

**PRACTICE POINTS**

## **Ninth Circuit Permits Appeal of Order Remanding Case for New Arbitration**

By Andrew D. Campbell – March 6, 2019

In a matter of first impression, the Ninth Circuit Court of Appeals held that the Federal Arbitration Act (FAA) allows an appeal to be taken from an order that vacates *and* remands a case for a new arbitration. [\*Sanchez v. Elizondo\*](#), 878 F.3d 1216, 1219 (9th Cir. 2018).

In *Sanchez*, claimant initiated an arbitration against his FINRA licensed broker for placing him in an inappropriately risky investment. *Id.* at 1217. Claimant’s arbitration claim sought damages of \$100,000. [FINRA Rule 12401](#) provides that claims for damages between \$50,000 and \$100,000 are to be decided by a single arbitrator. *Id.* at 1218. The same rule provides that “[i]f the amount of the claim is more than \$100,000” then the panel “will consist of three arbitrators” unless the parties agree otherwise. Pursuant to these rules, FINRA appointed a single arbitrator. In a pre-hearing brief submitted 11 days before the scheduled hearing, however, the claimant increased his damages claim to \$125,000. Claimant did not seek to amend his complaint, and respondent/broker did not object to the changed damages amount.

At the outset of the hearing, the arbitrator raised the issue of the increased damages request and asked whether either side objected to proceeding before a single arbitrator. Respondent/broker’s counsel objected. Despite the objection, the arbitrator determined that he could proceed alone because he interpreted the term “claim” in FINRA Rule 12401 to mean the claimant’s original arbitration demand and the damages sought therein. After the hearing, the arbitrator awarded damages in claimant’s favor of \$75,000.

Respondent/broker moved to vacate the award arguing that the arbitrator had exceeded his authority by proceeding alone and had exhibited a manifest disregard of the law. The district court judge agreed, vacated the award, and ordered a new arbitration. Claimant appealed.

The Ninth Circuit’s decision first assessed whether the district court’s order—which called for further proceedings—was in fact appealable. The court observed that the FAA allows an appeal to be taken from any order “confirming or denying confirmation of an award” or “vacating an award,” but it is silent as to whether an appeal can be taken from an order that vacates *and* orders further proceedings. *Id.* at 1219. Joining every other circuit that has considered this issue—including the First, Second, Third, Fifth, and Seventh Circuits—the Ninth Circuit determined that the order was appealable. *Id.* at 1219-20.

As to the merits, the Ninth Circuit reversed the district court’s order vacating the award. Though the FAA allows a court to vacate an award “where the arbitrators exceeded their powers,” the Ninth Circuit stated that this is a very high standard that is met only where an award is “completely irrational.” An award is “completely irrational” if it “fails to draw its essence from the [arbitration] agreement.” *Id.* at 1222 (internal citations omitted). This standard applies to matters of procedure as well as substance.

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The Ninth Circuit found that the arbitrator’s interpretation of the FINRA Rules drew its “essence” from those rules. He found that the term “claim” in the FINRA Rules meant claim as of the time of initiating the arbitration. This interpretation, according to the Ninth Circuit, was plausible. *Id.* at 1223.

Similarly, the Ninth Circuit concluded that the arbitrator did not exhibit a manifest disregard for the law. *Id.* This standard allows for vacatur where an arbitrator recognizes the applicable law and then ignores it. Here, the arbitrator identified the applicable law—the FINRA Rules—and he then interpreted and applied those rules. Although his interpretation of the rules may have been in error, that was not enough to overturn the award.

The Ninth Circuit did not confirm the arbitrator’s award but instead instructed the district court to determine if any other grounds for vacating, modifying, or correcting the award exist and, if not, to then consider claimant’s motion to confirm the award.

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