UNDER CONSTRUCTION
THE NEWSLETTER OF THE ABA FORUM ON CONSTRUCTION LAW

Private Arbitration Appellate Procedures: An Upgrade or Further Blurring the Line between Litigation and Arbitration?

Vol. 18 No. 2

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To quote L. Frank Baum in *The Marvelous Land of Oz*, "Everything has to come to an end, sometime." So for many of us, the limited ability to appeal an arbitration decision is considered one of its virtues. Even if we might disagree with an arbitration decision, the limited right to appeal allows our clients to more quickly put a dispute behind them and get back to their business.

Indeed, state and federal statutes and case law have repeatedly made clear that a judicial appeal of an arbitration decision will only be permitted in the narrowest of circumstances. Congress explicitly defined those narrow circumstances in Sections 10 and 11 of the Federal Arbitration Act (FAA). 9 U.S.C. §§ 10-11. The FAA only allows vacatur for corruption, fraud, undue means, evident partiality, misconduct or exceeding the arbitrator's powers. Modification is allowed only for an evident miscalculation of figures or material mistake in an award description, awarding upon a matter not submitted, or an imperfection in a non-material way. Many state statutes and related case law follow the FAA's approach, enforcing similar restrictions on the right to judicial appeal. In essence, the grounds for appeal do not address the underlying merits – if the arbitrator got the law wrong or made factual rulings with no basis, absent proof of the grounds listed above, the losing party's hands are tied.

This explicit limitation was crystalized by the Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[1] In determining that the FAA provides the *exclusive* grounds for appeal, the Court made clear that parties cannot draft around the FAA with dispute resolution clauses that add further grounds for appeal.[2] This

Under Construction, Winter 2016
Under Construction, Spring 2016
Under Construction, Summer 2016
Under Construction, Winter 2017

Under Construction

Under Construction is published three times per year by the ABA Forum on Construction Law. The publication offers practical information on the latest developments in the practice of construction law.

Under Construction is published by the American Bar Association Forum on Construction Law, 321 N. Clark Street, Chicago, IL 60654. Manuscripts submitted for consideration should be sent to the attention of the Editor, Jayne Czik. Email address corrections should be sent to the ABA Service Center. Requests for permission to reprint should be sent to the ABA's Department of

reading, the Court held, supported a "national policy favoring arbitration" with the limited review necessary "to maintain arbitration's essential virtue of resolving disputes straightaway."[3] To read the FAA any other way, warned the Court, would open the door to a scenario in which the arbitration process was "merely a prelude to a more cumbersome and time-consuming judicial review process."[4]

Given the solid statutory and judicial framework narrowing the circumstances for arbitration appeals, parties opting for arbitration generally know what they are getting into. Many select arbitration cognizant of a risk of an aberrant arbitration award, but deciding that the risk is worth the benefit of conserving the trial and appellate costs inherent with traditional litigation.[5] However, if the risk of an aberrant arbitration award is too great to bear, or parties otherwise decide they want access to an appeal process beyond what is provided for in the FAA or state statutes, most ADR organizations have created optional internal appellate arbitration procedures. For example, the International Institute for Conflict Prevention & Resolution (CPR) began offering optional appeals in 1999, JAMS followed in 2003, and most recently the American Arbitration Association's (AAA) Optional Appellate Arbitration Rules became effective in November 2013.[6]

Characteristics of the Optional Arbitration Appellate Process

Although some of the specific features of the CPR, JAMS and AAA's optional arbitration appellate processes vary, they have several common characteristics. First and perhaps foremost, they are both entirely optional and require the agreement of all parties. Because it is unlikely that the parties will agree to appeal *after* an award issues, the option for appeal should be incorporated into a dispute resolution clause or arbitration agreement.[7] In essence, by availing themselves of the appellate option, the parties agree that upon notice of the appeal the underlying arbitration award is not final for the purpose of judicial enforcement, vacatur or modification during the internal appeal process and the time period for judicial enforcement is tolled.[8]

The procedures all provide for the selection of a three-arbitrator tribunal or panel (or a single arbitrator if the parties agree) which is administered by the ADR organization.[9] The procedures allow for a notice period for the appeal, briefing and possible oral argument, and end with a written decision.[10] In the event of three-arbitrator panels, majority rules, although the AAA provides that the parties' agreement could require unanimity.[11]

The appeal procedures attempt to address concerns about prolonging the time for a final decision. For example, none allows the appellate panel to remand the decision.[12] The CPR instructs its panel and parties to use their "best efforts to avoid delay" and assure that the process is complete in six months.[13] While the CPR

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allows oral argument if any party requests it, JAMS only allows it when all parties request it or on the panel's own initiative, and the AAA provides that oral argument is not presumed unless the panel schedules it.[14] After submission of the appeal to the panel, JAMS and the AAA require decisions within 21 and 30 days, respectively.[15] Although under the JAMS rule the briefing schedule is left flexible to the parties and panel, the AAA appeal procedure is more rigid and could be completed 3 months from the date of notice without any delays or extensions.[16]

The grounds for reversal have similarities, especially between the CPR and AAA. Generally speaking, the decision must be based upon findings of fact which are clearly in error and unsupported by the record.[17] Errors of law must be material and prejudicial, with the CPR adding that the decision must "not rest upon any appropriate legal basis."[18] JAMS simply provides that the standard of review is the same as would be applied by the first-level appellate court to a trial court decision in that jurisdiction."[19]

The procedures vary in how they apportion the costs of the appeal and attorneys' fees in the event of an unsuccessful appeal. The CPR raises the stakes by providing that the panel *shall* require an unsuccessful appellant to reimburse the appellee's arbitration costs and attorneys' fees unless it orders otherwise.[20] The AAA provides that the appellant may be assessed costs and attorneys' fees but only if a statute or the parties' contract provides for it.[21] The AAA also requires an appellant to pay its $6000 administrative fee plus all the cost and fees for the panel, although if there is a cross-appeal the panel's costs and fees will be shared.[22] The JAMS procedure is silent as to apportioning costs for an unsuccessful appeal, though parties presumably could include a fee shifting provision in their agreement.

Is an Optional Arbitration Appellate Process Right for your Client?

Arbitration has been criticized by practitioners and authors as becoming too much like litigation, causing some to call the modern day arbitration process, "arbigation." The incorporation and increased use in arbitration of pretrial motions and discovery procedures characteristic of traditional litigation have likely fueled these critics' arguments. Adding an additional appellate procedure to the end of arbitration may be perceived in this vein, and perhaps rightly so. Indeed, one can see why features like this could undermine what the Supreme Court called in *Hall Street*, arbitration's "essential virtue of resolving disputes straightaway."[23]

However, even a skeptic may want to consider the option of appeal in some circumstances. First of all, if the concern of an aberrant arbitration is so real that a client is dissuaded from using arbitration altogether, the option of an appeal should be discussed, especially if arbitration is otherwise appealing. This may be

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particularly true for high stakes disputes or perhaps where a highly complex or unique issue is at hand.

Appealing within the arbitration process would allow the parties to maintain confidentiality and is still likely to be faster than a judicial trial and appeal. A satisfactory arbitration appeal process could even cause the parties to opt not to pursue a judicial appeal, even if they believed they had grounds for one. One other practical benefit is that it could potentially *reduce* the time and costs of the underlying arbitration if, by having the option of an appeal, the parties could be comfortable submitting their arbitration to a less costly single arbitrator rather than a panel.

Arbitration Appellate Process in Practice

All that being said, a review of articles written about the procedures and an informal survey of a number of construction lawyers reveal a healthy amount of skepticism about adding an appellate process. Indeed, the use of the procedures seems to be the small exception rather than the norm. The AAA reported that since introducing the procedures in 2013 they have only been used twice and neither was a construction case. JAMS and CPR similarly indicate they handle only few arbitration appeals each year. Nonetheless, they expressed pride in the ability to offer a "client-driven," optional appeal process as part of their menu of offerings. Even parties that do not administer the underlying arbitrations with one of the ADR organizations may still elect to bring an underlying arbitration decision to one of those organizations for the administration of the appeal.

If contemplating an appeal option, in addition to the potential for added cost and time, practitioners should carefully consider the timeframe for the appeal, how it may impact the underlying arbitration including the award and record, and whether they want fee-shifting provisions in their agreement. Parties that have selected the option of an appeal should also be mindful of it during the underlying arbitration: first, by creating an arbitration record that the panel could review in the event of an appeal, including making arrangements for a transcript, and second by requesting a reasoned award.[24]

Conclusion

Whether you should consider an optional arbitration appeals process for your clients will depend on the parties, the nature of the contract or dispute and the parties' reasons for opting for arbitration in the first place. In practice, it appears that most practitioners do not select the arbitration appellate route, perhaps in large part because of the belief that it would undermine the very efficiency that makes arbitration appealing. However, parties that do want to consider an optional arbitration appeal should weigh a number of factors that could ultimately impact how satisfied they are with the process.

Endnotes

1. 552 U.S. 576 (2008).

2. The parties' arbitration provision provided that the District Court could vacate, modify or correct any award where the arbitrator's findings of facts were not supported by substantial evidence or where the conclusions of law were erroneous. *Id.* at 579.

3. *Id.* at 588.

4. *I*d.

5. For helpful ideas to minimize the risk of an irrational award apart from adding an appeals procedure, see the Commentary in CPR's Arbitration Appeal Procedure and Commentary found at http://www.cpradr.org/Portals/0/CPRArbitrationAppealProcedure2015.pdf.

6. The International Court of Arbitration of the International Chamber of Commerce does not provide for an optional appellate process. For a discussion of that provider's pre-mediation and post-mediation "double-checks", and a more detailed discussion of arbitration appeals generally, see "What's the Appeal of Arbitration? Overturning Arbitration Awards and the New Appellate Rules", by John Bulman, Katherine Kohm & Benton Wheatley, presented at the ABA Forum's 2015 Fall Meeting.

7. See CPR Arbitration Appeal Procedure and Commentary (I).

8. CPR Rule 2.3, 2.4; JAMS at (C); AAA at A-2(a).

9. CPR Rule 4.1; JAMS at (A); AAA Rule A-5(c).

10. CPR Rules 3, 7; JAMS at (B)(i)-(v), (D); AAA Rules A-3, A-15, A-17, A-19.

11. CPR Section (d); JAMS Rule 8.4; AAA Rule A-19(a).

12. CPR Rule 8.2(b); JAMS at (D); AAA Rule A-19.

13. CPR Rule 9.

14. CPR Rule 7.4; JAMS at (B)(iv); AAA Rule A-15.

15. JAMS at (D); AAA Rule A-19(a).

16. As a practical matter, it seems likely that some delays or extensions will cause this period to be longer. Regardless, the parties should be prepared for a swift briefing period.

17. CPR Rule 8.2(a); AAA Rule A-10.

18. *Id.*

19. JAMS at (D).

20. CPR Rule 12.

21. AAA Rule A-11.

22. AAA Rule A-12.

23. *Hall Street*, 552 U.S. at 588.

24. CPR Rule 1.3; JAMS at (B)(iii); AAA Rule A-16.

Special thanks to the AAA, JAMS and CPR for their assistance.