictions have adopted the rule that judicial review is available on the grounds provided for in the statute.[74] This rule is also followed in a majority of states.[75] However, some recent California decisions have revived the rule that a court may review an award if it contains error on its face resulting in substantial injustice.[76]

IV. THE INSTANT DECISION

A. The Majority

On appeal to the California Supreme Court, Moncharsh alleged that the court may review an arbitrator's decision if there is error of law on the face of the

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73. *See Moncharsh*, 832 P.2d at 914. Section 1286.2 provides that the court may vacate an arbitrator's award if:

> a) [t]he award was procured by corruption, fraud or other undue means; b) [t]here was corruption in any of the arbitrators; c) [t]he rights of such party were substantially prejudiced by the misconduct of a neutral arbitrator; d) [t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or e) [t]he rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

CAL. CIV. PROC. CODE § 1286.2 (West 1992).

74. *See Moncharsh*, 832 P.2d at 914.

75. *Id.*; *see, e.g.*, Verdex Steel & Constr. Co. v. Board of Supervisors, 509 P.2d 240, 244 (Ariz. Ct. App. 1973); Affiliated Mktg. v. Dyco Chem. & Coatings, 340 So. 2d 1240, 1242 (Fla. Dist. Ct. App. 1976), *cert. denied*, 353 So. 2d 675 (Fla. 1977); Morrison-Knudsen Co. v. Makahuena Inc., 675 P.2d 760, 765 (Haw. 1983); Bingham County Comm'n v. Interstate Elec. Co., 665 P.2d 1046, 1052 (Idaho 1983); Konicki v. Oak Brook Racquet Club, Inc., 441 N.E.2d 1333, 1337 (Ill. App. Ct. 1982); State v. Sightes, 416 N.E.2d 445, 450 (Ind. Ct. App. 1981); City of Sulphur v. Southern Builders, Inc., 579 So. 2d 1207, 1210 (La. Ct. App. 1991), *cert. denied*, 587 So. 2d 699 (La. 1991); Plymouth-Carver Sch. Dist. v. J. Farmer & Co., 553 N.E.2d 1284, 1285 (Mass. 1990); AFSCME Council 96 v. Arrowhead Regional Corrections Bd., 356 N.W.2d 295, 299 (Minn. 1984); Savage Educ. Ass'n v. Richland County Elementary Sch. Dist. No. 7, 692 P.2d 1237, 1240 (Mont. 1984); New Shy Clown Casino, Inc. v. Baldwin, 737 P.2d 524, 524 (Nev. 1987); Kearny PBA No. 21 v. Town of Kearny, 405 A.2d 393, 399 (N.J. 1979); Cyclone Roofing Co. v. LaFave Co., 321 S.E.2d 872, 879 (N.C. 1984); Aamot v. Eneboe, 352 N.W.2d 647, 649 (S.D. 1984); Utility Trailer Sales of Salt Lake, Inc. v. Fake, 740 P.2d 1327, 1329 (Utah 1987); Milwaukee Police Ass'n v. City of Milwaukee, 285 N.W.2d 133, 136-37 (Wis. 1979). *But see* Texas West Oil & Gas Corp. v. Fitzgerald, 726 P.2d 1056, 1060-61 (Wyo. 1986) (statutory grounds to vacate an arbitration award held not to be exclusive).

76. *See, e.g.*, *Moncharsh*, 832 P.2d at 915 (citing Schneider v. Kaiser Found. Hosps., 264 Cal. Rptr. 227, 230 (Ct. App. 1989); Park Plaza, Ltd. v. Pietz, 239 Cal. Rptr. 51, 54 (Ct. App. 1987); Ray Wilson Co. v. Anaheim Memorial Hosp. Ass'n, 213 Cal. Rptr. 62, 68 (Ct. App. 1985); Hirsch v. Ensign, 176 Cal. Rptr. 17, 21 (Ct. App. 1981); Abbott v. California State Auto. Ass'n, 137 Cal. Rptr. 580, 584 (Ct. App. 1977); Campbell v. Farmer's Ins. Exch., 67 Cal. Rptr. 175, 179 (Ct. App. 1968)).

award that results in substantial injustice, the arbitrator exceeds his or her power, or the decision is illegal or violative of public policy.[77]

In Moncharsh's case, the court found that his petition did not satisfy any of the statutory grounds for judicial review and therefore affirmed the trial court's ruling that the decision was not reviewable.[78] In addition, the California Supreme Court overruled the appellate court and held that error of law on the face of the award resulting in substantial injustice does not provide grounds for judicial review.[79] The court concluded that Moncharsh had not shown why the presumption in favor of arbitral finality should not apply, and, therefore, the award was not reviewable.[80]

The court also concluded that the arbitrator did not exceed his power.[81] An arbitrator does not exceed his or her power, according to the *Moncharsh* court, if he or she decides an issue for an erroneous reason.[82] The court reasoned that a contrary decision would circumvent the rule against judicial review by allowing parties to obtain review by alleging that the arbitrator erred and exceeded his or her power.[83]

In addition, the court noted that the California statute allows the arbitrator to decide all of the merits of a controversy submitted to arbitration.[84] Moncharsh did not contend that the arbitrator decided an issue that was beyond the scope of the arbitration agreement;[85] the arbitrator decided an issue that arose out of the employment contract.[86] Moncharsh and H & B's arbitration agreement was intended to encompass all disputes arising out of the employment contract.[87] Therefore, the court held that the arbitrator did not exceed his power.[88]

The court also rejected Moncharsh's contention that the fee-splitting provision was illegal and therefore not subject to arbitration.[89] The court held that the arbitration clause allowed the arbitrator to determine the legality of the fee-splitting provision.[90] However, the court did state that judicial review would be available if a party alleged that the entire contract or the arbitration clause was illegal.[91]

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77. *Id.* at 905-06.
78. *Id.* at 916.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 917.
90. *Id.*
91. *Id.* at 917-18.

The court recognized that there may be certain exceptional circumstances where a party may obtain judicial review of portions of a contract on the grounds of illegality.[92] For instance, the court stated that one exception would lie in granting finality to the arbitrator's decision that is inconsistent with a party's statutory rights.[93] However, the court further stated that absent an expression of public policy by the legislature, courts should hesitate to review an award on this ground.[94] The court reasoned that the legislature had already expressed its support for the arbitration statute and arbitral finality and that, without clear illegality or a statement of public policy "undermining this strong presumption in favor of private arbitration, an arbitral award should ordinarily stand immune from judicial scrutiny."[95]

Finally, the court rejected the argument that provision X-C violated public policy.[96] The court quickly disposed of Moncharsh's argument by stating that this was merely an ordinary fee-splitting dispute which did not involve any issues of professional conduct and therefore did not violate public policy.[97]

B. The Dissent

Justice Kennard, in his dissent, agreed with the majority's result[98] but not with the holding that error on the face of an award resulting in substantial injustice was not grounds for review.[99] He reasoned that the judiciary's role in society is to achieve justice.[100] Justice Kennard agreed with the decisions allowing review of gross error or errors resulting in substantial injustice;[101] he stated that the judiciary's main role in society should be to promote justice, and he argued that courts should strive to correct any injustice presented to them.[102] To ignore an injustice and to refuse to correct it solely because it does not fall within the prohibitions of a statute, according to Justice Kennard, does not achieve this goal.[103]

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92. *Id.* at 919.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 924 (Kennard, J., concurring and dissenting).
99. *Id.* at 919-20.
100. *Id.* at 920.
101. *Id.* at 920-22.
102. *Id.* at 920-21.
103. *Id.* at 922-23.

V. COMMENT

Judge Kennard makes a convincing argument in his dissent for allowing judicial review of arbitration: The main goal of the judiciary is justice.[104] From the inception of the American legal system, judicial review has offered relief from "capricious decisions, prejudicial error, inequity, and inequality."[105] However, arbitration decisions are usually final or permit review only under such limited circumstances such as "fraud, bribery, serious misconduct, or total lack of jurisdiction."[106]

While alternative dispute resolution (ADR) is supposed to allow a quicker, less expensive, and more efficient solution to litigation, it does not seem fair to the parties involved not to allow judicial review based on gross error or manifest injustice. Parties rely on arbitration as an alternative to litigation; their main objective in arbitration is a *fair* decision through a more efficient process. If parties knew ahead of time that an arbitrator may make a blatant error and that the error may be allowed to stand, they may not choose to arbitrate. Even though the decisionmakers in ADR proceedings may take into consideration factors other than the law, such as equity, the parties should not be bound by decisions imposing unfair damages, penalties, or awards.

In society, parties conform their conduct to what they perceive the law to be. Contracts are entered into, corporations are managed, and investments are made all under the assumption that such actions will be governed by the law. By allowing decisions that are obviously contradictory to the law to stand, without judicial review, courts may be penalizing parties who, in good faith, conformed their actions to the law. Even though arbitrators may be able to weigh other factors, they should not be allowed to decide issues contrary to established statutes and legal doctrines.

If the courts will not allow review of arbitral decisions without express statutory authorization, the legislatures in these jurisdictions should examine their statutes closely. Statutes which do not allow for some type of review of gross errors resulting in manifest injustice should have this common law exception codified as a statute. In this manner, the courts will be given the authorization they require in order to review an arbitrator's award under these circumstances. Statutes providing for review under these circumstances will allow courts to prevent injustice and make decisions that parties would expect.[107]

If the "gross-error-resulting-in-manifest-injustice" exception to arbitral finality is eliminated, then arbitral decisions containing errors of this nature, but

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104. *Id.* at 920.

105. James L. Guill & Edward A. Slavin, Jr., *Rush to Unfairness: The Downside of ADR*, 28 JUDGES J., Summer 1989, at 8, 12.

106. *Id.* (citing Federal Arbitration Act, 9 U.S.C. §§ 1-15 (1988)).

107. *See* Lieberman v. Lieberman, 566 N.Y.S.2d 490, 495 (Sup. Ct. 1991) (not limiting judicial review to statutory grounds); *Texas W. Oil*, 726 P.2d at 1061-62 (same). *But see* Traveler's Ins. Co. v. Valcort, 506 N.Y.S.2d 213, 214 (App. Div. 1986).

no other statutory exception to finality, will be allowed to stand. If this occurs, the reliability of ADR will fall under scrutiny. If parties cannot rely on ADR to bring about decisions they feel are fair or just, they may choose not to resort to ADR at all and will litigate instead.

Without review of gross errors resulting in manifest injustice, ADR may not be as efficient nor as helpful as originally proposed. If a party becomes the victim of such error, the result may be more costly than the rejected chose of litigation. It is easy to imagine multi-million-dollar contract arbitrations going awry under these circumstances and costing the "loser" much more than if he or she would have litigated and received a decision made without gross error.[108] It is also not hard to imagine an arbitrator making these errors in complex and highly technical areas of the law.[109]

VI. CONCLUSION

Statutes, courts, and ADR should interact and work together to provide fair and equitable solutions to disputes. Parties that do not feel confident that ADR will bring about equitable decisions will probably turn more and more toward the courts to resolve their disputes because litigation provides more predictability. Although not every error made by an arbitrator should be subject to judicial review, those errors that result in manifest injustice should be reviewed by the court, either under the common law or by statutory authorization. In short, ADR should provide efficient justice, not efficient injustice.

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108. Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J., 425, 430 (1988).
109. *Id.*