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Arbitration: The Trial with No Appeal?

Authors: Sara Turner
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Including an arbitration provision in your contract can be a big cost saver in certain situations where going to court and proceeding through an all-out trial would be more expensive. Arbitration is private and the case pleadings are not part of a public record, as litigation records are. Whether you win, lose or draw in arbitration, the decision of the arbitrator is final and there is no meaningful basis for appeal. Or is there a possibility that the losing party could attempt to have a court vacate the decision of the arbitrator?

Part of the reason arbitration provisions seem so attractive is the ability to avoid having to go to court in front of a judge whom you will likely have no input in selecting. In arbitration, each party will typically have some input and choice about the arbitrators or arbitration panel to be selected. This ensures that those individuals are familiar with the type of law or the business that the dispute involves. A randomly selected judge will not likely have the same expertise. The ability to have a hand in selecting the person or people who will hear the dispute, however, does not absolutely protect against the possibility that the arbitrator may rule without regard to your ideas about the law and the facts of the case.

Is there anything you can do to ensure that, if there is a ruling that you are unhappy with, you can guarantee a court will have the opportunity to review? Some arbitration provisions have attempted to include these types of "mandatory review" provisions in their contracts with mixed results. The seminal case from the U.S. Supreme Court held that the Federal Arbitration Act (FAA) provides the exclusive grounds on which an arbitration award can be vacated.[1] Several Federal circuit courts of appeals have cited this Supreme Court decision in eliminating many other common law grounds which were available in those Circuits when attempting to vacate an arbitration award. The most significant ground for vacating an award that many courts have said did not survive Hall is "manifest disregard of the law." The Fifth Circuit,[2] which controls in Mississippi and Louisiana, has eliminated manifest disregard of the law as a basis by which a party can seek to vacate an arbitration award. The Eleventh Circuit,[3] which controls in Alabama and Georgia, has taken the same approach.

The Second and Ninth Circuits have taken a different tack;[4] They have both held that manifest disregard for the law is still a valid ground on which to vacate an arbitration award. The courts reason that this standard is simply shorthand for other FAA permissive statutory grounds for vacating the award. The Sixth Circuit permits judicial supplements to the statutory grounds for vacating arbitration awards included in the FAA, but does not permit parties to contract around them.[5]

The state courts reaching this question have each interpreted the impact of the Hall decision in their own way. Alabama very recently held that the FAA is not the exclusive way to have an arbitration award vacated.[6] Instead, Alabama common law can be used to supplement the grounds set forth in the FAA. This decision had a major impact because the court also found that Alabama common law requires strict adherence to a contract. In Alabama, parties can contract around the FAA grounds for vacatur and provide for court review of an arbitration award in circumstances other than those explicitly set out in the FAA. Interestingly, however, absent a contractual provision to the contrary, manifest disregard for the law is still insufficient in Alabama to vacate an arbitration award.[7]

Both Georgia and Tennessee prohibit contractual provisions which might add additional mechanisms for court review of an arbitration award.[8] Under Georgia's arbitration law, however, manifest disregard of the law is included as an explicit ground for vacatur.

The bottom line is that the *Hall* decision has further protected arbitration awards from being reviewed and vacated by courts generally. It has certainly reduced the justifications which can be utilized in seeking a review. This situation provides a sense of comfort in knowing that obtaining a favorable award is something that is less likely to be overturned as well as a sense of hesitation in knowing that a bad award is likely to stick. The current state of the law only further highlights the need to spend sufficient time researching and looking into the backgrounds of each potential arbitrator. A well-informed selection of the arbitrator may not always guarantee predictability or success on the merits, but it can help to give some increased stability to the process. Arbitration may not provide for an appeal in most situations, but it can still be a useful tool in many cases that should not be eliminated as part of an overall dispute resolution strategy.

Ms. Turner is an attorney in our Birmingham office.

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1. *Hall Street Assocs., L.L.C. v. Mattel, Inc.* 552 U.S. 576 (2008).
2. *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).
3. *Frazier v. Citifinancial Corporation, LLC*, 604 F.3d 1313 (11th Cir. 2010).
4. *Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277 (9th Cir.); Stolt-Nielsen v. AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008).
5. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415 (6th Cir. 2008).
6. *Raymond James Financial Services v. Honea*, 2010 WL 2471019 (Ala. June 18, 2010).
7. *Volvo Trucks North America, Inc. v. Dolphin Ling, Inc.*, 2010 WL 1641017 (Ala. April 23, 2010).
8. Brookfield Country Club, Inc. v. St. James Brookfield, L.L.C, 2010 WL 2557443 (Ga. June 28, 2010); Pugh's Lawn Landscape Company, Inc. v. Jaycon Development Corporation, 2009 WL 1099270 (Tenn. Ct. App. April 23, 2009).