

Practice Update

New Option to Appeal Arbitration Awards Within The Arbitration Process

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Arbitration is a faster and less expensive way to resolve disputes. One significant drawback of arbitration, however, is that there has been almost no way to overcome an aberrant decision by the arbitrator. Even when the arbitrator applies the wrong law or plainly mistakes the facts, courts will rarely disturb the award. To address this concern, the American Arbitration Association (“AAA”) has created new optional appellate arbitration rules to provide an expedited and complete review of the arbitration decision.

Review in the Courts

Under the Federal Arbitration Act, a court may vacate an arbitrator’s decision only in limited and unusual circumstances delineated by the Act such as arbitrator misconduct, refusal to hear material evidence, or the arbitrator exceeding his or her powers. Courts will not entertain claims that an arbitrator has made factual or legal errors. Florida statutory and decisional law is similarly restrictive.

Some courts have interpreted the arbitration statutes to include additional narrow grounds for vacating an award, such as finding the award “completely irrational” or a “manifest disregard of the law.” These are difficult standards that are rarely met. For

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example the United States Court of Appeals for the Second Circuit vacated awards because of “manifest disregard of the law” in only four of forty-eight cases it considered in a forty-year period. Nevertheless, these exceptions allowed a narrow hope of a court vacating an erroneous arbitration award.

In 2008, the *Supreme Court in Hall Street Assoc., LLC v. Mattel Inc.*, 552 U.S. 576 (2008), held that the Federal Arbitration Act enumerates the only grounds for reviewing an arbitration award, and these grounds for judicial review cannot be expanded by contract. Although the Supreme Court has declined to decide whether “manifest disregard” survives the Hall Street decision, the First, Fifth, Seventh, Eighth, and Eleventh Circuits have held it does not. Thus, at least in these circuits, even an award that is mistaken, incorrect or in manifest disregard of the law cannot be vacated by the courts.

Review by an Arbitration Panel

As an alternative to the extremely narrow review available in the courts, the AAA adopted Appellate Arbitration Rules, effective November 1, 2013. The rules create an appeal to an arbitration panel of former judges and neutrals with appellate backgrounds, empowered to review “an error of law that is material and prejudicial; or determinations of fact that are clearly erroneous.”¹ The rules only apply where the parties have agreed either by contract or stipulation to use them. Deadlines for all aspects of the proceeding are tight, so that the appeal is expected to be completed within approximately three months.

Key provisions include:

- An appeal must be initiated within 30 days of the underlying award through a notice of appeal which specifies the errors alleged.
- A cross-appeal may be filed within 7 days.

- A panel of three appellate arbitrators will be selected by the parties, unless the parties agree to utilize a single arbitrator.
- The record is compiled by the parties to include transcripts of the arbitration hearing, briefs provided to the arbitrator, and all relevant evidence presented at the arbitration hearing.
- Unless agreed otherwise by the parties, the initial brief is due twenty-one days after service of the notice of appeal; the answer brief twenty-one days following service of the initial brief; and the reply brief ten days after the answer brief. The rules provide for a single seven day extension for good cause shown. Under extraordinary circumstances, the appeal panel has discretion to grant further extensions.
- Oral argument may be requested by a party within thirty days of the notice of appeal and is at the discretion of the panel. Any oral argument shall take place within thirty days of the last brief.
- The appeal tribunal must provide its decision within thirty days of the last brief or oral argument, if any.
- The tribunal may adopt the underlying award, substitute its own award, or request additional information from the parties. The panel may not order a new arbitration or remand to the original arbitrator for further review.
- The appellant may be assessed the costs of the appellate arbitration, including attorneys' fees if provided by the parties' contract, if they are not the prevailing party on appeal.

Although an AAA arbitration appeal will be significantly faster than an appeal through the courts, it will not necessarily be less expensive. The initial administrative fee is \$6,000. In addition, the appellant must pay a deposit to cover the anticipated fees and expenses of the tribunal at the commencement of the appeal. The appeal tribunal may reallocate these fees and costs, but the appellant

must be prepared to shoulder this expense if not successful.

A similar optional arbitration appeal procedure has been available through Judicial Arbitration and Mediation Services (“JAMS”) since 2003.² Review under the JAMS rules applies the same standard of review that the first-level appellate court in the jurisdiction would apply to a trial court decision. Likewise, the International Institute for Conflict Prevention & Resolution has had an appellate arbitration procedure since 1999.³ Other groups, like the American Health Lawyers Association Dispute Resolution Services, do not yet offer an arbitration appeal.

Availability of the Appellate Arbitration Procedures

The optional appellate arbitration procedure should be considered by any business resolving disputes through arbitration. Especially in high stakes matters, the availability of review provides protection against an arbitrator’s error.

The appellate arbitration procedures are only available through specific agreement; a contractual agreement to arbitrate will not be sufficient to allow for an appeal under the AAA rules unless it specifically references such a right. The AAA website suggests the following language to provide an appeal option:

Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA’s Optional Appellate Arbitration Rules (“Appellate Rules”); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as

defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof.

Parties may stipulate to appellate arbitration review at the outset of, or during an arbitration, so counsel may wish to discuss this possibility with clients and opposing counsel in any pending arbitration matters. In addition, businesses may wish to review and modify their contracts to allow for appellate review.

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¹ The AAA Optional Appellate Arbitration Rules may be found at <http://go.adr.org/AppellateRules>.

² The JAMS (Judicial Arbitration and Mediation Services) rules may be found at <http://www.jamsadr.com/rules-optional-appeal-procedure/>.

³ The International Institute for Conflict Prevention & Resolution appellate arbitration rules are located at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/604/CPR-Arbitration-Appeal-Procedure-and-Commentary.aspx>.

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