Adding a Right of Appeal in Arbitration

Having an appeal process as part of an arbitration might help prevent irrational awards.

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Should there be appellate review as part of the arbitration process? At the present time, appellate review of arbitration awards is almost non-existent, although some commentators have expressed approval of such a mechanism. Paul Marrow, "A Practical Approach to Affording Review of Commercial Arbitration Award Chapter 41: Using an Appellate Arbitrator," AAA Handbook on Commercial Arbitration (2010); Saxe, "An Appellate Mechanism in Arbitration," (NYSBAJ, November/December 2013 pg. 44). A number of the larger alternative dispute resolution providers—the American Arbitration Association (AAA), JAMS, and the Institute for Conflict Preservation and Resolution (CPR)—have each adopted optional and varying appellate procedures with different standards of review to which the parties can agree to in their arbitration clauses or later provide for an appeal to a panel of arbitrators for an expedited review. See generally Conna A. Weiner, "Getting the Arbitration That You Want: Appeals? Really?"

These appellate mechanisms provide an opportunity to review errors of law that are material and prejudicial, or determination of facts that are erroneous. See Tracy T. Segal, "New Option to Appeal Arbitration Awards within the Arbitration Process."

The benefits of arbitration over litigation for dispute resolution is well accepted because arbitration is final, quick, efficient and results in cost savings.

Delay is cut short in the arbitral forum as opposed to court proceedings since the parties generally do not have to deal with clogged court calendars. The presentation of evidence is less formal—arbitrators rarely exclude testimony and do not as a rule operate as gatekeepers for excluding unreliable expert testimony. Additionally, arbitrators may have expertise in the area of the specific controversy and the proceedings are confidential.

Finality is often cited as one of the paramount advantage of arbitration. In New York as well as in the federal courts, an arbitration award may be vacated only upon limited grounds, such as a showing of corruption, fraud, misconduct or the partiality of the arbitrator. See generally CPLR §7511(b).

Case law in New York has established that even if the arbitrator makes a mistake of fact or law, or disregards the plain words of the parties' agreement, the award is not subject to being vacated "unless it is totally irrational" or "violates a strong public policy and therefore exceeds the arbitrator's powers. See *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146 (1995).

Practitioners seeking to challenge an arbitration award often rely on a claim that the award is in "manifest disregard of law." While federal decisions seem to recognize the doctrine, there is some dispute as to its viability as a ground for vacatur in New York (*Bank of Am. Svcs. V. Knight,* 4 Misc.3d 756 (Sup. Ct. N.Y. Cty. 2004)), although First Department cases appear to recognize the doctrine. See *Steyn v. CRTV*, N.Y.L.J. (1st Dep't July 5, 2019) (Renwick, J.); *Sawtelle v. Waddell & Reed*, 304 A.D.2d 103 (1st Dep't 2003).

Manifest disregard implies far more than error. For there to be manifest disregard, the arbitrator must first know the applicable law which must be well-defined and explicit and then refuse to apply it or ignore it altogether. *Bank of Am. Svcs*., 4 Misc.3d at 765).

Obviously the severe limitations on grounds to upset an award is reflective of the stated purpose of arbitration—to encourage disputes to be resolved with efficient finality.

But, is it fair? For years, as a state trial court judge and later as an Appellate Division Justice in the First Department, I regularly ruled on motions to confirm arbitration awards and accepted the litany of finality, which is the holy grail that surrounds an arbitration award. But now that I have resumed the practice of law, I have been surprised to see the frequency with which errors of law are made by arbitrators possibly because they are protected by the strict enforcement of finality.

Cases are legion involving the enforcement of arbitration awards and the inability of a court to vacate them even if there is a barely colorable justification for the result, or the award did not apply the clear majority view of certain principles of law, or simply was wrong on the law. See Marrow, supra, at fn. 5.

Since the grounds to vacate an arbitration award under federal or New York state law are so limited and since the failure of some arbitrators to simply follow the law causes some attorneys to pause before they recommend arbitration to a client, I propose that an internal appellate mechanism be developed within the arbitration process to deal with and correct these problems.

The creation of an appellate process must arise as part of the arbitration provisions in a contract. One suggested avenue is for the arbitration agreement to have a provision conferring appellate jurisdiction on a court. But, the case of *Hall v. Matell*, 552 U.S. 576 (2008) put that possibility to rest. The Supreme Court held that, for arbitration under the Federal Arbitration Act (FAA), the parties cannot authorize court review of an arbitration award beyond the level of review authorized by the Act.

While the Supreme Court noted that review of arbitration under other state statutes need not be so limited, in New York, CPLR Article 75's provisions allowing a court to review an award is as strictly limited as that of the FAA. See Saxe, supra fn. 11. Accordingly, if the arbitration

agreement is governed by New York law and the parties want the award to be reviewable for error of fact or law, that review should be provided by the arbitration tribunal itself pursuant to the arbitration agreement. My own personal view is that the appellate review be limited to errors of law and not encompass a de novo review of the facts presented.

Providing for an appeal to an appellate panel, as part of the arbitration agreement, has a number of advantages including the ability of the parties to structure the appellate process in order to maintain the benefits of speed and efficiency. Marrow, supra at 489.

Certain provisions should be included in the internal appeal process to insure that the process is concluded quickly. For example, the appeal should be initiated within 30 days of the underlying award through a standard notice of appeal specifying the alleged errors. Oral argument may be requested and the appellate arbitrators or tribunal should issue its decision within 30 days of oral argument or the submission of the last brief; the appellate arbitrators should have flexibility in issuing its awards—they should be able to adopt the underlying award as their own, issue their own award or even request additional information from the parties before issuing its review. In this regard, the AAA in its rules notes that the appellate panel may not order a new arbitration or remand to the original arbitrator for further review. See generally Segal, supra.

An appellate review will not necessarily eliminate the right or need for judicial review of the final arbitration award; it also may be possible to create a situation in which the arbitral appeal will be the only review mechanism.

Simplicity should be the guide post for creating an internal appellate review process so that the process does not become too costly. In creating the appellate review process, the following points have been suggested for inclusion in the parties' agreement (see Marrow, supra, at pg. 492):

- A statement of the arbitration law and the substantive law to be applied to any dispute to be resolved by arbitration.
- A requirement that all rulings by the arbitrator(s) shall be reasoned and in writing explaining the basis for the award and the principle facts and law on which it is based;
- A statement that a party may appeal an award to the appellate arbitrator or to the appellate panel (Appellate Arbitrator) only on the ground that the arbitrator (s) misapplied or misinterpreted the law;
- A statement that while and appeal is pending, no party shall enter judgement on the original award or seek vacatur as permitted by law;
- A declaration that the appeal to an Appellate Arbitrator is to be expedited pursuant to a set schedule; and
- A statement that the final ruling of the Appellate Arbitrator shall be final and binding.

Having an appeal process as part of an arbitration might help prevent irrational awards. Arbitrators might feel a greater measure of responsibility to follow decided law knowing that

their award will be subject to the scrutiny of an appellate arbitrator following customary standards of review employed by our immediate appellate courts when reviewing questions of law. This, in itself, may decrease resort to judicial review of the award. I suggest that an internal appeal mechanism should be far more available than it is now; if it was, it might have the effect, in my opinion, of encouraging non-users or reluctant users of arbitration to have a change of mind about its proper role and more importantly it would have the effect of promoting fairness in arbitration, certainly a worthy goal.

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