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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PATRICK FLANNERY, Plaintiff and Appellant, v. LAW OFFICES OF BURCH & COULSTON, LLP, et al., Defendants and Respondents.	B264803 (Los Angeles County Super. Ct. No. BC491584)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Daneshrad Law Firm and Joseph Daneshrad for Plaintiff and Appellant.

Kaufman Dolowich & Voluck, Barry Z. Brodsky and Jodi L. Girten for Defendants and Respondents.

Appellant Patrick Flannery sued his former attorneys, the respondents the Law Offices of Burch & Coulston, LLP (the Firm), Robert B. Burch, and Sven D. Buncher for legal malpractice and breach of fiduciary duty arising from the Firm's representation of Flannery in three actions involving Flannery's relationship with his ex-girlfriend. Flannery and the Firm signed a retainer agreement containing a provision requiring disputes between the parties to be submitted to binding arbitration. Pursuant to that provision, the trial court granted the Firm's petition to compel arbitration. The Firm later filed a cross-complaint with the arbitrator seeking payment for unpaid attorney fees. The arbitrator ruled in favor of the Firm on all claims in the complaint and cross-complaint. Flannery filed a petition to vacate the arbitration award, which the trial court denied.

Flannery challenges the trial court's judgment affirming the arbitrator's award. He contends that the trial court erred by confirming the arbitration award because not all of the claims in the case were arbitrable. Flannery also contends that we must reverse the trial court's judgment because the arbitrator exceeded her authority by ruling on the arbitrability of the Firm's cross-complaint. Finally, he argues that we must vacate the arbitrator's award because she refused to consider material evidence. We affirm.

FACTS AND PROCEEDINGS BELOW

A. *The Underlying Litigation*

On February 26, 2010, Flannery's girlfriend Andrea M., who lived with Flannery at the time, obtained a temporary restraining order

against Flannery, alleging that Flannery had committed acts of domestic violence against her. Five days later, Flannery entered into a retainer agreement with the Firm, in which the Firm promised to "represent [Flannery] with respect to his Domestic Violence Issues in the Superior Court of California, County of Los Angeles." The agreement contained a provision stating as follows: "If any dispute arises between you and this firm with respect to any billing or billings issued by our firm in reference to the above-referenced matter, we both agree that the dispute shall be submitted to mandatory binding arbitration. In addition, in the event of any dispute arising out of the attorney/client relationship, including a claim of legal malpractice, we both agree that the dispute shall be submitted to and resolved by binding arbitration."

On Flannery's behalf, the Firm agreed to a series of one-month extensions of the temporary restraining order. On June 4, 2010, after a hearing, the family court granted a domestic violence restraining order with a duration of one year. Under the terms of the restraining order, Flannery was required to remain at least 100 yards away from Andrea M.'s home. According to Flannery, this portion of the order posed a hardship to him, because Andrea M. lived on a ranch that Flannery owned and where he conducted a horse-boarding business. As long as the restraining order remained in place, it was impossible for him to conduct his business.

On May 25, 2010, shortly before the hearing on the restraining order, Andrea M. filed a complaint against Flannery alleging 13 causes of action, including breach of contract, fraud, quiet title, and

domestic violence. On July 27, 2010, a paralegal at the Firm sent Flannery a proposed retainer agreement. The agreement contained a provision stating that "Client hires Attorney to provide legal services in the following matter: Los Angeles Superior Court Case Number BC 438 538." It also contained an arbitration provision identical to the one in the first retainer agreement. Flannery declined to sign the second retainer agreement. Burch testified that he told Flannery that because the second action against him arose out of the allegations of domestic violence, it would be covered "under the existing retainer agreement." Flannery himself confirmed that he believed that "[i]t was not necessary for me to sign a second retainer, as Mr. Burch had told me that [the first] retainer would cover everything in his office." Flannery also confirmed that at the time he signed the first retainer agreement, he knew that Andrea M.'s civil suit against him "was coming even though it hadn't been filed yet."

Throughout the proceedings, the Firm billed Flannery separately for work on the domestic violence action and Andrea M.'s lawsuit against Flannery. The Firm also billed Flannery for a third case, which Flannery calls the "paternity action." In his appellate brief, Flannery does not describe the nature of the paternity action, nor how it was related to the other two cases in which the Firm represented Flannery.

B. *The Malpractice Suit*

In September 2012, Flannery filed a complaint in the trial court for legal malpractice and breach of fiduciary duty. He alleged, among other claims, that the Firm had been negligent by failing to obtain a modification in the restraining order to allow Flannery to continue

his horse-boarding business, by failing to obtain a modification of Flannery's child support obligations in light of his lack of income, and by recommending that he accept an unfavorable settlement offer regarding the distribution of the couple's property. In January 2013, respondents filed a motion to compel arbitration, relying on the provision of the retainer agreement that required arbitration. Flannery opposed this motion, arguing that the arbitration provision was invalid because, contrary to section 6204, subdivision (a) of the Business and Professions Code, it required him to agree to arbitration of fee disputes before any dispute arose, and that it was tainted with illegality and could not be enforced because it did not advise Flannery of its consequences. Flannery, however, did not argue that the arbitration provision was insufficiently broad to cover all of his claims. The trial court granted respondents' motion and stayed the action pending arbitration.

While the case was pending in arbitration, respondents informed Flannery that they intended to file a cross-complaint for attorney fees. Flannery objected on the ground that if he had known counterclaims were at issue, he might not have agreed to the choice of arbitrator. After a hearing, the arbitrator, relying on her authority under Code of Civil Procedure section 1282.2, subdivision (c), allowed defendants to file a compulsory cross-complaint for attorney fees.

In August 2014, nearly 18 months after the trial court granted Burch's motion to compel arbitration, and shortly before the arbitration hearing was set to begin, Flannery requested that the arbitrator decide that some of the matters in the complaint and cross-complaint were not

subject to binding arbitration. The arbitrator responded that Flannery should raise those issues before the trial court. Flannery filed an ex parte application for an order to limit the scope of the arbitration to issues relating only to domestic violence. The trial court denied the application, finding that Flannery had failed to make a showing of irreparable harm or exigent circumstances, that the court had previously ordered all matters relating to the dispute to arbitration, and that the retention agreement indeed required the arbitration of all matters alleged in the complaint and cross-complaint.

At the arbitration hearing, the arbitrator ruled in favor of Burch on all claims in the complaint and cross-complaint. The arbitrator awarded Burch $123,779 plus interest on the cross-complaint, along with the cost of arbitration.

Flannery filed a petition in the trial court to vacate the arbitration award, contending that the arbitrator had exceeded her authority and jurisdiction by determining issues outside the scope of the arbitration provision, and by refusing to allow him to litigate claims that had not been asserted in the complaint. The trial court denied Flannery's petition and confirmed the arbitration award. The court, applying a de novo standard of review, found that the arbitrator had correctly concluded that the arbitration provision of the retainer agreement was sufficiently broad to cover Flannery's claims against respondents, as well as the Firm's cross-complaint against Flannery.

DISCUSSION

Flannery raises three contentions on appeal. First, he contends that the trial court erred when it concluded that the retainer agreement was sufficiently broad to require the arbitration of claims that arose from the Firm's representation of Flannery in Andrea M.'s lawsuit against him and in the paternity action. Second, he contends that the arbitrator exceeded her powers by determining that the Firm's cross-complaint was arbitrable. Finally, Flannery contends that the trial court erred by affirming the arbitration award in spite of the arbitrator's refusal to consider evidence Flannery produced in support of claims that were not included in his complaint.

We review a trial court's decision regarding a petition to vacate an arbitration award de novo. (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196.) We hold that because Flannery did not raise his objection to arbitration in opposition to the motion to compel arbitration, he has forfeited that objection. Further, even if he did not forfeit his objection, we hold that the entire dispute was within the scope of the arbitration provision, and that the arbitrator did not exceed her authority by allowing the Respondent to file a cross complaint for attorneys fees in the arbitration proceeding. Finally, we hold that the arbitrator did not err by refusing to consider material evidence. Accordingly, we affirm the judgment.

I. *Forfeiture Of Challenge To Arbitrability Of The Complaint*

Although Flannery opposed the Firm's motion to compel arbitration, at that time he did not argue that the allegations in

his complaint were outside the scope of the arbitration provision. Instead, he raised that issue much later, in an ex parte request on the eve of the arbitration hearing. We hold that by failing to challenge the scope of arbitration at the outset, Flannery forfeited the issue on appeal.[1]

In most respects, arbitration proceedings are subject to ordinary rules of forfeiture. (See, e.g., *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 Cal.App.4th 672, 678; *Goossen v. Adair* (1960) 185 Cal.App.2d 810, 817.) "Those who are aware of a basis for finding the arbitration process invalid must raise it at the outset or as soon as they learn of it so that prompt judicial resolution may take place before wasting the time of the adjudicator(s) and the parties." (*Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 328–329.) Even if a party opposes a petition to compel arbitration, that party preserves for appeal only the arguments raised at that time. Thus, in *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, the plaintiff challenged arbitrability before the trial court on two grounds, but did not argue that the arbitration provision was unenforceable due to unconscionability. (*Id.* at p. 681.) Our Supreme Court held that the plaintiff had forfeited the issue of unconscionability on appeal. (*Ibid.*) Similarly, in this case, Flannery failed to raise the issue of the scope of the arbitration provision until arbitration proceedings had been underway for 18 months.

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[1] The parties did not address the question of forfeiture in their briefing. Consequently, we requested and received supplemental briefing on this subject.

Flannery argues that the question of arbitrability is a matter of the subject-matter jurisdiction of the court, and consequently it can never be waived or forfeited. He cites *United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576 (*United Firefighters*), a case involving the city's termination of a firefighter for alleged criminal conduct. (*Id.* at p. 1579.) When the city refused to hold a hearing to reinstate the firefighter, the firefighter and his union filed a petition in the trial court to compel arbitration of the dispute pursuant to the city's contract with the union. (*Id.* at p. 1580.) The trial court granted the petition over the city's objection, and the arbitrator ruled in favor of the firefighter and union. (*Ibid.*) The city did not file a motion with the trial court to vacate the arbitrator's award, and on appeal, the court held that the city did not thereby forfeit its challenge to the petition to compel arbitration. (*Id.* at p. 1581.) The court reasoned that "the arbitration agreement confers subject matter jurisdiction on the trial court to order the parties to arbitration," and consequently, it was not possible for the city to waive a challenge to its application. (*Id.* at p. 1582.)

But *United Firefighters* involved a fundamentally different procedural posture, and the court's reasoning there is not applicable to this case. In *United Firefighters*, the sole purpose of the suit was to compel arbitration, and the only function of the trial court was to determine whether the arbitration provision applied. Here, by contrast, the case began as an ordinary malpractice suit in the trial court. The challenge to arbitrability was a dispute over whether the case would proceed in the trial court or before an arbitrator, subject to

final confirmation in the trial court. Consequently, the challenge to arbitrability was not a matter of subject-matter jurisdiction, and it was subject to the ordinary rules of forfeiture, as described above.[2]

Flannery also argues that his challenge to the scope of the arbitrability provision was timely because at the time of the petition to compel arbitration, he was not aware of relevant facts. He claims that it was only later, when the case was in discovery prior to the arbitration hearing, that he learned that the Firm had sent him a proposed retainer agreement pertaining to Murray's civil suit, and that the Firm had invoiced him separately for the domestic violence issues, the civil suit, and the paternity matters. Because a party must challenge arbitrability "at the outset *or as soon as [he] learn[s] of it*"

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[2] Likewise, the court's holding in *South Bay Radiology Medical Associates v. Asher* (1990) 220 Cal.App.3d 1074, 1092, that a party may at any time challenge an arbitration award on the basis of illegality of the contract does not apply to this case, where illegality is not the relevant issue. Flannery also argues that to preserve a challenge to arbitrability on appeal, it is sufficient to make a motion to vacate the arbitration award. But the cases Flannery cites for this proposition, including *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 981-982, and *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 890, hold only that the trial court has the authority to vacate an arbitration award where the arbitrator has acted in excess of his or her authority. These cases do not address the issue of when a party must raise a challenge to arbitrability in order to preserve the argument on appeal. Flannery's position cannot be correct, as it would contradict the rule that a " 'party who questions the validity of the arbitration agreement may not proceed with arbitration and preserve the issue for later consideration by the court after being unsuccessful in the arbitration.' " (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1372, disapproved on another ground by *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 382, fn. 6.)

(*Cummings v. Future Nissan*, *supra*, 128 Cal.App.4th at pp. 328–329, emphasis added), Flannery argues that his ex parte motion on the eve of arbitration was timely. But in this case, Flannery must have learned of the relevant documents prior to the inception of the malpractice suit. Flannery received the second proposed retainer agreement in his email inbox, and Flannery and Burch testified that at the time, they discussed whether it was necessary for Burch to sign the new agreement. Similarly, Flannery could read the invoices at the time the Firm issued them and see how the Firm was billing him for work on the different matters.

Flannery also argues that if he forfeited the argument regarding the scope of the arbitrability provision, that forfeiture was limited to the arbitrability of the complaint. Because the Firm had not filed its cross-complaint at the time of its petition to compel arbitration, he cannot be faulted for failing to challenge its arbitrability at that point. We agree, but it does not alter the outcome of the case. Even if we consider all of Flannery's arguments on their merits, these arguments fail, as described in sections II and III below.

II. *The Scope Of The Arbitration Agreement*

Flannery contends that we must reverse the trial court's order confirming the arbitration award because the arbitration provision of the retention agreement was too narrow to encompass the full scope of the litigation. Where the trial court does not rely on extrinsic evidence in ruling on the interpretation of an arbitration agreement, we review the trial court's decision de novo. (*Metalclad Corp. v. Ventana*

Environmental Organizational Partnership (2003) 109 Cal.App.4th 1705, 1716.)

Parties are required to arbitrate their disputes only if they have agreed in writing to do so. (*Marsch v. Williams* (1994) 23 Cal.App.4th 250, 254-255.) On the other hand, we must construe arbitration agreements broadly. " ' " 'A heavy presumption weighs the scales in favor of arbitrability; an order directing arbitration should be granted "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." ' " ' " (*Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 642.) In other words, " ' "[d]oubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration." ' " (*Hartnell Community College Dist. v. Superior Court* (2004) 124 Cal.App.4th 1443, 1449.)

Flannery argues that it was error to confirm the arbitration award because the retention agreement contemplated that only disputes arising from the initial domestic violence case were subject to arbitration. At the time the parties signed the retention agreement, the only case pending against Flannery was Andrea M.'s application for a temporary restraining order. The retention agreement includes numerous references limiting the scope of the parties' obligations either to domestic violence issues or to a single "matter" or "case." For example, the Firm agreed to "represent [Flannery] with respect to his Domestic Violence Issues in the Superior Court of California" and to "devote [its] professional skills, knowledge, and expertise with regard to negotiation, and litigation relative to the above-entitled matter."

Flannery argues that, although the retention agreement also specified that the parties must arbitrate "any dispute arising out of the attorney/client relationship," we should interpret this arbitration provision as being limited to claims arising out of the initial domestic violence case.

In support of his position, Flannery relies on the court's opinion in *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501. In *Lawrence*, a law firm's client signed a retainer agreement with the following arbitration provision: " 'In the event of a dispute between us regarding fees, costs or any other aspect of our attorney-client relationship, the dispute shall be resolved by binding arbitration.' " (*Id.* at p. 1504.) The client sued for malpractice, and the law firm filed a petition to compel arbitration. (*Ibid.*) The Court of Appeal affirmed the trial court's denial of the petition, holding that the arbitration provision did not encompass allegations of malpractice. (*Id.* at p. 1508.) The court reasoned that in the context of a sentence dealing with disputes about financial matters, the phrase "any other aspect of our attorney-client relationship" must be interpreted in the same manner, as referring only to financial issues. (*Id.* at p. 1506.)

We are not persuaded that the *Lawrence* court's reasoning applies to this case. Unlike in *Lawrence*, the expansive language regarding the scope of the arbitration agreement in this case is clearly marked and is separated from the more limited language used elsewhere in the document. The arbitration provision begins with a limitation similar to those located elsewhere in the agreement, but it then shifts to broader language: "If any dispute arises between you and

this firm with respect to any billing or billings issued by our firm in reference to the above-referenced matter, we both agree that the dispute shall be submitted to mandatory binding arbitration. In addition, in the event of any dispute arising out of the attorney/client relationship, including a claim of legal malpractice, we both agree that the dispute shall be submitted to and resolved by binding arbitration." The use of the phrase "[i]n addition" shows that the arbitration is not limited to financial matters regarding the first domestic violence case, but covers all controversies involving the attorney-client relationship. If the parties had intended to limit arbitration to malpractice claims arising only out of the Firm's representation in the domestic violence case, they would have used limiting language like that found elsewhere in the contract.

Flannery argues that a broad interpretation of the second sentence of the arbitration provision is improper because it would render the first sentence mere surplusage. (See *Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 12.) Although it is true that we attempt to interpret a contract "so as to give effect to every part" (Civ. Code, § 1641), we must do so only "if reasonably practicable." (*Ibid.*) When "the only reasonable construction of the contract" requires us to interpret a small portion of the contract as redundant, we may do so. (*Flintkote Co. v. General Acc. Assur. Co.* (N.D.Cal. 2006) 410 F.Supp.2d 875, 890.) Here, it is impossible to understand the first sentence of the arbitration provision as referring to anything other than a small subset of the situations addressed in the

second sentence. By necessity, then, in order to give effect to the second sentence, we must interpret the first sentence as redundant.

Finally, Flannery contends that we should interpret the provision narrowly because "ambiguities in a written contract are to be construed against the party who drafted it." (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 745; accord Civ. Code, § 1654.) But we do not perceive an ambiguity in the contract on this point.

III. *Arbitrator's Decision On Arbitrability Of The Cross-Complaint*

Flannery contends that the arbitrator was without authority to decide that the Firm's cross-complaint was arbitrable, and that, consequently, we must reverse the trial court's judgment enforcing the arbitrator's award of damages to the Firm regardless of whether the arbitrator's decision was correct on the merits. We disagree.

Flannery's argument is based on the principle that questions of arbitrability "are reserved for the court unless the parties clearly and unmistakably delegate them to the arbitrator." (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1439 (*Peleg*).) In this case, the retainer agreement between Flannery and the Firm contained no provision dictating who should decide arbitrability. According to Flannery, therefore, arbitration could not proceed until the trial court made a ruling on the arbitrability of the cross-complaint.

This misinterprets the case law. The court in *Peleg* relied on the United States Supreme Court's statement in *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938 (*First Options*) that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability

unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." (*Id.* at p. 944, quoted in *Peleg*, *supra*, 204 Cal.App.4th at p. 1439.) But the Supreme Court did not therefore conclude that, in the absence of an agreement to the contrary, the trial court must first rule on arbitrability before arbitration may proceed. Instead, the Court held that an arbitrator's decision on arbitrability is "subject to independent review by the courts." (*First Options*, *supra*, 514 U.S. at p. 947.) Indeed, the Court in *First Options* presupposed that arbitrators had some authority to rule on arbitrability. The Court described the question it was trying to answer as follows: "[W]hether courts, in '*reviewing the arbitrators' decision on arbitrability*,' should 'apply a *de novo* standard of review or the more deferential standard applied to arbitrators' decisions on the merits.' " (*Id.* at p. 941, emphasis added.) The Court's holding was an affirmation of the de novo standard. (See *id.* at p. 947.)

Often, questions of arbitrability arise when a party files suit in the trial court, and the opposing party files a motion to compel arbitration. (See, e.g., *Hartley v. Superior Court* (2011) 196 Cal.App.4th 1249, 1253; *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 65-67 (*Rent-A-Center*).) Because of the procedural posture of these cases, the trial court rules on questions of arbitrability before the arbitrator has had an opportunity to make any rulings in the case. In these cases, the court must decide whether it has the authority to decide arbitrability, or whether it must defer the question to the arbitrator. When a court in this position states that " '[u]nless the parties clearly and unmistakably provide otherwise, the question of

whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator' " (*Rent-A-Center*, *supra*, 561 U.S. at p. 69, fn.1), the statement should not be interpreted as addressing cases in other procedural postures. In cases where a party files a complaint (or in this case, a cross-complaint) originally in arbitration, the holding of *First Options* applies: The arbitrator may make an initial determination of arbitrability, but unless the parties have clearly and unmistakably agreed to arbitrate arbitrability, the trial court reviews that decision de novo. (*First Options*, *supra*, 514 U.S. at p. 947.)

If we were to follow Flannery's position, the consequence would be that no cross-complaint in arbitration could be filed directly with the arbitrator, because in order to decide the cross-complaint, the arbitrator must necessarily decide that it is subject to the arbitration agreement. Indeed, Flannery argues that the Firm should have filed its cross-complaint with the trial court, then sought to transfer the case to arbitration, at which point the trial court would have determined the arbitrability of the cross-complaint. But in addition to having no support in statutory or case law, this procedure would compromise one of the primary advantages of arbitration, which is that it can "resolve disputes faster and cheaper than judicial proceedings." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 115, overruled on other grounds by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 344-346.)

By rejecting Flannery's position, we do not "deprive Flannery of [his] constitutional jury right by putting Flannery in a position of *fait accompli*." Flannery remained free to challenge the arbitrability

of the cross-complaint by filing, as he did, a petition to vacate the arbitration award in the trial court and the trial court correctly reviewed Flannery's argument on arbitrability de novo.

IV. *Refusal To Consider Evidence Outside The Complaint*

Flannery contends that the trial court erred by denying his petition to vacate the arbitration award in spite of the arbitrator's refusal to consider factual allegations Flannery raised outside the complaint. He argues that the trial court should have vacated the arbitration award on the ground that the arbitrator refused "to hear evidence material to the controversy." (Code Civ. Proc., § 1286.2, subd. (a)(5).) We disagree.

In the final arbitration award, the arbitrator noted that in the hearing and in his closing brief, "Flannery sets forth allegations against Respondents that are nowhere to be found in the Complaint." After listing these allegations, the arbitrator concluded, "While Flannery never sought modification of his Complaint, some of these additional complaints were addressed [in the arbitration]. To the extent that Flannery made allegations raised for the first time at the Arbitration that are not in the Complaint, this is prejudicial to Respondents, who had no notice of any such allegations outside those set for[th] in the Complaint."

We do not review the arbitrator's decision for most errors of law. "[A]wards may not be vacated due to such error because ' " '[t]he arbitrator's resolution of these issues is what the parties bargained for . . . .' " ' [Citations.] 'When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that

arbitrators, like judges, are fallible.' " (*Burlage v. Superior Court* (2009) 178 Cal.App.4th 524, 529 (*Burlage*).) In this context, Code of Civil Procedure section 1286.2, subdivision (a)(5) provides "a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case." (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439.)

In cases where a court has vacated an arbitrator's award pursuant to Code of Civil Procedure section 1286.2, subdivision (a)(5), it is typically because the arbitrator flatly refused to consider evidence relevant to the case, or allowed one side but not the other to present evidence on a point. For example, in *Royal Alliance Associates, Inc. v. Liebhaber* (2016) 2 Cal.App.5th 1092, 1108, only one party was allowed to offer oral testimony, and the opposing party was not allowed to cross-examine the witness who testified. The arbitration panel curtailed the testimony in part because the arbitrators did "not want 'to be here for another two hours.' " (*Id.* at p. 1109.) Similarly, in *Burlage*, the arbitrator excluded substantially all of the defendants' evidence, such that "the arbitration assumed the nature of a default hearing in which the [plaintiffs] were awarded $1.5 million in compensatory and punitive damages they may not have suffered." (*Burlage*, *supra*, 178 Cal.App.4th at p. 530.)

In this case, there is no evidence in the record that the arbitrator forbade Flannery from introducing the excluded evidence under any and all circumstances. Instead, the arbitrator excluded the evidence because Flannery attempted to introduce it without notice to respondents. The evidence in question apparently consisted of

testimony by Flannery's expert witness regarding ways in which respondents fell below the standard of care in their representation of Flannery. These allegations were not included in the original complaint, and Flannery did not seek to amend the complaint to include them. Nor did the expert include these allegations in his deposition. The arbitrator's decision to exclude the evidence in order to avoid surprise and prejudice to respondents was within her authority to "rule on the admission and exclusion of evidence and on questions of hearing procedure." (Code Civ. Proc., § 1282.2, subd. (c).)

DISPOSITION

The judgment of the trial court is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.