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Arbitration award appeals

THE PROCEDURES TO FOLLOW FOR A PRIVATE ARBITRATION ORGANIZATION'S *INTERNAL APPELLATE PROCESS*

Although arbitration awards are generally subject to extremely limited judicial review, many arbitration providers now offer optional internal appellate procedures that allow parties to seek review of an award within the arbitration process itself. Understanding this arbitration appellate option can help lawyers make more informed decisions about arbitration agreements and dispute resolution strategy.

When to appeal an arbitration award

Imagine you are representing a client in an arbitration. The law and the facts seem to be on your side, and all signs point to a decisive victory. Then the arbitrator issues the final award. Instead of a clean win, the award delivers your client a devastating loss. In your view, the arbitrator reached the wrong result – applying the wrong legal standard and making factual findings that do not square with the record. Your client is understandably frustrated.

The next question is obvious: Can we appeal?

Limited judicial review

In most cases, the answer is no – at least not in the way lawyers are accustomed to thinking about appeals. Courts reviewing arbitration awards generally do not revisit the merits of the dispute. As the California Supreme Court has explained, "generally, courts cannot review arbitration awards for errors of fact or law, even when those errors appear on the face of the award or cause substantial injustice to the parties." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916.)

This limited judicial review reflects a deliberate policy choice. Parties who agree to arbitrate often do so because they want a dispute resolution process that is faster, more flexible, and more private than traditional litigation. Restricting judicial review helps preserve those advantages. If courts routinely revisited the merits of arbitration awards, arbitration could begin to resemble ordinary litigation – with an additional layer of proceedings rather than a meaningful alternative.

Courts therefore frequently emphasize that arbitration involves a tradeoff. Parties gain procedural flexibility and efficiency, but they also accept that the arbitrator's decision will ordinarily be final. Judicial review exists primarily to ensure the integrity of the process, not to provide a second opportunity to challenge the merits of the dispute.

This emphasis on finality can create tension in practice. When a party believes an arbitrator misapplied the law or misunderstood the evidence, the instinct is often to look for a path to appellate review. Yet the narrow grounds for vacatur rarely permit courts to revisit those kinds of alleged errors. As a result, parties often discover that even egregious mistakes may not provide a basis for judicial relief.

Internal arbitration organization appellate process

The arbitration process, however, can include additional contractual safeguards designed to address potential errors. Several arbitration organizations have developed optional internal appellate procedures that allow parties, by agreement, to seek review of an arbitration award within the arbitration proceeding itself.

These procedures – often referred to as appellate arbitration – have existed for years but remain unfamiliar to many practitioners. Understanding the appellate option can help lawyers make more informed decisions when drafting arbitration agreements and advising clients about dispute resolution strategy.

Limited appellate review

Arbitration is a creature of contract. Because parties agree to submit their dispute to a private decisionmaker rather than a court, the arbitration process is defined largely by the terms of that agreement. Courts generally enforce the parties' choice by applying arbitration agreements according to their terms.

One consequence of this framework is the limited role courts play after the arbitrator issues a final award. Under the Federal Arbitration Act (FAA), for example, a court may vacate an arbitration award only in specific and narrowly defined circumstances. Those circumstances include where the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption on the part of the arbitrator; where the arbitrator is guilty of misconduct in refusing to postpone the hearing, refusing to hear material evidence, or engaging in other misbehavior that prejudiced the rights of a party; or where the arbitrator exceeded their powers or so imperfectly executed them that a final and definite award was not made. (9 U.S.C. § 10.)

California by statute similarly limits the grounds for judicial review of an arbitration award. Code of Civil Procedure section 1286.2 authorizes courts to vacate an award if the award was (1) procured by corruption, fraud, or other undue means; (2) issued by a corrupt arbitrator; (3) an arbitrator's misconduct substantially prejudiced the rights of a party; (4) the arbitrator acted in excess of the arbitrator's powers; (5) the arbitrator's refusal to postpone the hearing despite sufficient cause to do so or the arbitrator's refusal to hear material evidence; and (6) the arbitrator failed to disclose grounds for disqualifying the arbitrator or refused to accept disqualification when required to do so upon a timely demand. The grounds set forth in section 1286.2 provide the only basis for overturning an arbitration award in California. (*Moncharsh v. Heilly & Blasé* (1992) 3 Cal.4th 1, 33.)

Courts have repeatedly emphasized that this narrow scope of review is not accidental. Arbitration is intended to provide a streamlined alternative to litigation, and allowing courts to revisit the merits of arbitration awards would undermine that goal. If courts routinely reconsidered legal and factual determinations made during arbitration, the process could begin to resemble traditional litigation – only with an additional layer of proceedings.

Consistent with the limited role of courts, the parties under federal law may not broaden judicial review by contract. The U.S. Supreme Court made this clear in *Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, declining to enforce an arbitration agreement that would have allowed a court to review an award for legal error.

Some state laws, however, are to the contrary. The California Supreme Court, for example, interpreted the California Arbitration Act to allow judicial review for legal error if the parties to the arbitration agreement "make plain their intention that the award is reviewable for legal error." (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1361 [parties under the California Arbitration Act may obtain judicial review of the merits if they expressly agree that arbitrators who commit legal error act in excess of arbitral authority].) Although beyond the scope of this article, judicial review in this regard depends on the precise wording in the arbitration agreement and is discussed in several appellate decisions. (See e.g., *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2010) 182 Cal.App.4th 503, 518.)

Notwithstanding any inconsistent state laws, judicial review of arbitration awards focuses primarily on the fairness and integrity of the arbitration process rather than the correctness of the outcome. Courts ask whether the parties received the arbitration they agreed to, not whether the arbitrator reached the "right" result. Even when a reviewing court might have interpreted the contract differently or evaluated the evidence in another way, those differences generally do not provide a basis for vacating the award.

For example, the U.S. Supreme Court has held that "an arbitrator's error – even his grave error – is not enough" to correct the arbitrator's incorrect interpretation of a contract. (*Oxford Health Plans LLC v. Sutter* (2013) 569 U.S. 564, 572-573 ["The arbitrator's construction holds, however good, bad, or ugly"].) Similarly, the California Supreme Court has held that a final award could not be overturned even though the court concluded the arbitrator should have considered evidence of a settlement offer and modified its cost award. (*Heimlich v. Shivji* (2019) 7 Cal.5th 350, 367, 369 [an award may not be overturned "merely because arbitrators refuse to consider evidence they find legally irrelevant, even if the irrelevance determination rests upon an incorrect legal foundation"].)

This distinction can be difficult for parties to accept after a disappointing result, like the one described in the opening paragraph. In many disputes, the losing party believes the arbitrator misunderstood the facts or misapplied the governing law. Yet the narrow grounds for vacatur mean that such arguments rarely succeed in court. As a result, parties sometimes discover that the traditional judicial appellate process offers little opportunity to challenge an unfavorable arbitration award.

A reviewing court does not decide whether the arbitrator interpreted the contract correctly, applied the proper legal standard, or correctly weighed the evidence. Even when a court might have resolved the dispute differently, its role is typically limited to determining whether one of the recognized grounds for vacatur is present. Nuance may exist in some jurisdictions, but courts consistently emphasize the considerable deference given to arbitration awards.

The internal appellate arbitration option

In contrast to the limited role of the courts, several arbitration organizations offer internal appellate procedures. By way of example, and not an exhaustive list, JAMS, the American Arbitration Association (AAA), and Judicate West each maintain formal appellate procedures within the arbitration process, reflected in the *JAMS Optional Arbitration Appeal Procedures*, the *AAA Optional Appellate Arbitration Rules*, and the *Judicate West Appellate Rules*, all of which are available online.

Other organizations – including providers such as the International Institute for Conflict Prevention and Resolution (CPR) and National Arbitration and Mediation (NAM) – also offer appellate procedures. Lawyers should review the rules of any provider they are considering.

Appellate arbitration is a contractual mechanism that allows parties to seek review of an arbitration award within the arbitration system itself. Instead of asking a court to review the award on a petition to vacate, the parties agree that a different arbitrator – or group of arbitrators – will review the decision under procedures established by the applicable arbitration provider.

If the parties adopt a provider's appellate procedures as part of their arbitration agreement – or later agree to use those procedures in a particular arbitration matter – they may pursue an internal appeal after the arbitrator issues an award. The appeal proceeds within the confines of the arbitration process rather than through the courts.

In several respects, the process typically resembles a traditional appeal. The parties file a notice of appeal, submit written briefs identifying the alleged errors in the award, and the appellate tribunal reviews the record created during the arbitration proceeding. Depending on the provider's rules, the appellate tribunal may affirm the award, modify it, or issue a new award.

Although appellate arbitration procedures vary among providers, they generally share several structural features. The appellate arbitrator or panel is typically selected through procedures similar to those used for the original arbitration tribunal, allowing the parties to have input into the composition of the reviewing tribunal.

The appellate process also usually focuses on the record created during the underlying arbitration proceeding, including transcripts (if any) and exhibits. The parties submit briefs identifying the alleged errors in the award and explaining why the award should be affirmed, modified, or vacated under the applicable standards of review.

In many respects, appellate arbitration seeks to capture some of the benefits of appellate review while preserving the efficiencies of arbitration. The process is typically designed to move more quickly than traditional judicial appeals. Briefing schedules are often compressed, and oral argument – if permitted at all – may be limited. The objective is to provide meaningful review without undermining the speed and efficiency that lead many parties to select arbitration in the first place.

Appellate arbitration also preserves many of the features that distinguish arbitration from litigation. The proceedings remain private and confidential, and the appeal occurs within the same dispute-resolution framework the parties originally selected. For parties who value confidentiality and control over the dispute-resolution process, these characteristics offer significant advantages. The appellate decision comes with finality; courts review the final award on appeal under the same limited standards that apply to any arbitration award.

Practical considerations

Deciding whether to include appellate arbitration in an agreement involves both strategic judgment and careful review of the applicable rules. The parties can agree in their arbitration agreement – before any dispute arises – to an appellate arbitration process. Or the parties can agree during the arbitration itself. If the latter, it's best to raise the issue at the preliminary conference before any substantive rulings.

For the attorney, the availability of appellate arbitration may influence the way a case is presented. If the parties know that an appellate tribunal may later review the award, they may place greater emphasis on developing a clear record during the hearing. This may include ensuring that key legal arguments are preserved, that significant evidentiary issues are addressed clearly, and that the record contains the materials necessary for meaningful appellate review.

The availability of appellate arbitration may also affect how parties approach the selection of the original arbitrator or panel. In some cases, parties may elect to proceed before a single arbitrator – whether by agreement or under the applicable rules – while preserving the possibility of review by a tripartite appellate panel if the governing procedures allow it. If the parties anticipate that an appellate tribunal may review the award, they may feel more comfortable selecting a single arbitrator for efficiency, knowing that a panel could review the decision if necessary.

When appellate arbitration may make sense

In certain disputes, the availability of appellate review may provide additional confidence in the arbitration process. High-stakes cases involving complex legal questions are one example. When the financial or business consequences of an incorrect result are substantial, parties may value the opportunity to obtain an additional layer of review within the arbitration framework.

Long-term commercial relationships may present another context in which appellate arbitration is attractive. Parties who anticipate continuing interactions may prefer a dispute resolution process that includes an opportunity to correct significant legal or factual errors before the award becomes final.

When appellate arbitration may not make sense

Appellate arbitration is not appropriate for every dispute. One of arbitration's commonly cited advantages is the possibility of achieving a relatively prompt and final resolution. Adding an appellate layer inevitably adds time and cost to the process.

For lower-value disputes, the cost of pursuing an appeal may outweigh the potential benefit of additional review. Similarly, parties who value arbitration primarily for its finality may prefer to accept the original award rather than engage in another costly round of briefing and argument.

Even in higher-value cases, an appellate mechanism may not always advance the parties' interests. Arbitration is often chosen precisely because it avoids the extended appellate process that can accompany court litigation. If the parties expect that most awards will be appealed, the arbitration process may begin to resemble the very litigation framework they sought to avoid.

Parties should also consider the strategic incentives created by an appellate layer. A disappointed party may view an internal appeal as an opportunity to delay enforcement of the award or to gain leverage in post-award negotiations. While appellate procedures are generally designed to move more quickly than judicial appeals, they still require additional briefing, arbitrator time, and administrative costs.

For these reasons, parties who prioritize speed, finality, and cost predictability may conclude that an appellate mechanism adds more complexity than benefit. In such circumstances, relying on the traditional arbitration framework – combined with the limited judicial review available under applicable statutes – may better serve the parties' objectives.

Points to review in provider appellate rules

If parties decide that appellate arbitration may be worth considering, the next step is to select an appellate arbitration provider and review its rules carefully. Although the various appellate procedures share common features, the details can differ in ways that may affect the scope, nature, and cost of the appeal. Simply put, knowing the rules in advance can help ensure that the arbitration agreement reflects the parties' expectations.

Among other considerations, practitioners may wish to examine the applicable standard of review, the types of cases that may be appealed, the deadline for initiating the appeal, the number and selection of appellate arbitrators, the available remedies on appeal, whether the appeal is limited to the existing arbitration record, and whether the appellate tribunal may consider additional evidence or remand the matter under certain circumstances.

On the issue of remand, for example, the providers take different approaches. The JAMS procedures provide that "[t]he Panel may not remand to the original Arbitrator." (*JAMS Optional Arbitration Appeal Procedures*, Procedure (J).) Instead, the appellate panel "may reopen the record in order to review evidence that was improperly excluded by the Arbitrator or evidence that is now necessary in light of the Panel's interpretation of the relevant substantive law." The AAA rules similarly state that the appeal tribunal "may not order a new arbitration hearing or send the case back to the original arbitrator(s) for corrections or further review." (*AAA Optional Appellate Arbitration Rules*, Rule A-19.) If the appellate panel vacates or modifies the arbitrator's award, the panel may "substitute its own award for the Underlying Award."

By contrast, the Judicate West rules contemplate that certain remedies on appeal may be implemented "through reference back to the arbitrator or panel that heard the underlying matter." (*Judicate West Appellate Rules*, Rule 9.E.)

Another area in which the rules vary among providers is the applicable standard of review. Some procedures adopt standards similar to those used in judicial appeals, while others articulate the standards more generally. For example, the JAMS procedures provide that the appellate tribunal "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." (*JAMS Optional Arbitration Appeal Procedures*, Procedure (J).)

The AAA rules instead authorize an appeal where the award is based on "(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous." (*AAA Optional Appellate Arbitration Rules*, Rule A-10.) Judicate West similarly directs the appellate tribunal to apply "the same legal standard applicable for the underlying proceeding, unless otherwise agreed by the parties in writing." (*Judicate West Appellate Rules*, Rule 8.B.)

Counsel should also evaluate how appellate arbitration may affect litigation strategy. In some cases, the possibility of an internal appeal may influence settlement dynamics. A party dissatisfied with an arbitration award may be more willing to consider settlement discussions if an appellate proceeding is available, while a prevailing party may view the appeal as an opportunity to reinforce the strength of the award.

At the same time, lawyers should be mindful that appellate arbitration is not intended to replicate the full scope of judicial appellate practice. The procedures are typically more streamlined, and the standards of review are defined by the applicable arbitration rules rather than by traditional appellate doctrines. As a result, parties considering appellate arbitration should evaluate how those rules operate in practice before deciding whether to incorporate them into their dispute-resolution framework.

Conclusion

Internal appellate arbitration procedures have existed for more than two decades, yet many practitioners remain unfamiliar with them. Lawyers who draft arbitration clauses or represent clients in arbitration may wish to consider whether an internal appellate mechanism would serve their clients' interests in particular disputes.

Ultimately, the decision whether to include appellate arbitration in an agreement is a strategic one. For some parties, the prospect of an additional level of review may provide greater confidence in the arbitration process. For others, the additional time and expense associated with an appeal may outweigh the potential benefits. Careful consideration of these competing factors can help lawyers design dispute-resolution provisions that align with their clients' priorities.

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