

**PRACTICE POINTS**

# Getting the Arbitration that You Want: Appeals? Really?

Tips for post-arbitration review

By Conna A. Weiner – June 8, 2018

Commercial arbitration sometimes gets a bad rap for seeming to be no less expensive or lengthy than a court proceeding, and well, arbitrary. The accuracy of these criticisms often is inadequately explored, and there are many things that can be done to make business arbitration the efficient and fair process that it should be: some can be previewed in an article the author of this Practice Point wrote with United Technologies Litigation Chief Steven Greenspan: “[Reassessing Commercial Arbitration: Making It Work for Your Company](#),” published in *ACC Docket*, Association of Corporate Counsel, March 2017, pp. 53–61.

This Practice Point briefly addresses what some practitioners find particularly alarming: the narrow grounds available under the Federal Arbitration Act for vacation of an arbitration award. See [9 U.S. Code § 10](#). Since most arbitrations are governed by the FAA, a commonly held view is that parties will be stuck with a “runaway” arbitration award if they agree to arbitration. Judicially created exceptions that are only available in some jurisdictions based upon “manifest disregard for the law”—sometimes justified as a gloss on the vacation ground in the FAA based upon an arbitrator exceeding his or her powers - provide insufficient comfort. (For a general discussion, see Liz Kramer’s “[Arbitration Nation](#)” blog).

As discussed in the [ACC Docket](#) article cited above, there are many things that practitioners should do in connection with structuring their arbitration and arbitrator selection to ameliorate arbitration risks. Beyond that, however, attorneys should be aware of and explore with their clients at least two additional options:

## 1. Optional Arbitration Appeal Procedures

The major alternative dispute resolution providers—the American Arbitration Association (AAA), JAMS, and the Institute for Conflict Preservation and Resolution (CPR)—are well aware that attorneys sometimes avoid arbitration altogether because of the appealability concern. Starting with CPR in 1999, and followed by JAMS in 2003 and the AAA in 2013, each have adopted optional appellate rules—with varying procedures and standards of review—pursuant to which parties can agree in their arbitration clauses or later to provide for an appeal to a panel of senior arbitrators and avail themselves of an expanded standard of review by that panel on a reasonably expedited time frame. The rules, along with other model clauses and forms, are readily available on the provider websites, [www.cpradr.org](http://www.cpradr.org), [www.adr.org](http://www.adr.org) and

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[www.jamsadr.com](http://www.jamsadr.com). Under the JAMS procedures, the arbitration appeal panel applies the same standard of review that the first-level court in the jurisdiction would apply to an appeal from a trial court decision. CPR and the AAA also permit expanded review of the factual and legal errors. Many attorneys may not be aware of these optional rules, but should be since it could impact their decision to pursue arbitration.

## 2. “The FAA is Not the Only Game in Town”

In *Hall Street Associates LLC v. Mattel Inc.*, 552 U.S. 576 (2008), the U.S. Supreme Court held that the FAA barred courts from honoring parties’ agreements to have courts review an arbitration decision for legal error where the FAA applied. The Court explicitly noted, however, that the FAA “is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.” *Id.* There are a number of options here. Carefully and expressly adopting in an arbitration clause a state arbitration statute which permits expanded judicial review beyond the grounds permitted by the FAA—and assuming the dispute has sufficient jurisdictional contacts with the state if that is required—may secure expanded judicial review of an award, for example. New Jersey is one such state (New Jersey Arbitration Act, N.J. Stat. § 2A: 23B-4c) and there are others, including Texas and California. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 98-101 (Tex. 2011) (“We hold that the FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the [Texas Arbitration Act]”); *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. 2008) (parties may structure their agreement to allow for judicial review of legal error under California Arbitration Act). An excellent summary of the potential terrain left open by *Hall Street*—with appropriate cautionary notes concerning the changing landscape—is available in “Writing Arbitration Clauses to Get the Arbitration You Want,” Merril Hirsh and Nicholas Schuchert, Law360 August 9, 2016 <https://merrilhirsh.com/writing-arbitration-clauses-to-get-the-arbitration-you-want/>. “As Hall Street suggests,” the authors note, “the Federal Arbitration Act is not the only game in town” and the current state of play is certainly worth exploring in your jurisdiction.

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