

AAA Adopts Optional Appellate Arbitration Process

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The American Arbitration Association (AAA) has released new rules establishing an optional appeals process for parties involved in arbitration. Effective November 1, 2013, the *Optional Appellate Arbitration Rules* (Rules) afford parties an opportunity to seek review of unfavorable arbitration awards before an appellate arbitral panel. The Rules describe the process and requirements for parties wishing to have a decision reviewed in appellate arbitration.

The new Rules offer an alternative to the narrow grounds and limited scope of judicial review of arbitration awards. Typically, a court will *not* vacate an arbitration award except in rare cases where: (1) the award was procured through fraud, corruption, or undue means; (2) the arbitrator was plainly biased; (3) the arbitrator was guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) the arbitrator exceeded his or her powers.^[1] While these bases pertain to the fairness of the arbitration procedure, the new Rules permit appeals on substantive grounds.

Parties who adopt the Rules can now appeal on the grounds that the underlying arbitration award is based on (1) material and prejudicial errors of law, and/or (2) "clearly erroneous" factual determinations. Further, the appellate arbitrators will apply a comparable standard of review to an appellate court reviewing a trial court decision. Thus, arbitration subject to the new Rules more closely resembles the appellate review process found in the courts, but promises an expedited, cost-effective review process.

How to Appeal

Importantly, the AAA or the International Center for Dispute Resolution® (ICDR®) will only hear appeals of arbitration awards when all parties expressly agree to the Rules by contract or stipulation. Without such an agreement, a party cannot unilaterally appeal an arbitration award. If, within thirty (30) days of the underlying arbitration award, a party decides to appeal, the appellant must:

- File a "Notice of Appeal" to the AAA and all parties to the underlying award;
- File a copy of the applicable arbitration agreement to the AAA and all parties to the underlying award;
- File a copy of the underlying award to the AAA; and
- Pay an administrative filing fee of \$6,000.

The AAA will choose an "appeal tribunal" from its "Appellate Panel," which includes former federal and state judges and other arbitrators with strong appellate backgrounds. There is some flexibility in the appointment of arbitrators. Parties can appoint the tribunal themselves, or follow the AAA's appointment procedures if they do not agree on a tribunal. The AAA will appoint a panel of three arbitrators, unless the parties decide to use only one.

The appellate tribunal will consider the merits of the appeal on written documents, without oral argument. Still, if necessary, the tribunal can elect to hear oral arguments or the tribunal can honor a party's request for oral argument. The Rules also require the parties to compile a record on appeal. After considering the record and the appellate briefs, the tribunal will either: (1) adopt the underlying award; (2) substitute its own award for the underlying award; or (3) request additional information and exercise an option to extend the process for no more than thirty (30) days.

Take-away

The Rules aim to promote arbitration as an easy, fast, and efficient forum for dispute resolution. The AAA states that the appeals process can be completed in roughly three months. It appears the Rules also carve-out an exception and are not applicable in the context of disputes arising from standard contracts for consumer goods or services.

The new Rules bear some significant costs. Excluding the \$6,000 administrative fee, the appellant may be assessed the appeal costs, and other reasonable costs of the appellee incurred after the commencement of the appeal if the tribunal determines that the appellant is *not* the prevailing party. This can include attorneys' fees if the contract or a statute provides for such. Therefore, the appellate process seems best suited for parties involved in large, complex cases, for which the Rules were primarily designed.

Moreover, parties wishing to adopt the Rules should consider obtaining resources to maintain an adequate record. The Rules require parties to compile a record and also allow parties to submit expert reports, deposition transcripts, documentary evidence, excerpts of the transcript from the underlying arbitration, and other relevant evidence. Since an extensive record may come at a high expense, the new Rules seem most appropriate for large or important cases.

Presently, some employers have pre-dispute mandatory arbitration agreements in which employees waive their right to a judicial forum in all, or many, disputes. Those agreements may provide for AAA procedures and arbitrator selection; however, the new appellate Rules do *not* apply unless the parties affirmatively include them in such agreements. Accordingly, employers should be aware of the Rules and how adopting the Rules in an arbitration agreement may affect the cost, length, overall process, and outcome of arbitration.

If you have any questions or concerns regarding the new *Optional Appellate Arbitration Rules*, please contact the lawyers listed on this alert or your Proskauer relationship lawyer.

[\[1\]](#) Federal Arbitration Act, 9 U.S.C. § 10.

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