

ARBITRATION - REVIEW OF CRAZY AWARDS

By Hon. Peter W. Kilborn (ret)

There is a tension between two goals in arbitration: one is to have finality, to have arbitration serve as a final answer, not just a first stage in a lengthened litigation. The second goal is to come up with the correct resolution of the dispute. The first goal is served by greatly restricting the grounds for upsetting an arbitration award. They are found in sections 12 and 13 of Chapter 251 and they are cold comfort to a losing party - essentially fraud or partiality on the part of a neutral. If the arbitrator made a mistake of law or fact, that's too bad. So you end up with less of a right of appeal than you would have of an errant trial court judgment.

REBA has an experienced panel of neutrals. None of them is a crazy. But how can you assure a client that one of them won't produce a crazy award in arbitration? There are a couple of possible answers. One is to have recourse to the courts in a proceeding which the parties have agreed in advance will be restricted in scope. The problem, as Judge Kass has pointed out elsewhere, is that it is by no means clear that a court will go along with having its jurisdiction tailored by the parties.

But there is a second avenue of relief. That is to have the parties agree in advance that an award may be reviewed by another arbitrator or arbitrators. REBA now provides for that. Here is how it works. When the parties agree to a REBA one-arbitrator arbitration, they can agree that the award may be reviewed by either party. The party seeking a review can decide, after the award, to have the review by one reviewer, chosen by REBA from its panel. Or he/she can elect review by three reviewers, in which event each party names a reviewer from REBA's panel and the two choose the third, also from the panel. All this is set up so as to be done within sixty days of the date of the award.

The review is limited to the record generated by the arbitrator, including any exhibits. The award is confirmed unless the reviewer(s) conclude there wasn't substantial evidence to support its findings of fact or that there was an outcome-determinative error of law. If the reviewer(s) do not confirm, they can vacate, reverse or revise the award. Their action becomes the award for purposes of Chapter 251.

This approach is meant as a safety-valve. So there is an incentive not to choose review: if you are the losing party in the award and you choose to have a review, you pay for the review if the award is confirmed.

REBA hopes this approach will comfort counsel whose inclination to reap arbitration's savings in money and time has been outweighed by worries about an aberrant award.

A former Chief Justice of the Land Court, Judge Kilborn serves on the panel of neutral mediators and arbitrators for REBA Dispute Resolution, Inc., a subsidiary of REBA.