ARBITRATION AWARDS: UNDERSTANDING THE LIMITATION OF VACATUR AND THE POSSIBILITIES FOR AN APPEAL

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The problem: An arbitrator has made an award that you believe contains significant errors of both facts and law. But you also believe that the award was made in good faith. What, if anything can you do? As we shall see, if the draftsman has not made provision for an appeal to an appellate arbitrator, there is precious little that can be done to correct the mistakes contained in the award. That is what this article addresses.

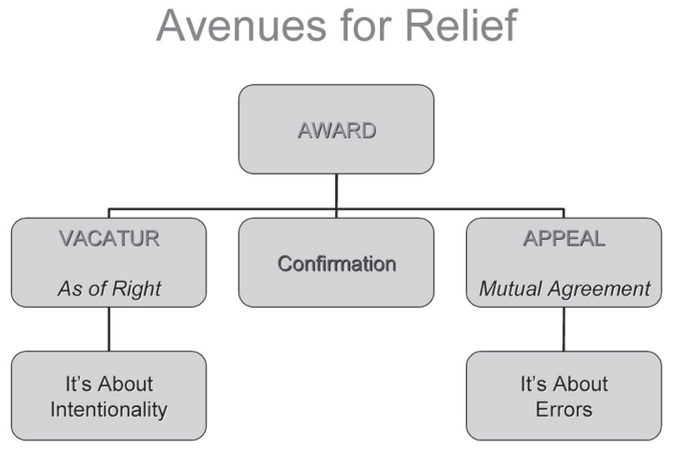
One of the traditional and foremost benefits of arbitration is finality. Usually provided as an alternative to the courts in agreements between repeat players engaged in the same industry, it makes sense to have someone familiar with that industry listen to the parties and render a binding decision that could not be reviewed. After all, repeat players have to continue to deal with one another and value mechanisms that resolve disputes and make it possible to get on with the business at hand.

But with crowded court calendars and concerns about the costs of litigation, arbitration is now looked to as a way to resolve disputes between parties who may not be repeat players and often have no other contact other than the contract that contains the arbitration clause. Today arbitration clauses are common place in all forms of consumer agreements and specialty agreements such as employment agreements, divorce and family law agreements, merger and acquisition agreements and agreements involving intellectual property, to mention but a few. And while many parties want arbitration for all its benefits, many others refuse to consider it because of the daunting finality of the process.

So what does one do with an award that is believed to be a mistake? There are three possibilities, and only three:

1. Accept the error and proceed with confirmation
2. Seek judicial intervention in the form of a petition for vacatur
3. If available under the terms of the arbitration clause, appeal.

Vacatur is a creature of statute and it is available as of right, provided that the petition can cite conditions that fit the limited terms of the CPLR (Article 75) or the Federal Arbitration Act, ("FAA") depending on which one applies. Vacatur requires either clerical error, intentional misconduct or misbehavior by the arbitrator who rendered the award. As an alternative an appeal, exists only if the parties can agree as to the propriety of such relief.



When considering the various alternatives, the draftsman should be aware of the many pitfalls presented when relying on vacatur. As a practical matter, proving any of the statutory grounds laid out in the statutes is difficult at best. Anyone seriously concerned about the reality of finality should explore the possibilities for structuring an appeal.

Vacatur: It is available as of right and it is about misconduct or misbehavior.

Whether derived from state or federal law, vacatur is a creature of legislative action. In New York, the statute is the CPLR[1]. The federal law is found in the FAA.[2] While the statutes are similar, there are major differences. The CPLR tends to be more restrictive. This reality has significant implications for anyone relying on vacatur as an avenue for review. So the draftsman has to understand the limitations of each of the statutory schemes.

The statutes are both concerned about clerical error and more importantly intentional misbehavior or misconduct that undermines the validity of an award. Both statutes recognize that both a party and an arbitrator can act badly. What makes the statutes really different is that the federal scheme is broader when it comes to naughtiness attributable to an arbitrator.

Consider the following:

The FAA provides an "extra," not found in the CPLR, *i.e.*, a provision permitting vacatur if the arbitrator engages in "any other misbehavior by which the rights of any party have been prejudiced . . ." This "extra" has opened the door for judicial pronouncements as to what might constitute "other misbehavior." The most frequently cited is the doctrine of manifest disregard for the law. [3]

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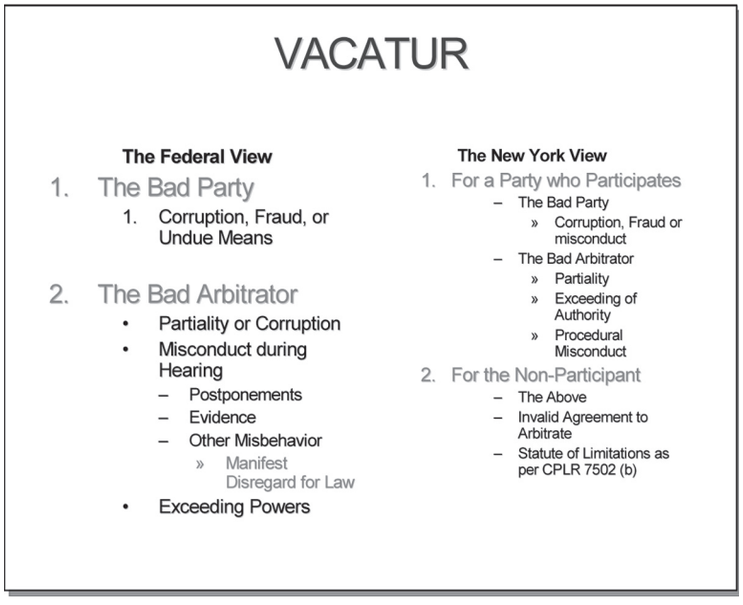

Manifest disregard for the law is accepted by some of the federal courts. To date it has not been accepted by any New York State court as a viable ground for vacatur pursuant to the provisions of the CPLR. Let's take a careful look at the possibilities presented by this doctrine.

In the federal courts, manifest disregard of the law is recognized only if the following elements are established:

1. The arbitrator must have known of a governing legal principle and refused to apply it or ignored it altogether; and
2. The law ignored or disregarded all together must be well defined, explicit and clearly applicable.[4]

Imagine an arbitrator declaring: "The parties agree that the U.C.C. governs and should be looked to for a definition of what is a sale. However, I have read the U.C.C. provisions called to my attention and I just don't like what they say so I'm going to disregard the U.C.C. and impose my own definition." No questions about it, that statement smacks of a manifest disregard for the U.C.C. But how likely is it that an arbitrator will dole out such a statement? Almost never!

Note that these elements do not include an error by the arbitrator. An error made in good faith, no matter how glaring is not grounds for vacatur based on a manifest disregard for the law. The Court of Appeals for the Second Circuit has explained:

> "A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award 'should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached.'" [5]

Since these elements must be established, the arbitration clause must be designed to facilitate that responsibility. This means that the clause must contain accommodating

mechanisms. To begin with, the agreement must provide that an arbitrator's award be grounded in the law. Many agreements are silent as to this point and absent such a clause, many providers have rules that permit an arbitrator to do whatever he or she feels is appropriate.[6] And this approach has the blessings of the courts.[7]

In addition, the draftsman must provide some apparatus for proving that the arbitrator acted to disregard of the law. This can be accomplished by requiring either a transcript of the entire proceeding or a reasoned decision as to facts and law. Absent one or the other, there is no way to establish how the arbitrator behaved.[8] Unsubstantiated speculation obviously does not prove anything. And in the Federal Second Circuit, manifest disregard of the law cannot be established by deposing an arbitrator.[9] But keep in mind that most arbitration proceedings are conducted without a transcript because of the cost involved and many feel that reasoned decisions are to be discouraged because they frequently lead to vacatur on the grounds that an arbitrator exceeded his or her authority.

What about New York state courts? As a general proposition, if the CPLR is in play, manifest disregard of the law is not recognized. But even that conclusion is murky at best.[10] What happens if the state courts are called upon to apply the FAA? Recently the U.S. Supreme Court, in *Citizens Bank v. Alafabco, Inc*.,[11] answered this question by declaring that state courts should apply the FAA in virtually all cases involving commercial activity. The Court established that for purposes of the FAA, what counts is a showing, on a case by case basis, of the effect of the transaction upon interstate commerce, and if the aggregate economic activity in question represents a general practice subject to federal control, the FAA, rather than state law, controls. In short; "Only that general practice need bear on interstate commerce in a substantial way."[12]

So, in New York, if the general practice impacts interstate commerce in a substantial way, the CPLR is trumped by the FAA. In commercial matters at least it is hard to conceive of an activity that does not bear on interstate commerce in a substantial way. The end result: the CPLR is for all practical purposes forced to give way to the FAA.[13]

Finally, the draftsman should bear in mind that vacatur in the Second Circuit based on the doctrine is very rare.[14] This is because it is very difficult to establish factually either or both of the above cited elements. As one court observed:

After [*Hoeft v. MVL Group, Inc]*[15] it becomes difficult to see how a court can find the knowledge and intention prong of the two-part test where the award is rendered without a reasoned opinion, unless 1) the record contains some statement or indicia that the arbitrator announced his intention to ignore the law, 2) the parties have clearly agreed on the law and so advised the arbitrator, or 3) the material submitted by the parties contains only one view of the law. In the two latter situations, the award would also have to be wholly inconsistent with such law.

Even if such a situation exists, it may not be enough for vacation of an award under the manifest disregard standard. Arbitrators are entitled to make a "mistake of law," and an award made on a mistake, in the absence of a "manifest disregard" would still stand.

The second requirement, that the law be clear and unambiguous presents even a more difficult problem is analyzing whether manifest disregard is present. While an agreement or stipulation of the parties as to the law would provide a basis for such a finding, any dispute between the parties as to what the law was would seem to preclude a finding of manifest disregard, perhaps unless the argument was so preposterous that absurdity would be obvious to the most casual observer. (*In Re Matter of Fellus v. Watley*, 7 Misc 3d 1016A (Sup. Ct. NY Cty. 2005).

Other types of statutorily-based challenges are obviously available, but again, caution is advised. In a recent study published by the Arbitration Committee of the Dispute Resolution Section of the American Bar Association,[16] a sampling of 182 reported (2004) cases, both federal and state, revealed that 80% of the time vacatur was denied. The authors observed:

Our review … indicated … that the courts in our sample saw their roles mainly as one of policing the procedural propriety of the arbitral process rather than correcting the substantive merits of the awards rendered: Did the arbitrators decide the issues entrusted to them? Did the arbitrators engage in prejudicial misconduct that tainted the fairness of the process?

Once satisfied that the arbitrators had decided the issues submitted to them by the parties, and that the process employed satisfied some acceptable standard of "due process," the courts in this sample by and large refrained from second-guessing the merits of the decisions reached by the arbitrators.

The bottom line is that no one can be faulted for electing to accept vacatur as the sole instrument for correcting clerical error and intentional misconduct. But if there is concern about other forms of error, serious concern must be given to making provision for an appeal.

Appeals: Not Available as of Right and it is About Correcting Substantive Errors

At the outset, it is important to note that the possibility of an appeal is not going to be attractive to everyone. Some may feel that it will lead to an unwarranted delay and an unnecessary increase in costs. And others may be quite comfortable with the finality of the process. But for those who feel otherwise, a carefully drafted clause containing a detailed scheme for an appeal may make sense.

Both the CPLR and the FAA are silent when it comes to appeals. But neither of the statutes proscribes the voluntary creation of a private right to appeal which makes sense since appealing error does not violate public policy. So how does the draftsman go about creating such a right?

There are only two ways to go and both require the written consent of all parties to the arbitration clause:

1. An agreement permitting an appeal to a court.
2. An agreement permitting an appeal to another arbitrator.

If the choice is between these two alternatives, attempting to create a private right to appeal to a court is extremely risky. Many courts simply do not recognize the possibility for vesting authority on the grounds that their jurisdiction is rooted in statutes and not private agreements. Still, some are willing to accommodate private parties on the theory that, in doing so, the court is supporting the now universal public policy favoring arbitration entered into voluntarily by private parties. [17]

What about the Second Circuit and the New York state courts? Unfortunately the Circuit Court of Appeals has yet to take a position.[18] The concept has not fared well in the state courts and the Court of Appeals has not spoken to the issue, although there is only one ruling on the issue.[19] Moreover, the CPLR may by its expressed terms appear to bar such a review.[20] So it follows that attempting to vest such authority in a court is a very risky strategy to follow.

This leaves open the possibility of providing for an appeal to another arbitrator.[21] Making such a provision has many benefits, all of which surpass those available as of right under the vacatur procedures discussed above. For instance, providing for an appeal eliminates the need to confine claims involving mistakes to the technicalities of the manifest disregard for the law doctrine. This in turn overcomes much of the resistance to arbitration based on the daunting finality presented by traditional arbitration. Providing for an appeal also serves to focus the parties during the negotiation phase of their relationship on the issues surrounding the applicability of law to their agreement. In addition, by providing for an appeal the parties will most likely eliminate in the entirety challenges to the unconscionability of any arbitration clause. Moreover, by detailing an appeals procedure the parties may be able to overcome the uncertainty and the expense that would otherwise result from a petition for vacatur.

Finally, by contractually providing for an appeal, the parties generally do not give up the right to seek vacatur. The only exception would seem to be at the confluence of errors of law and manifest disregard of the law. An appeals mechanism probably negates the possibility of vacatur based on that doctrine.

Rules of the Providers

In New York, there are five major providers of arbitration services: The American Arbitration Association ("AAA"), the CPR International Institute for Conflict Prevention & Resolution ("CPR"), JAMS, National Arbitration Forum ("NAF") and National Arbitration and Mediation ("NAM"). Selecting the right provider is important because the rules vary significantly from one another. So do the rosters with some of the providers boasting a slate of retired federal and state judges.

Both CPR and JAMS have rules that specifically provide the details for an appeal with the proviso that under either set of rules, there must be written consent by all parties for the implementation of any appeals procedure.[22] The rules of the remaining organizations are silent as to appeals with the exception of the rules of NAF which indicate that appeals, if any, shall be conducted pursuant to their rules.[23]

Appeals utilizing the rules of CPR and JAMS are straight-forward and detailed. Nothing more need be done than to reference the acceptance of these rules in the arbitration clause. Still, some thought should be given to the advantages of modifying these rules. It follows literally that the parties will unquestionably encounter delay and expense, all of which may not be appropriate in every situation. Appeals using the rules of the AAA and NAF appear to be possible on the basis of language in their rules that permit the parties to modify the rules to accommodate their needs.[24] Specifically, the AAA will administer a clause containing an appeals provision if, and only if the clause specifies in detail all of the terms and conditions of the procedure that have been agreed upon by the parties.[25]

There does not appear to be any limitation on the scope of an appeal although it would seem that it is best to limit the scope to issues of law. A review of issues of fact gives parties a "second bite," something that grates against the spirit, if not the underlying purpose, of arbitration.

Tips for the Draftsman

There are a number of matters that should be included in any clause to insure that the wish for appellate review is made possible. These include:

1. Selection and designation of the provider. It is probably wise to also designate an alternate in case the first choice declines to hear either the dispute or the appeal, or both.
2. Declare the need for a reasoned decision by the arbitrator rending the initial award.
3. Specify the requirement that the initial award be grounded in law.
4. Resolve any issues involving conflicts of law.
5. Include a statement as to the authority of the appellate arbitrator concerning modification of the initial award as well as the power to remand.
6. Specify procedures for addressing concerns about delays and expenses associated with the appeals procedure.

Conclusion

As was pointed out above, there is not anything irrational about limiting one's relief from an unacceptable arbitration award to the technicalities surrounding vacatur. But for many, vacatur may not provide sufficient assurances that rights will be adequately protected during the arbitration process. For those parties, the structuring of an appeal procedure may provide a viable alternative. But only vacatur is of right. An appeal is a private agreement that must be accepted by all parties to any arbitration. ■

Endnotes

[1] CPLR § 7511. Vacating or modifying award
(b) Grounds for vacating.
1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
(i) corruption, fraud or misconduct in procuring the award; or
(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.
2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:
(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or
(ii) a valid agreement to arbitrate was not made; or
(iii) the agreement to arbitrate had not been complied with; or
(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.
(c) Grounds for modifying. The court shall modify the award if:
1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
3. the award is imperfect in a matter of form, not affecting the merits of the controversy (emphasis added)

[2] F.A.A. § 10. Same; vacation; grounds; rehearing
(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
(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.
(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5 (emphasis added).

[3] There is a companion doctrine "manifest disregard of the evidence." This doctrine is not recognized by the courts in the Second Circuit. "In sum, 'the Second Circuit does not recognize manifest disregard of the evidence as proper ground for vacating an arbitrator's award.' *Success Sys., Inc. v. Maddy Petroleum Equip., Inc., 316* F. Supp. 2d *93, 94* (D. Conn. *2004)*. We recognize only the doctrine of manifest disregard of the law, which doctrine holds that an arbitral panel's legal conclusions will be confirmed in all but those instances where there is no colorable justification for a conclusion. To the extent that a federal court may look upon the evidentiary record of an arbitration proceeding at all, it may do so only for the purpose of discerning whether a colorable basis exists for the panel's award so as to assure that the award cannot be said to be the result of the panel's manifest disregard of the law. A federal court may not conduct a reassessment of the evidentiary record, as did the district court here, upon the principle that an arbitral award may be vacated when it "runs contrary to 'strong' evidence favoring the party bringing the motion to vacate" the award. (citations omitted) Only this approach to the evidentiary record is consistent with the 'great deference' which must be paid to arbitral panels by federal courts." *Wallace v. Buttar*, 378 F. 3d 182, 193 (2d Cir 2004)

[4] *Wallace v. Buttar*, *id* at 189; s*ee also, Duferco Intl. Steel Trading v. T Klaveness Shipping A/S*, 333 F. 2d 383 (2d Cir 2003); *Hoeft v. MVL Group, Inc*., 343 F.3d 57 (2d Cir. 2003); *Westerbeke Corp. v. Daihatsu Motor Co., Ltd*., 304 F.3d 200 (2d Cir. 2002); *Greenberg v. Bear, Stearns & Co*., 220 F.3d 22, 28, (2d Cir. 2000) *cert. denied*., 531 U.S. 1075, 148 L. Ed. 2d 669, 121 S. Ct. 770 (2001).

[5] *Wallace v. Buttar*, *id,* at 190 *citing Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 260 (2d Cir. 2003).

[6] The Commercial Rules and the Construction Rules of the AAA are silent and do not require that an arbitrator apply law. The rules of JAMS, CPR and NAF do require that an arbitrator apply law. This has been criticized by many as being the basis for the claim that arbitration is a "lawless" process. *See* Robert Scott*, The Lawlessness of Arbitration*, 9 Conn. Ins. L. J. 355 (2002/2003); Rex Perschbacher and Debra Bassett, *The End of Law*, 84 B.U.L. Rev. 1 (2004).

[7]"In addition, unless the agreement provides to the contrary, 'an arbitrator is not bound by principles of substantive law or by rules of evidence but 'may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be'" *Azrielant v Azrielant*, 301 A.D.2d 269, 275 (1st Dep't 2002) app den, 99 NY2d509 (2003), quoting *Matter of Silverman v Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984). Accordingly, an award will not be vacated "unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power" (*Matter of Silverman*, 61 N.Y.2d at 308; *accord Matter of United Fed. of Teachers, supra*)." *Brown & Williamson Tobacco Corp. v. Chesley*, 7 A.D. 2d 368, 372 (1st Dept. 2004).

[8] *See In Re Fellus,v. Watley*, 7 Misc. 3d 1016A (Sup. Ct. NY. Cty. 2005) "Thus, manifest disregard, the Second Circuit said, must be found solely from the record and the award. The Court recognized that in *Hoeft*, in reversing the District Court's findings of manifest disregard, the Award did not set forth the arbitrators reasoning, but only a conclusion and, as a result, it could be difficult or impossible to show how the arbitrator reached his decision. The remedy for this problem, the Court offered, is that the parties could have agreed that the arbitrator set forth his reasoning in the Award."

[9] *Hoeft v. MVF Group, Inc*., *supra,* note 4 at 67-68

[10] *City of Buffalo v. Buffalo PBA*, 13 AD 3d 1202 (4th Dept 2004): "Contrary to the contention of the City, we conclude that an arbitration award is not subject to vacatur on the ground that the award was based on a "'manifest disregard of the law'" (*Matter of Banc of Am. Secs. v Knight*, 4 Misc. 3d 756, 758, 781 N.Y.S.2d 829 (N.Y.Sup Ct 2004); *see Matter of United Fed. of Teachers, et al. v Bd of Ed. of the City of N.Y*., 1 N.Y.3d 72, 79, 769 N.Y.S.2d 451 (2003); cf. *Halligan v Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998), *cert denied* 526 U.S. 1034, 119 S. Ct. 1286, 143 L. Ed. 2d 378 (1999). Rather, only where a mistake of law rendered the award totally irrational or in violation of a strong public policy will such a mistake be grounds for vacatur. *Hackett v Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 155, 630 N.Y.S.2d 274 (1995). *See also Ames v. Garfinkel*, 11 Misc.3d 1015A (Sup. Ct. NY. Cty. 2006). *See* discussion, Hans Smit*, Manifest Disregard of the Law in the New York Supreme Court, Appellate Division, First Departmen*t, 15 Am. Rev. Int'l Arb. 111 (2004)

[11] 539 US 52 (2003).

[12] 539 US 52-53.

[13] In *Wein & Malikin v. Helmsley-Spear, Inc*., 6 N.Y. 3d 47, 478, n.81 (2006), the Court of Appeals observed: "In *Citizens Bank v Alafabco, Inc.*, the Supreme Court held that the Federal Arbitration Act (FAA) encompasses a wider range of transactions than those actually "in commerce" (539 U.S. at 56). …The Supreme Court's remand [in the instant case], therefore, meant that if the subject matter of an arbitration merely affected interstate commerce, the FAA would apply." (emphasis added).

[14] *Hoeft v. MVF Group, Inc*., *supra* fn.4; *Fellus v. Watley*, *supra,* fn. 8

[15] *Hoeft v. MVF Group, Inc*, *supra*, fn.4

[16] Mills, Bader, Brewer and Williams*, Vacating Arbitration Awards*, Summer 2005 "Dispute Resolution Magazine" 23 available at www.aranet.org/dispute/dch/committeecfm?com=DR011000.

[17] For a detailed discussion of the arguments on all sides of this question *see* Diane Wood, *Brave New World of Arbitration*, 31 Cap. U.L. Rev. 383 (2003); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negot. L. Rev. 171 (2003); Karon Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 Cumb. L. Rev. 337 (2001).

[18] The only statement to date about the enforceability of such an agreement is found in *Hoeft v. MVL Group, Inc*., *supra* fn. 4 at 64: "While various courts have enforced private agreements to alter the judicial review to be applied to arbitral awards, as the *Hoefts* acknowledge, "most of these cases have involved attempts to raise the level of judicial review otherwise available under the FAA." [*Br. of Petitioners-Appellants* at 26 n.16 (emphasis added).] *See, e.g.*, *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001); *Lapine Tech. Corp. v. Kyocera Corp*., 130 F.3d 884, 888-89 (9th Cir. 1997); *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995). Decisions enforcing agreements to decrease the otherwise applicable level of judicial review are far more scarce. *See, e.g., Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001) (noting in dicta that "parties to an arbitration agreement may eliminate judicial review by contract"); *Aerojet-Gen. Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973) (same). While taking no position on the enforceability of agreements to raise the level of judicial review, we note that there is a fundamental difference between an agreement to increase the scrutiny that courts apply when considering whether to confirm or vacate an arbitration award and an agreement to prevent courts from reviewing the substance of an arbitration award at all." (emphasis added).

[19] *In Re Chemung*, 277 A.D. 2d 792 (3d Dept. 2000): "The arbitration clause of the parties' agreement provides that the arbitrator's award shall be final and binding except that "in the event either party determines that the arbitrator has varied the terms or illegally interpreted the terms of [the agreement] ... such aggrieved party shall have the right to submit that sole issue to the Court ... and the Court shall have jurisdiction of that particular issue." To the extent that this provision can be construed as broadening the scope of judicial review under CPLR article 75, it is of no effect."

[20] CPLR § 7501 provides in part: "In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute." To date, no court in New York has considered this argument.

[21] *Chicago Typographical Union v. Chicago Sun-Times, Inc*., 935 F 2d 1501, 1505 (7th Cir 1991); "If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award."

[22] The CPR Arbitration Appeal Procedure is available at *www.cpradr.org.* JAMS Optional Arbitration Appeal Procedure is available at www.jamsadr.com.

[23] NAF Rule 1 (d) provides:
" Parties may modify or supplement these rules as permitted by law. Provisions of this Code govern arbitrations involving an appeal or a review de novo of an arbitration by other Arbitrators." (emphasis added).

[24] For example, the AAA Commercial Rules, R-1 (a) provides: "The parties, by written agreement, may vary the procedures set forth in these rules." Similar language is found in the AAA Construction Industry Rules.

[25] For a detailed discussion of appeals under the rules of the AAA, *see* Paul Bennett Marrow, *Appealing an Arbitrator's Award, Suggested Approaches,* 77 Journal NYSBA 14 (2005).