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Challenging Arbitration Orders In The Appellate Courts

Arbitration is frequently used to resolve commercial and other disputes in a manner that is expeditious and economical. Despite the fact that parties seek to utilize arbitration to resolve disputes quickly and inexpensively, there still is substantial litigation related to arbitration – such as motions to compel arbitration and motions to confirm arbitration awards. Of course, where there is trial court litigation, there most certainly are appeals of arbitration orders. This article addresses some of the appellate issues that arise in state and federal courts with respect to appellate challenges to different types of arbitration orders.

California Law Regarding Arbitration Order Appeals

The California Civil Procedure Code sets forth the types of arbitration orders that are appealable. California Civil Procedure Code section 1294 provides that an aggrieved party may appeal from (a) an order dismissing or denying a petition to compel arbitration; (b) an order dismissing a petition to confirm, correct or vacate an arbitration award; (c) an order vacating an award unless a rehearing in arbitration is ordered; and (d) a judgment entered pursuant to the California arbitration provisions.

In California state court, when the trial court denies a motion to compel arbitration and the moving party appeals, the trial court action is automatically stayed pending the appeal. The automatic stay allows the party seeking to compel arbitration the opportunity to obtain appellate review of the order without having to expend further resources and energy litigating the merits of the case in the trial court. Unfortunately, the automatic stay may encourage unscrupulous appellants to file borderline frivolous appeals for the main purpose of obtaining a one to two year delay in litigating the case.

In contrast to an order denying a motion to compel arbitration, an order granting a motion to compel arbitration is not appealable because it is considered to be an interlocutory order. In general, it is only reviewable on appeal from a subsequent judgment. However, in certain limited situations it may be reviewable by writ petition. *See Zembsch v. Superior Court*, 146 Cal. App. 4th 153, 160 (2006). In *Zembsch*, the appellate court acknowledged that the general rule is that writ review of orders directing the parties to arbitrate is available only in "unusual circumstances" or in "exceptional situations." It further recognized that writ review is proper in at least two specific circumstances: (1) if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement; or (2) if the arbitration would appear to be unduly time consuming or expensive.

Federal Law Regarding Arbitration Order Appeals

Under the Federal Arbitration Act, an arbitration order denying a motion to dismiss the action, stay the action or compel arbitration is an appealable order. 9 U.S.C. § 16. In federal court, the general rule is that an appeal automatically stays the district court action. "In general, the filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *See Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 379 (1985). However, in the Ninth Circuit, when a party appeals from an order denying arbitration, the district court action is not automatically stayed pending the appeal. To obtain a stay, the appellant must file a motion for stay in the district court. The decision to stay the district court proceedings is vested in the discretion of the district court. The district court may stay the action pending appeal if the arbitration motion presents "a substantial question" for the reviewing court to consider. *See Britton v. Co-op Banking Group,* 916 F.2d 1405, 1412 (9th Cir. 1990).

If the district court refuses to stay the action, the appellant may file a motion for stay with the Ninth Circuit. The Ninth Circuit generally considers four factors when determining whether to grant a stay pending appeal: (1) whether the applicant for a stay has made a strong showing of likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure the other parties in the proceeding; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The lack of an automatic stay in federal court is a significant difference from California state court procedure in which an appeal from an order refusing to compel arbitration automatically stays the trial court action. The lack of a stay changes the calculus of whether a party should appeal from an order denying a motion to compel arbitration. In federal court, the appeal of the order denying arbitration is of little value if the appellant also must litigate the case in the district court while the appeal is pending. Moreover, the potential benefits of compelling arbitration – speed and economy – are most certainly lost if the appellant has to litigate the merits of the case in the trial court while litigating the issue of arbitrability in the appellate court. Therefore, before advising a party to appeal from an order denying a motion to compel arbitration the federal appellate lawyer must seriously consider whether the appeal presents "a substantial question" and whether a stay will be able to be obtained pending appeal.

Like state court orders, federal court orders compelling arbitration are interlocutory, and thus, are not appealable. 9 U.S.C. § 16. However, a party may petition to file a discretionary appeal pursuant to 28 U.S.C. § 1292(b). It is very difficult to get the Ninth Circuit to take up an appeal under section 1292(b). First, the district judge must state in an order that the non-appealable order involves a controlling question of law

as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Second, the Ninth Circuit, in its discretion, must then permit an appeal to be taken from such order. If the Ninth Circuit does not take up the appeal, then the appellant is out of luck and does not have an appellate remedy. Significantly, an application to appeal under section 1292(b) does not stay proceedings in the district court unless ordered by the district judge or the Ninth Circuit.

As in California state court, confirming or refusing to confirm an arbitration award is appealable. Similarly, an order modifying, correcting or vacating an award is appealable to the Ninth Circuit.

Conclusion

Arbitration orders can present many interesting issues for appellate practitioners – even though arbitration agreements are intended to avoid litigation. As an appellate practitioner, it is important to pay attention to some of the significant differences between state and federal court practice with respect to such orders.

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