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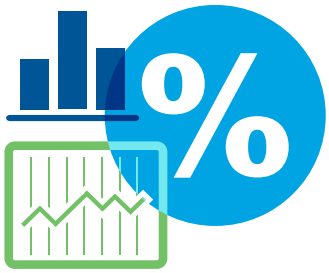

Financial Services Employment Arbitration Q&A

Appellate Arbitration: Too Much of a Good Thing?

Employment arbitration has its advocates and detractors. Some view it as a speedy, efficient and less expensive alternative to the sinkhole of court litigation. Others say that arbitration is a false panacea, in which employers forfeit meritorious jurisdictional defenses and are forced to go to "trial" in nearly every case.

Regardless of where one falls on that spectrum of views, one area of agreement is that arbitration presents extremely limited opportunities for judicial review of awards, regardless of how "good, bad or ugly" the award was (to use Justice Elena Kagan's memorable *recent articulation*).

Several prominent arbitration providers have stepped into the void, offering parties the option of "appellate arbitration" in addition to the more common "trial level" proceedings. In effect, these procedures allow the parties to "double down" on arbitration, using the private dispute-resolution system not only to find the facts and decide the law, but also to provide a backstop of additional review to correct errors.

Like trial-level arbitration, appellate arbitration is a matter of consent. Under the various providers' approaches, both parties have to agree to permit the additional level of review. While appellate review would not be mandatory in any given case, it would require that both sides agree that the procedure is available to the non-prevailing party. Similarly, use of the appellate procedure would not necessarily foreclose subsequent judicial review. (But, if judicial deference to a trial-level award is significant, one can only imagine how askance a court might look at a petition to vacate after two sets of arbitrators have had their say.)

The AAA adopted its appellate procedures only recently, with its *Optional Appellate Arbitration Rules* effective November 1, 2013. If the parties consent to these procedures and the losing party invokes them, the process would embody the following key features:

- The grounds for appeal include "an error of law that is material and prejudicial" or "determinations of fact that are clearly erroneous."
- The appeal would be heard by a three-arbitrator panel selected from a roster of appellate specialists, consisting of "former federal and state judges and other arbitrators with strong appellate backgrounds."
- The appellate panel could rule on its own jurisdiction. Cross-appeals are permitted.

- Appeals would be decided on the papers unless the panel desires oral argument. Like in court, "[a] party may not present for the first time on appeal an issue or evidence that was not raised during the arbitration hearing."

- The appellate panel may: (1) adopt the underlying award; (2) substitute its own award; or (3) request additional information and then take option (1) or (2) after consideration thereof. It "may not order a new arbitration hearing or send the case back to the original arbitrator(s) for corrections or further review."

- The appeal would be decided in about three months. The case would not be considered final for purposes of confirmation or vacatur until the appeal is decided, and the time periods for commencing judicial review would be tolled.

JAMS has had an *Arbitration Appeal Procedure* since June 2003. Its features are similar to the AAA's but somewhat less formal in their articulation. JAMS does not appear to have a set roster of appellate specialists (although it has a large number of retired judges as arbitrators generally), and it suggests that the parties simply "elect to rely on the memoranda or briefs previously submitted" to the arbitrator(s) as part of the evidentiary proceedings. The appellate arbitrators "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," and they may "affirm, reverse or modify an Award." Remand to the original arbitrator(s) is not permitted.

CPR (formally the International Institute for Conflict Prevention & Resolution) has had an *appellate procedure* since 1999. It says (presumably without intending the pun) that "[m]ost users of arbitration find the finality of an arbitration award appealing." As such, its appellate rules appear to be the most restrictive of the three providers. In order for the procedure to be invoked, the prior arbitrator(s) must have rendered a written, explained decision with a record of all hearings conducted and evidence admitted. And if the original award is "fully affirm[ed]," the appellant must reimburse the appellee for the costs of the appeal and its appeal-related attorneys' fees.

FINRA does not offer an appellate procedure.

Ever since the Supreme Court blessed class-action waivers in arbitration agreements, some commentators have suggested (with enthusiasm or resignation) that all employment litigation will be replaced by single-claimant arbitrations. If there is truth to those predictions, then perhaps appellate arbitration offers the ideal balance: the efficiency and relative speed of a trial-level arbitration with the comfort that the award will be subject to review by a "fresh set of eyes" in case the arbitrator or panel does anything crazy.

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