Is that Your Final Answer? Appeals of Arbitration Awards

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For the last twenty years, there has been an increased emphasis on the use of alternative dispute resolution mechanisms in America. It is not hard to understand why. As discovery costs have increased and court dockets have become more crowded, it can seem that even the seemingly simplest civil dispute can take on a life of its own. In contrast, arbitration has a reputation as "litigation lite" taking less time and costing less than traditional litigation.

It is no surprise then that litigants have often sought to avoid becoming entangled in a Dickisonian *Jardyce v. Jardyce* – interminable litigation with ever escalating costs that leave the litigants ground to dust. However, as with all things in life, the benefits that come with arbitration can be counterbalanced by increased risks as well. One of those downsides is the inability to obtain meaningful review of an arbitrator's decision. This article will discuss the issues of limited appeal rights in arbitrations as well as some alternatives that could increase the chances an arbitrator's opinion will be reviewed.

I. Alternative Dispute Resolution in a Nutshell

Alternative dispute resolution ("ADR"), typically takes two forms – mediation and arbitration. Mediation is simply a process where parties in a dispute use a disinterested third party to attempt to facilitate settlement. The mediator cannot dictate an outcome to the parties – rather the parties must reach an agreement. In contrast, arbitration results in a binding decision that is enforceable by the courts.

Arbitration is fundamentally a matter of contract between the parties. As a result, the terms of the arbitration clause(s) have a great effect over the terms of the dispute. It should be noted that because policy favors arbitration, once a clause is included in a contract, courts will generally resolve any doubts about the application of an arbitration clause in favor of arbitration. In short, if there is an arbitration clause in the agreement, in all likelihood, the

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litigants will be in arbitration, even if one party later changes its mind about the selected method and forum for disputes. (It is possible that some types of tort claims are not subject to arbitration if they are not sufficiently related to the underlying contract, but those and other limited exceptions are not relevant for purposes of this article.)

Typically, an arbitration clause will designate the location, number of arbitrators, a governing body and set of arbitration rules – for example the American Arbitration Association. The governing body will typically have procedural rules that govern selection of the arbitrator, and what, if any discovery and pre-hearing procedures will be utilized. Generally, the arbitrator(s) have great discretion over pre-trial matters although the arbitration agreement can set out some minimum standards. Sometimes discovery can be fairly extensive, but in most cases is more limited than in traditional litigation.

This same informality tends to apply in the actual hearing. Arbitrators may, but are not required to, apply rules of evidence (unless the agreement calls for it). Even if rules of evidence are followed, the adherence to the rules is not necessarily strict, since the hearing is in essence a bench trial. Typically evidentiary rulings during arbitration will not form the basis for setting aside a ruling unless the evidentiary ruling violated a parties' fundamental right to a fair hearing (a high burden).

Once an arbitrator has issued a ruling, the winning party may submit the award to a court of competent jurisdiction. The court will enter a judgment on the arbitration award. From that point on, the judgment is collected in the same manner as if it had been rendered in the court system. The careful reader will note that with some variation, this process seems very similar to traditional litigation, with one exception – how do you appeal an adverse ruling by the arbitrator?

II. Limitations on Review Rights

The Federal Arbitration Act[1] provides that the grounds for vacation of an arbitral award are (1) corruption, fraud, or undue means; (2)

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evident partiality or corruption; (3) misconduct in refusing to postpone the hearing (upon sufficient cause shown), in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or (4) the arbitrators exceeding their powers, or so imperfectly executing them that a mutual, final, and definite award upon the subject was not made. 9 U.S.C.A. §10. In addition to the statutory grounds above, federal courts have vacated an arbitration award if they find a "manifest disregard of the law" on the part of the arbitrators. *See, e.g. St. Lawrence Explosives Corp. v. Worthy Bros. Pipeline Corp.* 916 F. Supp. 187 (N.D.N.Y. 1996).

In short, in order for the dissatisfied party in an arbitration to successfully challenge the arbitral award, the party must prove at least one of the types of misconduct described above. The most common grounds for appeal is that of claiming that the arbitrator manifestly disregarded the law. In order to prove manifest disregard of the law, the error by the arbitrator must have been obvious and capable of being readily and instantly perceived by an average person qualified to serve as arbitrator – the implication being that the arbitrator appreciated the existence of clearly governing legal principle but decided to ignore it. *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Intern., Ltd.*, 888 F.2d 260 (N.Y. 1989). Further, the governing law alleged to have been ignored must be well defined, explicit, and clearly applicable. *St. Lawrence Explosives* at 187.

In general, the award of the arbitrators cannot be set aside for errors of law or fact except where those errors are so gross as to suggest fraud, misconduct, bad faith, a manifest disregard for the law, or a violation of public policy, or so great as to prevent a full and fair exercise of the judgment of the arbitrators. 4 Am. Jur. 2d § 207. Because the courts will not revisit the facts of the case, if the court believes that the arbitrator believed the law to be inapplicable, the award will not be vacated. In order to prevail, a party seeking to set aside an award would likely be forced to rely on the transcripts of the arbitration to prove that an average person qualified to serve as arbitrator would have readily and instantly perceived this failure to consider the law as an error.

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It is obvious that the burden of proving the manifest disregard of the law is high. Because courts are admonished to facilitate and encourage the use of arbitration, proving misconduct severe enough to justify vacating an award is difficult. Another consideration is that if a party was successful in meeting this burden and the award is overturned, it very well may be forced to undergo additional arbitration proceedings with the same arbitrator to correct the deficiencies of the initial arbitration proceedings – which could result in the same practical outcome.

III. Alternatives to Preserve Review Rights

In the past, some arbitration agreements included provisions that expanded the grounds upon which courts could vacate an award. For some time, there was uncertainty about the enforceability of such clauses. However, the Supreme Court ultimately held that parties may not expand on the statutory grounds for challenging arbitration awards. In short, statutes trump private agreements. *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

Given the fact that review of an award is extremely limited once the arbitration process is complete, parties who wish to build in some review component to the dispute should do so within the arbitration structure itself. For example, parties can, in their arbitration agreement, provide that arbitrators submit draft opinions for comment. In this way, parties at least have the ability to point out factual or legal errors prior to the award being handed down. However, this process has the drawback of rearguing points to an arbitrator who has already rejected a party's position. Thus, such an approach is more likely to correct clerical or other non-controversial mistakes than address disputes on the merits.

To address the issue of substantive review, parties should include provisions in their arbitration agreement for an award to be reviewed within the arbitration process itself before a final award. For example, under JAMS arbitration rules, parties may agree to an "Optional Arbitration Appeals Procedure." This process would be utilized prior to the award becoming final. Any initial award would be subject to a panel review of three neutrals. The process would be very similar to that of an appellate court. Review would be limited to

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evidence presented at the original hearing, but parties could also present legal briefs and oral argument. The panel would apply a review standard in the same way as an appellate court would. The decision of the appeal panel would then become the final arbitration award.

In short, if parties want substantive review on the merits of an arbitration award, their arbitration agreement should provide for it and either reference the review procedure of the governing body or otherwise spell it out in the agreement. Otherwise, parties in arbitration should not expect a second bite at the apple.[2]

IV. Striking the Balance

As noted above, parties have dealt with the tension in arbitration – the desire for quick decisions and finality versus the risk inherent in the limited review – in different ways. In many ways the size and scope of the dispute can dictate how one views the cost benefit of arbitration. The smaller the dispute, the higher the value one places on speed and finality. The larger the dispute, the greater value one would place on the availability of some post-hearing recourse.

1 Most states, including Tennessee, have arbitration statutes that have similar limitations for vacation of an award. In Tennessee an award can be vacated for (1) corruption, fraud or other undue means; (2) evident partiality by an arbitrator or corruption or misconduct prejudicing a party; (3) arbitrators exceed powers; (4) refuse to postpone upon sufficient cause shown and; (5) no arbitration agreement on issue. T.C.A. 29-5-313(a)(1-5). Awards can also be modified or clarified to correct clerical errors or other areas not affecting the merits. T.C.A. 29-5-314, 315(a)(1-3).

2 Credit for detailing the alternatives to appeal go to David Zaslowsky in his excellent article "Litigation: Ways to Appeal Arbitral Awards"

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