Can I Appeal a "Rogue" Arbitration Award?

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CAN I APPEAL A "ROGUE" ARBITRATION AWARD?

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You agreed to arbitration, and thought the hearing went well. Sometime later, you receive the arbitrators' decision and ask, "What were they thinking? This can't be right. They're wrong on the law and the facts. Can I appeal?"

To determine whether, and on what grounds, you can appeal an unfavorable arbitration award, the first step is to review the agreement that approved arbitration as a means of settling disputes. That agreement may control whether the scope of an appeal is governed by the Federal Arbitration Act (FAA), the Texas Arbitration Act (TAA), or an appellate panel of the organization that administered the arbitration, such as the American Arbitration Association (AAA). And that decision can affect the odds of a successful appeal.

Any discussion of arbitration appeals begins with the FAA, which governs most commercial contracts affecting interstate commerce. Under the FAA, as interpreted by the United States Supreme Court, arbitration awards are presumed to be final and enforceable, except in rare circumstances. Specifically, a court may vacate an award:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). The Supreme Court has held these are the only grounds for vacating an arbitration award, and they cannot be supplemented by agreement of the parties, thus rendering appeals of most arbitration awards toothless. For example, in *Hall Street Associates, LLC v. Mattel, Inc.* (2008), the parties agreed that a district court "shall vacate, modify, or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." The Supreme Court held this provision unenforceable because it purported to expand the scope of review beyond the statutory grounds. The Fifth Circuit subsequently interpreted *Hall* as barring "manifest disregard of the law," a long-recognized common law ground for reversing arbitrations, as a basis for review under the FAA. And the Fifth Circuit has defined "evident partiality" to mean an arbitrator's failure to disclose a "significant compromising relationship."

For matters governed by the TAA, the potential grounds for appeal are only slightly more liberal. In *Nafta Traders, Inc. v. Quinn* (2011), the Texas Supreme Court held that *Hall* did not control the meaning of virtually identical language in the TAA. Specifically, the Court held "the TAA permits parties to agree to expanded judicial review of arbitration awards." Moreover, the Court held the FAA did not prevent state courts from enforcing the parties' agreement to expand judicial review of an award governed by the TAA. In addition, Texas applies a somewhat broader definition of "evident partiality" than the Fifth Circuit. And the Texas Supreme Court has not resolved whether common-law grounds for challenging arbitration awards are preempted by the TAA.

Given these differences, how do you know whether your agreement is governed by the federal or state rules? Unless an agreement explicitly provides otherwise or a statutory exception applies, the FAA governs arbitration provisions in any "contract evidencing a transaction involving commerce," which has been interpreted quite broadly. And where the FAA applies, it overrides conflicting provisions of state law, including the TAA. Contracting parties may, however, choose to have their agreement governed by state law, provided they use language leaving no doubt as to their intention. It is not enough to provide that the agreement is "governed by Texas law." The Texas Supreme Court and the Fifth Circuit have held the FAA does not apply where a contract explicitly requires that disputes be resolved "in accordance with the Texas General Arbitration Act."

As noted, choosing to have an agreement governed by the TAA might result in a somewhat expanded scope of review. Are other options available if the parties want to ensure greater review of arbitration awards for legal or factual errors? In recent years, in response to concerns by many parties of the lack of effective relief for serious errors by arbitrators, several major organizations, including the AAA, JAMS, and CPR (the International Institute for Conflict Prevention & Resolution), have developed internal procedures for review by a panel of senior arbitrators. Because the appeal is internal to the organization and does not affect judicial review, it can be available in agreements governed by the FAA or TAA. This review is available, however, only if the original arbitration agreement includes provisions invoking the internal appeals process. According to the AAA, its "rules permit review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous." And it touts that its appellate process "can be completed in about three months, while giving both sides adequate time to submit appellate briefs." An appeal is treated as a new proceeding, requiring additional fees.

Here’s the rub: How do you know when negotiating an agreement requiring arbitration of disputes whether you or your adversary will be the one searching for grounds to appeal an arbitration award? Protecting against “rogue” awards could make arbitration more attractive. But making appeals more available or effective could undermine one of the primary purposes of arbitration—an efficient means of resolving disputes. There is no simple answer to this question, but these issues should be considered whenever an arbitration agreement is contemplated. Be careful what you ask for.