Contractual Limitations on Judicial Review of Arbitration Awards

By

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I. Introduction

The Fourth Circuit recently lamented the frequency of appeals of arbitration awards:

> [T]his genre of almost-reflexive appeal of arbitration awards seems to be an increasing common course, leading to arbitration no longer being treated as an alternative to litigation, but as a precursor.[1]

Perhaps as a result, a number of parties have placed in their arbitration clauses prohibitions on the appellate review of arbitration awards. But how effective have such clauses been in restricting motions to vacate to district courts and appeals to the courts of appeal? The purpose of this article is to review selected caselaw on the viability of such limitations.

II. Decisions Which Circumvent the Non-Appealability Provision

A. Second Circuit

Hoeft v. MVL Group, Inc., 343 F.3d 57 (2nd Cir. 2003)[2] involved an arbitration over a portion of a stock purchase agreement. The arbitration clause stated that "such dispute shall be resolved by Steven Sherill, whose decision in such matters shall be binding and conclusive upon each of the parties hereto and shall not be subject to any type of review or appeal whatsoever."[3] The arbitrator found in favor of the plaintiff and the defendant moved to vacate. The district court vacated on the basis that the arbitrator manifestly disregarded the law.

On appeal, the plaintiff argued that the district court lacked jurisdiction to vacate the arbitration award. The court of appeals rejected this argument stating: "Since federal court are not rubber stamps, parties may not relieve them of their obligation to review arbitration awards for compliance with § 10 (a) [of the Federal Arbitration Act]."[4] However, the court of appeals went

on to reverse the decision of the district court without further consideration of the restriction on appeals in the arbitration clause.

B. Ninth Circuit

The parties agreed to a binding, non-appealable arbitration concerning allocation of legal fees in *In re Wal-Mart Wage & Hour Employment Practices Litigation v. Class Counsel & Party to Arbitration,* 737 F.3d 1262 (9th Cir. 2013). One of the parties to the arbitration moved the district court to vacate the award which it declined to do. When that party appealed to court of appeal, the prevailing party invoked the non-appealable portion of the arbitration clause.

The court of appeals noted that a non-appealable provision has been interpreted in two ways: (1) it precludes on a review of the merits of the arbitration award but not § 10 of the FAA dealing with vacature for partiality, arbitrators exceeding their authority etc.; or (2) it precludes review of the award on any basis by either the district court or the court of appeals. The court adopted the former position noting that along with a federal policy in favor of arbitration in the FAA, that Congress incorporated minimum safeguards to ensure due process and prevent misconduct in § 10:

> Permitting parties to contractually eliminate all judicial review of arbitration awards would not only run counter to the text of the FAA, but would also frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration. Through § 10 of the FAA, Congress attempted to preserve due process while still promoting the ultimate goal of speedy dispute resolution.[5]

Thus, the court of appeals ruled that the non-appealable provision could not limit the jurisdiction of either the district court or the court of appeals.

C. Fifth Circuit

Vantage Deepwater Co. v. Petrobras America, Inc., 966 F. 3d 361 (5th Cir. 2020) involved a drilling contract with an arbitration clause stating that any dispute would be "exclusively and finally resolve[d]" through arbitration and that "[t]he parties waive irrevocably their right to any form of appeal, review or recourse to any court or other judicial authority, to the extent that such waiver may be validly made."[6] The losing party argued to the district court that the panel award should be vacated on public policy grounds, namely that the contract was illegally procured through bribery. However, the district court declined to do so.

On appeal, the court of appeal discussed several similar cases from other circuits, commenting that the 10th circuit approach (limitations on appeal enforceable) is "persuasive."[7] But then the court concluded: "Still, if the district court's judgment is affirmable on the merits, we do not need to discern the law for this circuit on such appeal waivers."[8] Ultimately, the court of appeals affirmed.

D. Third Circuit

Southco, Inc. v. Reell Precision MFG. Corp., 331 Fed. Appx. 925 (3rd Cir. 2009) involved an alleged breach of a joint marketing agreement. The arbitration clause stated that disputes "shall be settled exclusively by submission to final, binding and nonappealable arbitration for determination . . ."[9] However, another section of the agreement between the parties provided that the judgment may be entered in the district court.

The district court confirmed the arbitration ruling and losing party appealed. The court of appeals ruled that it had jurisdiction to hear the appeal of the district court ruling:

> [G]enerally, a contract provision stating that arbitration is "non-appealable" signifies that the parties to the contract may not appeal the merits of the arbitration; not that the parties agree to waive a right to appeal the district court's judgment confirming or vacating the arbitration decision.
> . . .
> Moreover, the Agreement in this case which binds two sophisticated parties, recognizes the difference between the arbitration award, on one hand, and the judgment of the District Court upon hat award.
> . . .
> We conclude that the [Arbitration] Agreement does not waive appellate review of the District Court's judgment.[10]

E. **Sixth Circuit**

A product liability death claim was the factual background of *Uhl v. Komatsu Forklift Co.,* 512 F.3d 294 (6th Cir. 2008). The arbitration agreement stated that:

> There can be no appeal from any decision made by the arbitrators except a claim of fraud or that the arbitrators, parties or their attorneys violated one of the provisions of the Agreement.

> . . . .
> The award shall be exclusive, final and binding to all issues and claims that were raised or could have been raised . . . [11]

However, after the arbitration was complete, the parties filed a stipulation that directed the district court to retain jurisdiction to settle any dispute between the parties regarding enforcement of the arbitration award.

The arbitration panel issued an award favoring the plaintiff and the defendant sought to have it vacated based on certain non-disclosures. The district court declined to do so and the defendant appealed. The plaintiff challenged the jurisdiction of the court of appeals which found that there was no waiver of appealability given that the language on non-appealability was tempered by the stipulation stating that the district court retained jurisdiction.

III. Decisions Which Apply the Non-Appealability Provision to Courts of Appeal

A. Fourth Circuit

Beckley Oncology Associates v. Abumasmah, 933 F.3d 261 (4th Cir 2021) involved a dispute over employment compensation. The relevant arbitration clause stated that the arbitrator's decision "shall be final and conclusive and enforceable in any court of competent jurisdiction without any rights of judicial review or appeal."[12] The arbitrator found for the employee, the employer moved the district court to vacate. The court granted the employee's motion to confirm.

The language of the arbitration clause could be read to prohibit the district court's review of the arbitration ruling, but the employer could hardly make such an argument since it sought to have the district court vacate the ruling. Nonetheless, the court quoted a Ninth Circuit opinion, *In re Wal-Mart* (see *infra*) on the position that an arbitration clause is powerless to eliminate all judicial review:

> Permitting parties to contractually eliminate *all judicial review* of arbitration awards would not only run counter to the text of the FAA, but would frustrate Congress's attempt to ensure a *minimum level of due process* for to an arbitration. Just as the text of the FAA compels the conclusion that the ground for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that

> these grounds are not waivable, or subject to elimination by contract.[13]

So saying, the court ruled that the non-appealability provision did not apply to the district court but did apply to the court of appeals.

B. Ten Circuit

A dispute over payment of royalties for a patented invention provided the backdrop for *MATEC, Inc. v. Gorlick,* 427 F.3d 821 (10th Cir. 2005). The arbitration clause stated that "the award rendered by the arbitrator shall be final and nonappealable and may be entered in any court having jurisdiction thereof."[14] The district court found for the defendant and the plaintiff asked the district court to vacate which the court declined to do. The court of appeals found that the non-appealable clause did not apply to the district court but barred the appeal to the court of appeals:

> [W]hile an unsatisfied defendant would not be able to appeal a district court order denying his application to vacate the award, so too would an unsatisfied plaintiff be unable to contest a district court's vacatur of an arbitration award in plaintiff's favor. From the parties' perspective, then the risks of a negative outcome resulting from the non-appealability clause are borne equally by both sides.[15]

IV. Comments

The Federal Arbitration Act provides specific bases to vacate an arbitration which are designed to protect the due process rights of the parties involved in the arbitration. They are not designed to allow the courts to second-guess the arbitrators on the merits of their decisions. It appears to be recognized in virtually all the case law on point, that the jurisdiction of the district courts to protect due process rights under the FAA is not waivable in order to preserve a balance with the substantial authority granted to arbitrators.

However, different considerations apply to courts of appeal. It is a non sequitur for the majority of the courts of appeal who have considered this issue to rule, notwithstanding non-appealability provisions, that they can hear appeals of the district court decisions as long as they do not go to the merits of the arbitration ruling. District court decisions are not on the merits, so the majority of the circuits are effectively reading the non-appealability provisions out of existence.

Endnotes

[1] *Tecnocap, LLC v. United Steel, Paper & Forestry Int'l Union,* 2021 U.S. App. LEXIS 1396 (4th Cir.)
[2] Overruled on other grounds by *Hall St. Assoc. L.L.C. v. Mattel, Inc.,* 552 U.S. 576 (2008).
[3] 343 F.3d 57, 60.
[4] *Id.* at 64.
[5] 737 F. 3d 1262, 1268
[6] 966 F. 3d 361, 366,
[7] *Id.* at 370, citing *Mactec, Inc. v. Gorelick,* 427 F.3d 821, 827 (10th Cir. 2005).
[8] *Id.*
[9] 331 Fed. Appx. 925, 927.
[10] *Id.*
[11] 512 F.3d 294, 299.
[12] 993 F.3d 261, 262.
[13] *Id.* at 265. (internal citations omitted).
[14] 427 F.3d 821, 828.
[15] *Id.* at 829.