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Subject: New Appellate Arbitration Rules



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New Appellate Arbitration Rules

The American Arbitration Association (AAA) recently issued "Optional Appellate Arbitration Rules", essentially a "Rules of Appellate Procedure" for AAA arbitrations that allows parties, for the first time, to add a post-award appeal process to AAA arbitrations. These Rules should make arbitration more attractive for complex and expensive disputes. However, they also contain many nuances that present risks and pitfalls for the unwary or uninformed.

First, the Rules distinguish appealing an award from *modifying* an award. "Modification" is defined technically in arbitration to mean the correction of clerical, typographical, or computational errors in an award. The Rules provide that an appeal cannot be used to modify an award; modification must be sought through the procedures of the ordinary AAA Rules, within 20 days of the issuance of the award. Thus, a party who appeals an award without also timely seeking to modify it could forfeit its right to have the award modified, even if the award is admittedly substantially erroneous.

Second, an appeal under these Rules must be initiated within 30 days of the receipt of the award by filing a Notice of Appeal with specified information and documents, in the manner prescribed in the Rules. The precision of these requirements may be a surprise to, and risk for, practitioners who assume the Rules are informal because they are for arbitration, not litigation.

Third, the Rules also require the submission of a record and provide that any issue or evidence not presented in the underlying arbitration is waived. Because of these provisions, the Rules affect not just post-award proceedings but how parties should conduct their underlying arbitration. The lack of a transcribed record and lax evidentiary rules found in most arbitrations create opportunities for parties to maximize their issues and evidence for appeal or limit those of their opponent, and risks for parties who are uninformed or do not plan accordingly.

Further, the Rules provide that once an appeal is lodged the original award is no longer "final." The Rules also specify certain information an appellate panel must include in and attach to an award for that award to be final. Courts will only enforce "final" awards. Thus, if the appellate panel and parties are not diligent, the panel could issue an award that is not final and is unenforceable. As the original award also would no longer be "final", a failure to follow these Rules could cause a prevailing party to lose its victory, though it won at every stage in the arbitration.

The rest of the Rules provide procedures similar to those for judicial appeals. The appellate panel is a three-arbitrator panel chosen by AAA from party lists. The standards of review are the same as for judicial appeals, clearly erroneous for factual findings and *de novo* for legal findings. But as there is no "Supreme Arbitrator" to enforce these standards and no *stare decisis* from one panel to another, it remains to be seen how closely appellate panels will adhere to these standards in practice. Regardless, one difference with judicial appeals is that, in a singular nod to efficiency, the appellate arbitral panel under these Rules does not have the authority to remand for further

proceedings; instead, it must either affirm the original award or issue a new or revised award.

It is unclear whether courts will choose to intervene in the arbitral appeal process. At least initially, savvy practitioners could gain an advantage by convincing courts the Rules provide new bases for vacatur or (non-)enforcement, arguing, for instance, that the Rules' limits on appellate panels' authority provide a basis for vacatur, based on panels' exceeding their authority, or that the issue of *whether* there is an agreement to appeal is a "gateway" issue for judicial resolution in the first instance.

The Rules are "optional" and will apply only where parties incorporate them; AAA provides model language for this purpose. Obvious areas of future dispute include what non-model language incorporates these Rules and whether the Rules can be incorporated retroactively, for instance, by a clause drafted two years ago providing a non-prevailing party "full appeal rights." Parties also remain free to adopt their own variation of these Rules. However, any arbitral appeal must be to other arbitrator(s), not a court. The U.S. Supreme Court has struck down attempts to allow courts to review arbitration decisions for errors of fact or law, a strict stance that was one of the motivations for these Rules.

In all, these Rules are a valuable addition to the AAA arbitral regime that may enhance the appeal of arbitration for complex (and expensive) transactions and disputes. However, the Rules create surprising opportunities and risks that will give parties who are informed about them an advantage over those who are not, particularly before their nuances are widely known. More generally, as additional procedural protections such as these make arbitration fairer and more attractive, they also add to the body of law a lawyer needs to know to practice arbitration effectively; cumulatively, these changes subvert the attractiveness and purpose of arbitration as an informal and efficient alternative to litigation. Regardless, these changes are occurring and making arbitration more like other areas of law, requiring knowledge and experience to work in them effectively, and to avoid inadvertent mistakes and unwanted liability.

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