

Yes, You Can Appeal An Arbitration Award

Law360, New York (January 28, 2015, 10:01 AM ET) -- It is not possible to appeal an arbitration award to a court on the usual appellate grounds under federal or state law. Under the Federal Arbitration Act, which governs most arbitrations, a party may petition a court to modify or vacate an arbitration award, but the grounds are extremely narrow — basically that the arbitrator was corrupt, evidently partial, engaged in misconduct regarding evidence or scheduling, or exceeded his or her powers. Also, parties cannot expand the narrow FAA grounds by agreement as the U.S. Supreme Court clarified in 2008 in *Hall Street Associates LLC v. Mattel Inc.*

The finality of arbitration awards is often touted as one of the advantages of arbitration, saving parties both time and money. Parties considering arbitration as an alternative to litigation, however, may worry about the risk of arbitrator error in an award that cannot be appealed to an appellate court on familiar legal grounds. They may be especially concerned in “bet-the-company” cases or where they think the risk of error may be greater such as in highly complex or single arbitrator cases. In response to these concerns, several major arbitration providers offer parties an optional appeal within the arbitration process based on the parties’ agreement. CPR published its Arbitration Appeal Procedure in 1999; JAMS issued its Optional Appeal Procedure in 2003; and in 2013 the American Arbitration Association created its Optional Appellate Arbitration Rules.

CPR, JAMS and the AAA have rules for how, when and on what grounds parties may appeal an arbitration award. All three providers require a record of the original arbitration, prohibit the appeal tribunal from remanding to the original arbitrator(s), and include suggested language for parties wishing to agree to an appeal process. While these procedures have much in common, each has its own distinctive features, including the grounds for appeal which are different in all three.

Differences in CPR, JAMS and AAA Appeal Procedures

The CPR procedure is available to parties to any binding arbitration in the U.S., whether under CPR rules or otherwise, who agree to use it in their basic agreement or in a post-dispute arbitration agreement. Preconditions for an appeal are: the original arbitrator(s) were required to apply the law; a record of all hearings and evidence in the original proceeding exists; and the award includes written findings of fact and conclusions of law.

The Appeal Tribunal (appointed by CPR from its panel and limited to former federal judges) may modify or set aside the original award only on the following grounds: the award contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis; the award is based upon factual findings clearly unsupported by the record; or the award is subject to one or more of the grounds set forth in the FAA for vacating an award. CPR includes a fee-shifting provision requiring the

appellant to promptly reimburse the appellee's costs and attorney fees for the appeal if the tribunal affirms the original award, unless the tribunal orders otherwise.

The JAMS procedure provides for the same standard of review by the Appeal Panel (normally three JAMS neutrals) that the first-level appellate court in the jurisdiction would apply to an appeal from a trial court decision. Parties may agree at any time to the JAMS optional appeal procedure, including after the award is rendered. Appeals must be filed within 14 calendar days after the award has become final and cross-appeals must be filed within seven calendar days of service of the appeal. The panel may affirm, reverse or modify an award, and may reopen the record to review evidence improperly excluded or evidence now necessary in light of the panel's interpretation of law. Absent good cause for an extension, the panel will issue its decision within 21 calendar days of receipt of the record and briefs, receipt of the new evidence, or of oral argument, whichever comes last, and will issue a concise written explanation of its decision.

The AAA procedure requires that the parties by stipulation or in their contract provide for the appeal of an arbitration award. The award appealed may have resulted from an AAA arbitration or otherwise. Grounds for appeal are that the underlying award is based upon (1) an error of law that is material and prejudicial, or (2) determinations of fact that are clearly erroneous. An appellant/cross-appellant may be assessed costs and attorneys' fees if not determined to be the prevailing party. Unless the schedule is modified for good cause, the appeal tribunal shall render a decision within 30 days of service of the last brief.

Practice Tips

Parties worried about the risk of an arbitration award being both final and wrong may agree to arbitrate if the agreement includes an optional procedure to appeal to an arbitration tribunal through an arbitration provider. Parties wishing to agree to appeal under the CPR, JAMS, or AAA appeals procedures will need to consider: what sort of record of the arbitration hearing will be required; whether a written, reasoned award by the initial tribunal is required and what the grounds for appeal will be as the grounds are distinctly different in each provider's procedure. They should also consider the timeframes to agree to an appeals procedure and for triggering an appeal or cross-appeal; fee-shifting provisions, if any; and whether the award must be from the same provider.

When considering an appeal process, counsel should consider if their clients and opposing counsel and parties have differing arbitration knowledge and experience. Counsel and parties should thoroughly discuss the distinctly different appeal procedures offered by leading arbitration providers in determining whether such a procedure would be appropriate and, if so, which procedure would best serve their needs and likely be accepted by the other party.

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