

# THE FALSE ALLURE OF ARBITRATION APPEALS

Presented by:

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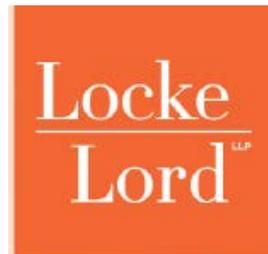
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# The False Allure of Arbitration Appeals

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# Caveats

- We are dealing with appeals to the courts
- Domestic arbitration only
  - There are no appeals to the courts permitted in international arbitrations seated in Canada
- Appeals are distinct from applications to set aside or defences to recognition and enforcement applications

# What is Commercial Arbitration

- Commercial arbitration is a process by which parties contractually agree to resolve their commercial disputes by submission of those disputes to one or more neutral decision makers for final determination as an alternative and to the exclusion of the courts. By doing so, parties in dispute also agree that the decision of the neutral or neutrals will be binding, whether or not the parties believe that that decision is correct, either in fact or law.  
*Pupuke Service Station Ltd. V Caltex Oil (NZ) Ltd PC 63/94, 16 November 1995 at 1, per Lord Mustill*

# Arbitration Guiding Principles

- Alternative to court litigation
- Limited court intervention
- Choice of adjudicator
- Confidentiality
- Timeliness and efficiency
- Costs
- Final and binding awards

# The Allure

- That the courts will provide a second look at arbitration awards as a check against legal errors made by arbitral tribunals

# The Allure is False

- The allure is unbalanced, favouring only the loser
- The allure presumes a “real” right of appeal
- Pure errors of law are rare
- Most “legal” errors intertwined with factual issues
- Appellate courts have high thresholds for review
- Deferential (“reasonableness) standard of review in arbitration

# Statutory Appeal Rights

- No appeal provisions in statutes (Canada, Nfld., P.E.I., Que.)
- No appeal on question of law expressly referred to tribunal (Alb.)
- Parties can agree to appeals on questions of law or appeal on questions of law with leave, unless they waive this right after commencement of arbitration (B.C.)
- Parties may by agreement provide for appeals on questions of law, fact or mixed fact/law (Alb., Sask., Man., Ont., N.B., N.S., N.W.T., Nun., Yuk.)
- If parties do not provide for appeals on questions of law, they can do so with leave (Alb., Sask., Man.)
- If parties do not deal with appeals on questions of law in agreements, they can do so with leave (Ont.)
- Parties may appeal on questions of law with leave (N.B.)

# Contract Out of Right to Appeal on Question of Law?

- Yes
  - Ontario, Yukon, N.W.T., Nunavut, Nova Scotia, Saskatchewan
  - British Columbia (only after commencement of arbitration)
- No
  - New Brunswick, Alberta, Manitoba

# Tests for Leave to Appeal

- Importance to the parties of the matters at stake in the arbitration justifies an appeal and determination of the point of law will significantly affect the rights of the parties – leave shall be granted (Alb., Man., Sask., Ont., N.B., )
- Importance of result to the parties justifies court intervention and determination of point of law may prevent miscarriage of justice, or point of law is important to a class or body of persons of which the applicant is a member, or point of law is of general importance – leave may be granted (B.C.)

# Appeal Remedies

- Confirm, vary/amend or set aside (B.C., Alb., Sask., Man., N.B.)
- Remit to tribunal with opinion on question of law (B.C., Alb., Sask., Man., Ont., N.B.)
- Ask tribunal to explain any matter (Alb., Sask., Man., Ont., N.B.)
- Give directions to tribunal as to conduct of arbitration (Alb., Sask., Man., Ont.)

# Aronowicz

(2007), 84 O.R. (3d) 428

- Broad issue: did offer in answer to trigger of shotgun comply with shotgun (\$25 million)
- Narrow issue: application of price adjustment provisions (\$800k) – supplementary award
- Leave granted on \$800k issue
- Importance to parties of stake justifies appeal
  - 3% monetary impact important enough
  - Future impact on parties (!)
  - The clause was important enough to arbitrate (!)
- Question will significantly affect parties' rights
  - No need for future or ongoing impact
  - Test eliminates less than decisive appeals

# Sattva (1)

[2014] 2 S.C.R 633

- In contract interpretation, what distinguishes a question of law and a mixed question of fact and law
- What is the standard of review on an arbitration appeal

# Sattva (2)

- Claim successful at arbitration (12/08)
- Application for leave denied (BCSC) (08/09)
  - Mixed fact and law/discretion to deny leave
- Appeal from denial successful (BCCA) (05/10)
  - Question of law
- Appeal from award failed (BCSC) (05/11)
  - Correctness standard; plain meaning of contract
- Award overturned (BCCA) (08/12)
  - Correctness standard; literal contract meaning absurd
- Award re-instated (SCC) (08/14)
  - Reasonableness standard; contract terms not unreasonably reconciled

# Sattva (3)

- Issue: calculation of finder's fee; Construction of contract
- BCCA erred in granting leave as issue was not a question of law
- Contract interpretation
  - Contract interpretation not always question of law
  - Law: what is the correct legal test
  - Mixed: what is objective contractual intention; consideration of factual matrix; apply legal standard to set of facts

# Sattva (4)

- “Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in the light of the factual matrix.”  
(para. 50)
- Contract interpretation is inherently fact specific
- Consistent with deference to fact-finders and limiting intervention of appeal courts

# Sattva (5)

- In “rare” circumstances, with caution, appeal courts can identify readily extricable questions of law in contract interpretation
  - Application of incorrect principle
  - Failure to consider element of legal test
  - Failure to consider relevant factor

# Sattva (6)

- Standard of review
  - Almost always: reasonableness
    - Consistent with objectives of commercial arbitration
  - Correctness in limited circumstances; e.g.,
    - Constitutional question
    - Question of law of central importance to legal system as a whole and outside adjudicator's

# Ottawa v. Coliseum (1)

- Issue: breach of settlement agreement relating to lease of city property
  - Construction of two sections of agreement
- Hearing (9/13)
- Award (2/14)
- Leave application/appeal (6/14)
- Award set aside (8/14)
- Court of Appeal Hearing (early 2016)

# Ottawa v. Coliseum (2)

- Alleged errors of law
  - Contract interpretation
  - Test for waiver and estoppel
  - Test for reasonable mitigation of damages
  - Test for award of compensatory damages

# Ottawa v. Coliseum (3)

- Contract interpretation – 3 alleged errors
  - Import of words used in contract
  - General language must yield to specific language
  - Speculation as to contractual intention
- *Sattva* “followed and applied”
  - Legal errors led to inconsistent factual findings
  - On a “reasonableness” standard

# VIH v CHC

- Arbitration:
  - Heard 3 days in March 2010
  - Award: June 2010
- Chambers motion
  - Heard December 2010
  - Decision April 2011
- Court of appeal
  - Heard November 2011
  - Decision March 2012
- Appeal from discretionary order refusing leave
  - see *Sattva* paras. 85-92 and 95-100

# Why No Rights of Appeal

- Arbitration is an alternative to court proceedings (freedom of contract)
- Disconnect between domestic and international arbitration
- The parties have bound themselves to final and binding determinations
- Arbitration is not but a first step in dispute resolution
- Loss of parties' choice of decision-maker/adjudicator
- Time and cost

# Development of Law (1)

- Rights of appeal are not required to assist in the development of the law
  - ADR is not concerned with development of the law
    - Negotiation, mediation, conciliation
  - Arbitration is assisted by the courts but is not part of the court system
  - In choosing arbitration parties prioritize decision of their specific case over refinement of legal principles over time
    - *(with thanks to W.G. Horton)*

# Development of Law? (2)

- “To men of commerce a mechanism to resolve disputes is a necessary evil en route to accomplishing their own business goals. It is we, the lawyers, who insist on redress for a decision which is wrong in law. ... [T]he parties ... are more concerned with resolving a dispute than establishing a body of precedential law”
  - Dissent; BC Law Reform Report on Arbitration (1982)

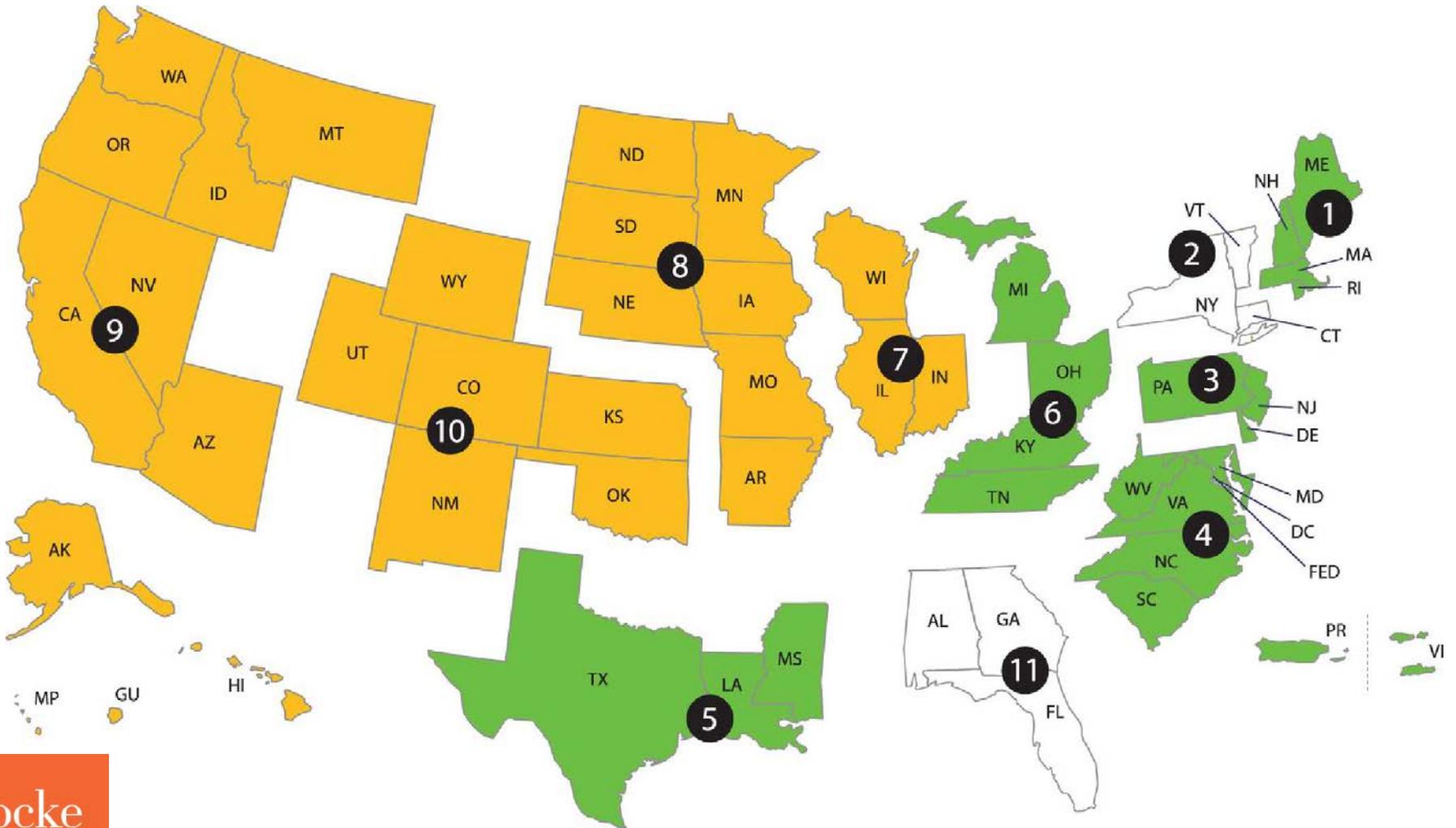
# Better Solutions

- Appoint arbitrators best suited to issues in the case
- Appoint 3-member tribunals as a hedge against potential errors
- Provide for appeals to arbitral appellate tribunal

# APPELLATE REVIEW OF ARBITRATION AWARDS IN THE UNITED STATES

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# Prior to 2008



# *Hall Street Assoc., L.L.C. v. Mattel, Inc.,* 128 S.Ct. 1396 (2008)

- At issue in *Hall Street* was the following provision:

*“[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The 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.”*

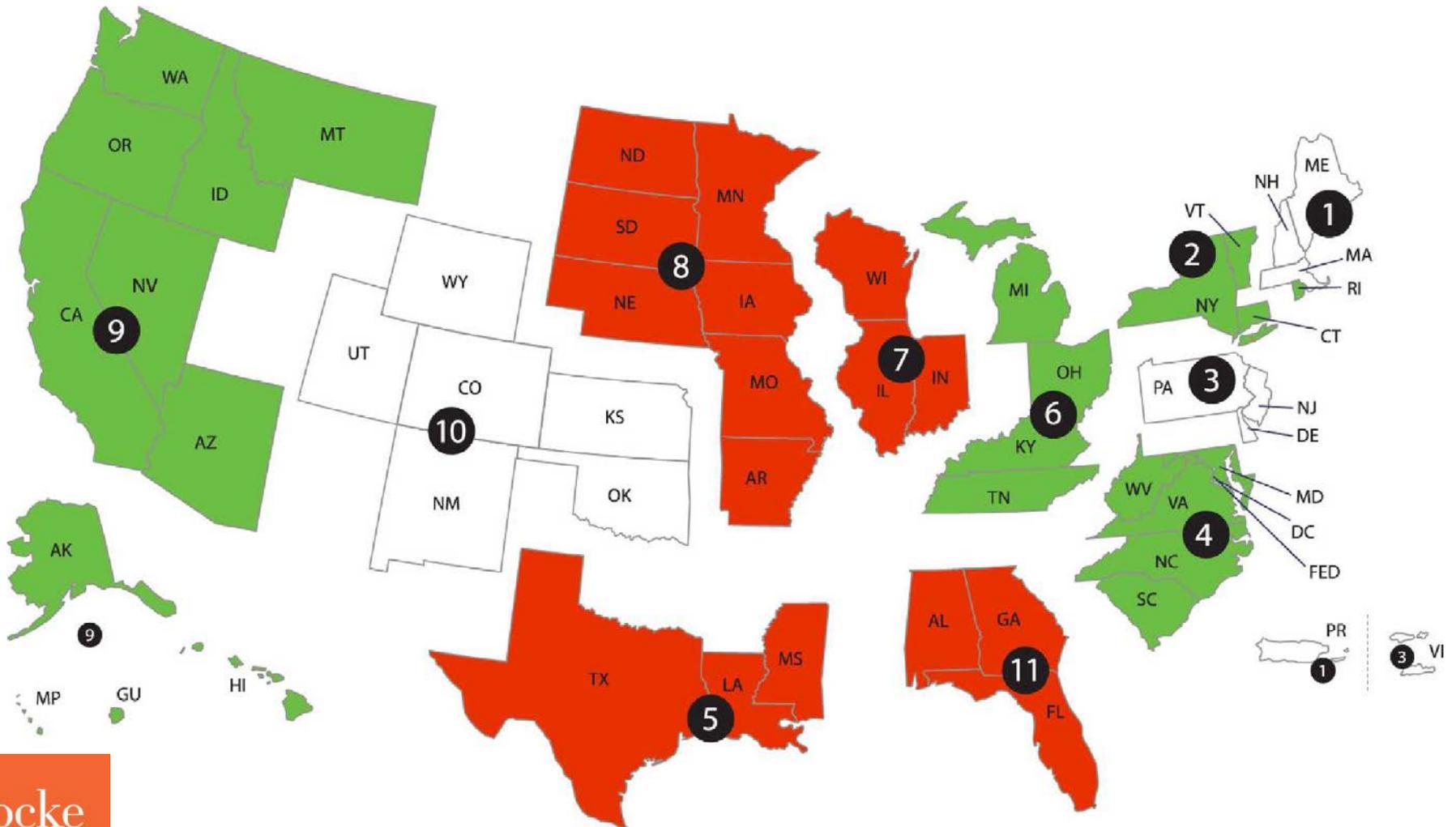
# *Hall Street* (cont'd.)

- The Federal Arbitration Act (“FAA”) supplies mechanisms for enforcing arbitration awards:
  - a judicial decree confirming an award,
  - an order vacating it, or
  - an order modifying or correcting it.
- Under the terms of § 9 of the FAA, a court “must” confirm an arbitration award “unless” it is vacated, modified, or corrected “as prescribed” in §§ 10 and 11.
  - Section 10 lists grounds for vacating an award
  - Section 11 list the grounds for modifying or correcting one

# *Hall Street* (cont'd.)

- Supreme Court's holding
  - Sections 10 and 11 provide exclusive regimes for review
  - Cannot be supplemented by contract

# Manifest Disregard of the Law



# Manifest Disregard (cont'd.)

- **Second Circuit:**

- “*manifest disregard*” standard survived *Hall Street* as a “*judicial gloss*” on the enumerated grounds for vacatur of arbitration awards under 9 U.S.C. § 10.

*See Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444 (2d Cir. 2011).

- The doctrine allows for the vacatur if a reviewing court . . . finds that

- (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and
- (2) the law ignored was well defined, explicit, and clearly applicable to the case.

*“[a] federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. . . . 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.”*

# Manifest Disregard (cont'd.)

- **Fourth Circuit**

- “manifest disregard continues to exist” *as a basis for vacating an arbitration award.*

*Henry M. Jackson Found. for the Advancement of Military Med., Inc. v. Norwell, Inc.*, 596 Fed. Appx. 200, 203 (4th Cir. 2015).

# Manifest Disregard (cont'd.)

- **Sixth Circuit**

- *“Since Hall Street, we have continued to acknowledge “manifest disregard” as a ground for vacatur. ...”*

*Schafer v. Multiband Corp.*, 551 Fed. Appx. 814, 819 (6th Cir. 2014), cert. denied, 134 S. Ct. 2845, 189 L. Ed. 2d 808 (2014).

# Manifest Disregard (cont'd.)

- **Ninth Circuit**

- “. . . *in this circuit, an arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitration award under § 10(a)(4) of the Federal Arbitration Act.*”

*Comedy Club, Inc. v. Improv W. Assoc.*, 553 F.3d 1277, 1281 (9th Cir. 2009).

But What about Review of Arbitral Awards under State Law?

# Texas

- *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2009)

- Provision at issue stated:

*arbitrator “does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.”*

## *Nafta Traders (cont'd.)*

- *Hall Street* framed the issue as “*expandable judicial review authority*”
- *Nafta Traders* framed the flip-side of the issue -- limitation on arbitrator’s decision-making authority.

# *Nafta Traders (cont'd.)*

- Texas Supreme Court noted:
  - the U.S. Supreme Court held the FAA grounds for vacating, modifying, or correcting an arbitration award cannot be expanded beyond those listed in sections 10 and 11;
  - the U.S. Supreme Court did not discuss section 10(a)(4), providing for vacatur “*where the arbitrators exceeded their powers.*”
  - Section 171.088(a)3(A) of Texas Arbitration Act also provides for vacatur “*where the arbitrators exceed their powers.*”

## *Nafta Traders (cont'd.)*

- In reaching conclusion that limitation could be enforced, Texas Supreme Court noted

*public policy requires [ ] that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.*

# *Nafta Traders (cont'd.)*

- Result
  - In Texas, if the “appeal” is couched as a “limitation on jurisdiction” the arbitrator’s decision can be reviewed.

# Other States

- **Massachusetts** -- *Katz, Nannis & Solomon, P.C. v. Levine*, 40 N.E.3d 541(Mass. 2015)
  - Provision at issue

*The decision of the arbitrator shall be final; provided, however, solely in the event of a material, gross and flagrant error by the arbitrator, such decision shall be subject to review in court. ...*

- Court held: parties may not modify scope of judicial review.

# Other States (cont'd.)

- **California** -- *Cable Connection, Inc. v. DirectTV, Inc.*, 190 P.3d 586 (Cal. 2008)

Provision at issue:

*... the parties agreed that “ [t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for each error.”*

- Court held: parties may obtain judicial review of merits by express agreement.

# AAA/ICDR's Optional Appellate Arbitration Rules (effective Nov. 1, 2013)

- Only by agreement of the parties
  - The parties may agree to the Appellate Rules without regard to whether the underlying arbitration was conducted pursuant to the AAA's or ICDR's Rules;
  - Appellate review on the grounds that the underlying award is based on errors of law that are material and prejudicial, and/or on determinations of fact that are clearly erroneous; and,
  - Typically to be determined upon written submissions with no oral argument.

# Appellate Arbitration Rules (cont'd.)

- Appellate Panel consisting of former federal and state judges, and neutrals with strong appellate backgrounds.
- Appeal Tribunal consists of three appellate arbitrators, unless the parties agree to a single arbitrator.
- Appellate process can be completed in approximately three months.

# The False Allure of Arbitration Appeals

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# Questions about the allure of arbitration appeals

1. Is the allure of the possibility of an appeal situational? More alluring for the party that loses the arbitration? Is this something the parties should think about in making their arbitration agreement?

# Questions about the allure of arbitration appeals

2. Under the Alberta legislation, the parties are able to provide in their arbitration agreement for an appeal to the court on (a) a question of law, (b) a question of fact, or (c) a question of mixed law and fact: section 44(1).

# Questions about the allure of arbitration appeals

3. If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may—with the permission of the court—appeal an award to the court on a question of law: section 44(2).

# Questions about the allure of arbitration appeals

4. In 2014, the legislation was amended to provide that leave should only be granted under section 44(2) if the court is satisfied that:

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and

(b) the determination of the question of law at issue will significantly affect the rights of the parties.

Section 44(2.1)

# Questions about the allure of arbitration appeals

5. Section 44(3) provides that there is no appeal on a question of law—under either subsection (1) or (2)—which the parties have expressly referred to the tribunal for decision.

# Questions about the allure of arbitration appeals

6. Could the parties provide in the arbitration agreement that there is not to be any appeal, even on a question of law? Would this be effective, or contrary to public policy?.

# Questions about the allure of arbitration appeals

7. Does having an appeal (or the possibility of an appeal) on a question of law effectively convert arbitration into just the first step in the litigation process, instead of being final in and of itself?

# Questions about the allure of arbitration appeals

8. What was the time frame involved in *Teal*?

Settlement Framework Agreement	2004
Addendum #2 to SFA	2005
Arbitration award	27 April 2011
Judgment of Bauman CJBC on leave and merits	16 April 2012
Judgment of Court of Appeal	10 July 2013
Remand by SCC to CA for reconsideration	23 October 2014
BCCA Reconsideration	9 June 2015
Application for leave to SCC granted	1 December 2015
Case to be heard by SCC	Fall 2016

# Questions about the allure of arbitration appeals

## 9. What was the time frame involved in *Urban Communications*?

Arbitration award	3 January 2013
Judgment of Cohen J on leave and merits	25 March 2014
Supplemental judgment by Cohen J	11 June 2014
Judgment of Court of Appeal	29 June 2015
Application for leave to SCC granted	18 February 2016
Case to be heard by SCC (tentative)	1 November 2016

# Questions about the allure of arbitration appeals

10. What was the time frame involved in *Sattva*?

Arbitration award	23 December 2008
Judgment by Greycell J on leave application (denied)	7 August 2009
Judgment by Court of Appeal re leave (granting leave)	14 May 2010
Judgment by Armstrong J on legal questions	6 May 2011
Judgment by Court of Appeal on legal questions	7 August 2012
Judgment by SCC	1 August 2014

# Questions about the allure of arbitration appeals

11. Does *Sattva* restrict the scope of a “question of law”?

# Questions about the allure of arbitration appeals

12. How does *Sattva* apply to interpreting standard form contracts, where there was no negotiation between the parties?

# Questions about the allure of arbitration appeals

13. Standards of review—reasonableness of the arbitrator’s interpretation of the contract *versus* correctness for the method of going about interpreting it?

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**Alberta Arbitration Act**  
**RSA 2000, c. A-43**

**Remedies**

**Appeal of award**

**44(1)** If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

**(2)** If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may, with the permission of the court, appeal an award to the court on a question of law.

**(2.1)** The court shall grant the permission referred to in subsection (2) only if it is satisfied that

- (a)** the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
- (b)** the determination of the question of law at issue will significantly affect the rights of the parties.

**(3)** Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

**(4)** The court may require the arbitral tribunal to explain any matter.

**(5)** The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal and give directions about the conduct of the arbitration.

**(6)** Where the court remits the award to the arbitral tribunal in the case of an appeal on a question of law, it may also remit to the tribunal the court's opinion on the question of law.

**British Columbia Arbitration Act**  
**RSBC 1996, c 55**

**Appeal to the court**

- 31 (1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if
- (a) all of the parties to the arbitration consent, or
  - (b) the court grants leave to appeal.
- (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
- (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
  - (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
  - (c) the point of law is of general or public importance.
- (3) If the court grants leave to appeal under subsection (2), it may attach conditions to the order granting leave that it considers just.
- (3.1) A party to an arbitration in respect of a family law dispute may appeal to the court on any question of law, or on any question of mixed law and fact, arising out of the award.
- (4) On an appeal to the court, the court may
- (a) confirm, amend or set aside the award, or
  - (b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

# THANK YOU

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