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ARBITRATION APPEALS

A Safety Valve That Is Fast, Fair, Cost-Effective and Final

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Arbitration provides a toolbox of dispute resolution options that are quicker, more targeted and less expensive than litigation. However, formal and informal surveys reveal that one important component of this toolbox is unknown or misunderstood by corporate and outside counsel: the parties' contractual right to appeal the final award, "on the merits," to a panel of seasoned and knowledgeable appellate arbitrators.[1] In fact, the cumulative experience of JAMS' appellate neutrals proves that appellate arbitration is a fast, fair, final and cost-effective dispute resolution option that provides parties with the reassurance that they can have "another set of eyes and ears"[2] review their arbitration awards.[3]

Contracting for the Private Right of Appeal

A widespread but mistaken belief that there is no appellate remedy for erroneous arbitration awards is often cited as one of the chief negatives of arbitration.[4] This misunderstanding likely stems from the fact that the Federal Arbitration Act (FAA) and many state arbitration statutes provide few grounds for judicial relief from a final arbitration award.[5] Indeed, the FAA does not allow for any judicial appellate review of an award, even by agreement of the parties.[6]

Nevertheless, neither the FAA nor state arbitration codes prohibit parties from contracting for the right to appellate review of an arbitration award via a private panel of appellate arbitrators. Parties may agree to this option in their original arbitration agreement or by written stipulation at any time after a dispute arises.[7] JAMS suggests the following model contract provision: "The Parties adopt and agree to implement the JAMS Optional Arbitration Appeal Procedure" with respect to any arbitration award "arising out of or related to this [arbitration] agreement."[8] JAMS' arbitration rules also allow parties to "agree at any time" during an arbitration to adopt the JAMS optional appellate procedures as an optional remedy in that proceeding.[9] Including such an option in an arbitration does not mean that it will be used, but given humankind's undeniable proclivity to err, parties approaching an arbitration hearing may be comforted by the existence of a contractual backstop to guard against the risk of arbitrator mistakes.[10]

A Fast and Final Appellate Process

Some speculate that allowing appellate scrutiny of arbitration awards would "frustrate the purpose of having an arbitration at all — the quick resolution of disputes and the avoidance of the expense and delay associated with litigation."[11] The experience of JAMS' appellate arbitrators proves otherwise: Parties may enjoy the peace of mind provided by appellate review, as well as receive a quick and final arbitral award, free of the delays caused by the lengthy appeals and retrials that plague litigation.[12] In a JAMS appeal, there are no crowded appellate dockets, motion practice or many months of delay for briefing, oral argument

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and waiting for an appellate decision.[13] Brevity is baked into the JAMS appeals procedure. An appeal must be filed within 14 days of a final award; any cross-appeal must be filed seven days thereafter. The arbitrators are selected promptly, and the parties are required to provide the record on appeal. The parties must agree on, or JAMS will establish, a reasonably abbreviated schedule for briefing and possibly oral argument. Finally, the panel must issue its decision 21 days after the receipt of the record and all briefs or oral argument, whichever occurs later, unless the parties agree otherwise.[14]

In addition, the finality of JAMS' appellate review may surprise those used to remand as the reward for reversal of judgment on appeal, or those who lament that statutory award vacatur may result in an arbitration rehearing or referral to *de novo* litigation.[15] Instead, JAMS' procedures prohibit remand for further hearing or "retrial" and limit the appellate panel's authority to either affirming, reversing or modifying an award.[16] Even if a panel reopens the record to receive evidence excluded in error, at most, the panel will issue a new final award.

Cost Savings

Parties may avoid arbitration appellate review to save money.[17] That is unfortunate, as parties can preserve their appellate option in arbitration and still achieve significant cost savings, especially compared to litigation appeals. First, time is money, especially in an industry like construction, where any delay can escalate the cost of a project.[18] So correcting an error on the expedited timetable of a JAMS appeal can save parties money, both directly and indirectly.[19] Second, the activities necessary for this appellate process can be abbreviated by agreement of the parties or at the direction of the panel, with limited briefing and waiving oral argument.[20]

Third, in the right kind of case, the parties can agree to an interlocutory appeal of a key issue, such as insurance coverage or whether the parties have liability to one another, before incurring any further costs associated with proving the amount of loss or damages.[21]

Finally, even more cost savings can be realized before the parties reach the point of appeal, as their knowledge that any award will be reviewed by highly experienced appellate arbitrators has been used to justify using one arbitrator—rather than the three called for by contract—to decide the underlying case.[22] Obviously, using one arbitrator to manage and hear a dispute will save roughly two-thirds of the panel cost of the underlying arbitration. These savings should exceed the relatively limited cost of the appellate panel. Because appeals are optional, it is possible a party will not appeal and thus not incur any additional costs.

A Fair and Just Review

The standard of review is an important issue to consider when contracting for the right of appeal. While it is possible for parties to contractually define the standard of review, absent such a stipulation, JAMS' appellate procedures provide: "The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision."[23] JAMS' appellate panels are comprised of highly experienced former jurists and appellate practitioners. Thus, any appeal will be accorded the same standard of review and quality of scrutiny as a judicial appeal.

In addition, the parties may participate in selecting each member of their appellate panel and may require neutrals who "speak the language" and have the legal and substantive knowledge best suited to their dispute.[24] This advantage over litigation is particularly important in complex or technical arbitrations.

The right to customize the appellate process itself is another plus. JAMS' appellate arbitrators agree that arbitration appeals need not follow any hard-and-fast rules. If the parties and panel need several hours of oral argument, they may so agree.[25] If the panel needs additional information after initial briefing or argument, it may request it. If the panel needs clarifying evidence to supplement the record, it may obtain it. If the parties want the results of the appeal to remain confidential, they may so agree.

Fairness is more than procedural flexibility or a broad standard of review. Fairness requires a consideration of the underlying award free from constraint or prejudice, even if an award was issued by a JAMS colleague. On this point, JAMS' appellate neutrals are adamant and in agreement. Regardless of whether the members of a panel know the arbitrator whose award they are reviewing,[26] they will not hesitate to reverse or disagree with that neutral's decisions, when the evidence and law so require.[27] Many, as former appellate judges, have learned from experience to set aside any temptation to be less than rigorous in reviewing decisions of fellow JAMS neutrals.[28] As one stated, it is their ethical obligation and ingrained into their character to "never be afraid to do what is right."[29]

One of the most important tools provided by JAMS' arbitration rules and guidelines is the optional remedy of a prompt, private right of appeal to experienced, personally selected appellate specialists. Parties may rightly decide that arbitration of certain disputes would be too risky to undertake without such an option. In summary, by assuring review of awards finally, quickly, inexpensively and fairly, "appellate arbitration enhances the benefits of arbitration itself."[30]

See footnotes on following page.

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1. Bryan Cave Leighton Paisner LLP conducted a survey of corporate counsel, advocates, arbitrators and academics in 2020 (BCLP Survey) concerning arbitration appeals. *See https://www.bclplaw.com/images/content/1/8/v2/186066/BCLP-Annual-Arbitration-Survey-2020.pdf.* Survey participants admitted they were concerned about the risk of erroneous arbitration awards, but they also believed that appellate relief was either unavailable or would impair finality and cause delays or increase the cost of arbitration. They also raised concerns about the fairness of possible review processes.
2. Per JAMS appellate arbitrator J. Gail Andler, Ret. (J. Andler): In the right kind of case, parties welcome the option of "another set of eyes and ears" as a "safety net" in arbitration.
3. Indeed, the ability to appeal an arbitration award may enhance the fairness of the arbitral process, providing an answer, among others, to concerns that a particular contractual arbitration clause appears unjust, per JAMS appellate arbitrator J. Stuart Palmer, Ret. (J. Palmer).
4. According to the BCLP Survey, "Some believe that the finality of arbitration undermines the legitimacy of the process, as there is no relief from error."
5. *See, e.g., Patton v. Signature Insurance Agency, Inc.,* 441 F.3d 230, 234 (4th Cir. 2006). In *Hall Street Associates, LLC. v. Mattel Inc.,* 552 U.S. 576 (2008), the U.S. Supreme Court limited vacation of an award to statutory grounds such as "evident impartiality," "fraud," "corruption," refusing to hear "pertinent and material" evidence and acts exceeding the powers of the arbitrator.
6. *Hall Street Associates, supra.*
7. For a scholarly discussion of the legal bases for contractual, legislative and other ways of overcoming concerns about the limited standards of review allowed for most arbitration awards, *see* Philip L. Bruner, *The Appeal of Appellate Arbitration*, in 35 INTERNATIONAL LAW REVIEW, Pt. 4, 436, 444 *et seq.* (2018) (Bruner)
8. CPR and the AAA have their own, slightly different model contract language and rules.
9. *See, e.g.,* Rule 34 of the JAMS Comprehensive Arbitration Rules and Procedures.
10. Per J. Palmer.
11. *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.,* 142 F.3d 188, 193 (4th Cir. 1998). Finality of an arbitration award is cited in the BCLP Survey as an important reason parties favor arbitration.
12. Per JAMS appellate arbitrator J. Ronald Cox, Ret. (J. Cox).
13. Per JAMS appellate arbitrator J. Ignazio Ruvolo, Ret. (J. Ruvolo).
14. J. Andler describes these rules as a "fast-track process."
15. *See Enforcement of the Arbitration Award and Limited Rights of Appeal,* in ARBITRATION AND THE SURETY, 79, 80 (A. Belleau, et al., eds. Am. Bar Ass'n 2020) (after vacatur of an arbitration award, the remedy is often no better than a costly "do over").
16. Per J. Andler.
17. *See, e.g., MACTEC, Inc. v. Gorelick,* 427 F.3d 821, 829-30 (10th Cir. 2005).
18. Per J. Cox.
19. For example, as JAMS neutral Philip L. Bruner explained, "Having served as chair of a JAMS appellate arbitration tribunal reviewing an award issued by a non-JAMS arbitrator, my tribunal was able to correct an important error of law on the record and issue the final award within three weeks after receiving the record and counsel briefs." Bruner, pp. 447-48.
20. Per J. Andler.
21. Per JAMS appellate arbitrator J. Nancy Wieben Stock, Ret. (J. Stock).
22. Per J. Stock. The idea of having one arbitrator decide the case with the right of appeal to a tripartite panel is also a formula adopted by the European Court of Arbitration. *See Attempts to Set Aside an Award,* in THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 216, 217 (Margaret L Moses, 3rd ed. 2017).
23. JAMS, CPR and AAA have slightly different standards of review.
24. Per J. Cox.
25. Per J. Andler.
26. Parties can require that the appellate panel member do not work with or come from the same part of the country as the underlying arbitrator as part of the panel selection process.
27. Per J. Palmer.
28. Per Ruvolo, "Any appellate arbitrators who might have a concern about how their ruling may affect a colleague below need to recuse themselves, as the parties are entitled to have the appellate panel consider the case completely independent of the underlying arbitrator(s)."
29. JAMS appellate arbitrator J. Richard Suarez, Ret.
30. Per J. Stock.