



NONJUDICIAL APPEALS OF ARBITRAL AWARDS

An Underutilized Tool in Alternative Dispute Resolution

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Expedited proceedings, specialized adjudicators, flexible procedural rules, truncated discovery procedures, and finality are the hallmarks of arbitration. In contrast to litigation, parties in arbitration have the opportunity to choose their arbitrators, the procedural rules for the proceedings, the forum, and the substantive laws that will apply. This streamlined dispute resolution process provides distinct advantages to conventional litigation. These benefits, however, can come with additional risk. The conventional arbitration scheme provides little opportunity for appellate review of an arbitration award. Accordingly, dissatisfied parties have had no recourse when an arbitrator issues an award that, while within the range of permissibility under the Federal Arbitration Act, is nonetheless fundamentally flawed.

In recent years, arbitration organizations, such as JAMS and the American Arbitration Association (AAA), have instituted new procedural mechanisms to address this concern and allow expedited appeal of arbitral awards for parties. These relatively new rules provide recourse against potentially flawed arbitral awards while simultaneously preserving the key features of arbitration. Given the popularity of arbitration and the advantages associated with it, one would expect that the use of appellate review procedures would be at least roughly equal to the percentage of cases appealed from federal district courts. While arbitration institutions are reluctant to provide specific data, anecdotal information indicates that the appeal rate in arbitrations is approximately half of the federal courts. Historically, approximately 20 percent of civil judgments in federal district courts are appealed. In contrast, it is estimated that only about 10 percent of arbitrations are appealed.¹ Given the benefits of appellate arbitration over traditional modes of litigation, this is

surprising. This article explores the appellate arbitration landscape, discusses its features, and provides guidance to practitioners as to how to maximize the benefits of an underutilized tool for alternative dispute resolution—nonjudicial appeals of arbitral awards.

Traditional Appellate Procedures Under the FAA

The Federal Arbitration Act (FAA) is the primary mechanism by which parties enforce their arbitral awards.² When a party secures an arbitration award, the FAA allows for limited judicial involvement. Most importantly for prevailing parties, the FAA permits federal courts to confirm an award. This is a purely ministerial process, which does not grant the court with the authority to question the merits of the arbitrator's decision. Judicial confirmation of an appellate award transforms an arbitral award into an enforceable judgment against the losing party.

Even after the adoption of the FAA in 1925, litigants have had few

opportunities for meaningful review, judicial or otherwise, of an arbitral award. There are at least two reasons for this. First, arbitration awards escape meaningful review because an arbitrator's discretion is exceedingly broad. Arbitration proceedings are, by their nature, more flexible than conventional litigation. Unlike judges, an arbitrator need not follow the law unless the arbitration clause mandates it.³ Instead, an arbitrator may base his decision on practice insight, business customs, or broad principles of equity and justice.⁴

Losing parties may feel understandably upset when an arbitrator bases his decision on opaque principles of equity, questionable business customs, or other extra-judicial reasoning. The limited appeals process hampers that litigant's opportunity to challenge an award and, in turn, reverse arbitral decisions that, while technically permissible under the FAA, are nonetheless irrational.

Second, although the FAA allows for judicial involvement, the statute significantly constrains a court's ability to substantively review an arbitral award.⁵ Under the Federal Arbitration Act, arbitration awards may not be appealed before federal courts. Parties may only seek to vacate or modify an award on limited grounds. A court may modify an arbitration award to correct an obvious miscalculation or similar defect in form not affecting the merits.⁶ Alternatively, a court can vacate an award for fraud, procedural misconduct by the arbitrators, evident partiality or corruption on the part of the arbitrators, or instances where the tribunal has exceeded its power under the arbitration agreement.⁷

Grounds for Vacatur Under the FAA

Evident Partiality or Corruption

Section 10 of the FAA provides that an award may be vacated "where there was evident partiality or corruption in the arbitrators, or either of them."⁸ To vacate an award on these grounds, a party must establish that the arbitrator had a direct, definite, and demonstrable interest in the outcome of the arbitration.⁹ The party seeking vacation has the burden of proving "that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration."¹⁰ To do this, he or she "must establish specific facts that indicate improper motives on the part of the arbitrator."¹¹ Courts consider the following factors: (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he or she is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding.¹²

Procured by Corruption, Fraud, or Undue Means

A party seeking to vacate an award on the basis of fraud, corruption, or undue means must show that (1) his or her adversary engaged in fraudulent activity; (2) the petitioner could not, in the exercise of due diligence, have discovered the alleged fraud prior to the award; and (3) the alleged fraud materially related to an issue in the arbitration.¹³ Petitioners face a particularly high burden. To warrant vacatur, it must be "abundantly clear" that the award was the product of fraud, corruption, or undue means.¹⁴

Arbitrator Misconduct in Refusing to Postpone the Hearing or Refusing to Hear Pertinent Evidence

Section 10 of the FAA also permits parties to seek vacatur where the arbitrator is "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."¹⁵ This is an exceptionally narrow ground for vacating an award.¹⁶ When a party seeks to vacate an arbitration award based on an evidentiary decision of the arbitrators, that decision "will not be opened up to evidentiary review" except "where fundamental fairness is violated."¹⁷

In short, judicial review of an arbitral award under the FAA is extraordinarily narrow. While there are statutory grounds for vacatur, federal courts rarely disturb an arbitrator's decision. An appellant bears a heavy burden as "[i]t is not enough to show that the arbitrator committed an error—or even a serious error."¹⁸ In reviewing an arbitral award, the "sole question" for a court is whether the arbitrator "even arguably interpreted the parties' contract, not whether he got its meaning right or wrong."¹⁹ By way of example, the Fourth Circuit's decision in *MCI Constructors v. City of Greensboro* provides an example of how review by the federal courts operates under the FAA.²⁰

In *MCI*, the city of Greensboro entered into a contract with a subcontractor for the expansion and upgrade of a wastewater treatment plant. The contract was valued at almost \$30 million. After construction was delayed significantly, the city terminated the contract. MCI sued the city for breach of contract, negligent misrepresentation, and wrongful termination. The city filed a counterclaim for breach of contract, seeking \$14 million in damages. After an arbitral tribunal heard the matter, the panel found for the city and issued an award to the city for almost \$15 million.²¹ In response, the contractor petitioned the panel for a modification, arguing that the tribunal erred in its damages calculation. Specifically, MCI asserted that the panel should have reduced the damages award from the contract balance, as is traditionally done in damages calculations. The panel refused to modify the award and concluded that there were no errors. MCI appealed the district court and sought modification under § 11 of the FAA. After years of litigating the dispute, the Fourth Circuit issued a decision in 2010. The court of appeals affirmed the award, stating:

The scope of judicial review for an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.²²

As this case demonstrates, appellants seeking vacatur of an arbitral award in federal courts face virtually insurmountable procedural hurdles. An arbitration panel may issue an award that, while "permissible" within the FAA, is nonetheless irrational, inconsistent, or against the weight of the legal authority. When this occurs, parties are left with little judicial recourse. Where litigation in federal court would have provided a meaningful opportunity for review of the merits of an award, the FAA does not allow this. This, of course, is an intended feature of arbitration under the federal scheme. When the rules were codified, a primary goal was the finality of the award. Unfortunately, this goal can disadvantage parties who may have a legitimate claim on appeal but no procedural mechanism to pursue it.

This problem can be further frustrated by the lack of formal decisions. Arbitrators are often not required to issue formal, extensive opinions, justifying their decision.²³ Under the Uniform Arbitration Act, arbitrators are not required to submit written findings at all. The FAA only requires that arbitrators issue a "reasoned award." While

this encourages speedy resolution of disputes, it also exacerbates problems parties face when seeking relief from federal courts. As we can see from *MCI*, when an arbitrator submits a decision without an extensive written opinion, the parties have little likelihood of convincing a court to vacate or modify the award. In sum, without a meaningful mechanism for appellate review, the arbitration process can be an unpredictable, and therefore ultimately unsatisfactory, means of alternative dispute resolution. This criticism remains one of the primary obstacles for parties in selecting arbitration over conventional litigation.

In response to these problems, the AAA, JAMS, and other arbitration associations recently created appellate arbitration rules that expand the level of review available to parties under an expedited appellate review process. These rules provide a mechanism for private appellate review to address a potential weakness in the FAA scheme.

Optional Appellate Arbitration Rules

In 2013, the AAA and International Centre for Dispute Resolution (ICDR) released the “Optional Appellate Arbitration Rules” for use in both domestic and international disputes. With the recent promulgation of these rules, parties may now take advantage of expedited and flexible arbitration proceedings while preserving meaningful appellate review. AAA designed the rules “for the types of large, complex cases where the parties think the ability to appeal is particularly important.”²⁴ Other arbitration associations, such as JAMS, introduced similar rules that are designed to offer a moderate position to parties who wish to sacrifice a modicum of finality in exchange for the a limited appellate review procedure that serves to protect against arbitral decisions that would otherwise evade review from federal courts. It is important to note that the AAA Optional Appellate Arbitration Rules and JAMS Optional Arbitration Appeal Procedure do not supplant the FAA. Rather, the rules complement the federal scheme by allowing for an alternative route for relief.

An Underutilized Tool

Federal courts remain congested with civil cases, which can take years to resolve. For instance, in 2014, the total number of civil cases pending in U.S. district courts exceeded 337,300, which represented a 12 percent increase from the year before.²⁵ On average, in 2014 a civil matter took eight and a half months to resolve from the date the complaint was filed until termination in the district court. If the parties went to trial, the median time from filing to disposition ballooned to more than 26 months.²⁶ These wait times grow larger each year. Last year, the median time for judicial resolution of a civil case rose to 8.7 months and, if the matter went to trial, to 27.2 months.²⁷

Growing caseloads are placing increasing pressure on an already overburdened federal courts system. Last year, 410 civil cases were filed per judgeship. With each case, judges must familiarize themselves with the nuances of each dispute. Consequently, litigants in federal district court face protracted litigation, exponentially growing costs and attorney’s fees, and overburdened judges with growing dockets.

On appeal, litigants do not fare any better. In 2015, an appeal took an average of 9.1 months to resolve from the date a notice of appeal was filed until its disposition. The Eighth Circuit resolves appeals faster than any other circuit—five months. On the other end of the spectrum, an appeal in the D.C. Circuit takes an average of more than 13 months to resolve.²⁸

Unlike traditional appellate procedure in federal courts, appellate arbitration rules are designed to provide an expedited appeals process. Whereas appeals take on average nine months to complete in federal courts of appeal, an arbitration appeal conducted under the AAA rules is designed to be completed in approximately three months.²⁹

Given the fact that appellate arbitration can be completed in a fraction of the time, it remains a largely untapped resource. Given that appellate arbitration can be completed in a fraction of the time, it remains a largely untapped resource. In past decades, roughly 20 percent of judgments in federal district courts for tort and contract claims have been appealed to the courts of appeal. In contract, parties are not taking advantage of the appellate procedures with the regularity of traditional appeals. Throughout the end of the 20th century, roughly 20 percent of judgments in federal district courts for tort and contract claims have been appealed to the courts of appeal.³¹

While still a relatively new concept in alternative dispute resolution, as parties become more familiar with this alternative, we can expect a higher proportion of appellate arbitration proceedings. Likely, the lack of use of this alternative may be an indication that parties are either unaware of or unfamiliar with appellate arbitration, and therefore have yet to include it as a term in their arbitration agreements. Once parties embrace the AAA Optional Appellate Arbitration Rules, they can expedite appeals, lower the associated costs, and further relieve the burden on our courts. The first step in that process is, of course, familiarization.

AAA Optional Appellate Arbitration Rules

In many respects, appellate review in arbitration mirrors the traditional commercial arbitration rules. By way of example, under the AAA appellate review procedure, parties enjoy flexibility in selecting arbitrators to hear the appeal, choosing the size of their appellate panel, and controlling the overarching structure of the proceedings. The initial step in an arbitral appeal is, of course, to select the review panel. Arbitration appeal panels brought under the AAA Optional Appellate Arbitration Rules are selected by the parties or, if the parties do not appoint a panel, by the AAA selection procedure. Unless they agree otherwise, a tribunal of three arbitrators will hear the appeal.³²

A party may initiate appellate review under the AAA rules by filing a notice of appeal with the AAA. Within 30 days from the arbitrator’s final award, the petitioner must file a notice of appeal identifying the portion of the award being appealed and the alleged errors in the arbitrator’s decision. Once filed, the opposing party has seven days from the date of the notice of appeal to file a cross-appeal.³³

Briefing in an arbitral appeal follows a similar procedure to that found in federal courts of appeal. An appellant has 21 days from the date of the notice of appeal to file a brief. The opposing party may file a response within 10 days. The appellant has the option of filing a reply brief as well, if necessary. Generally, appeals are resolved through written materials only. The parties may request oral argument so long as they file their request within 30 days of the notice of appeal, but the appellate panel has discretion in determining whether oral argument is necessary.³⁴

Below are some key features of the AAA Optional Appellate Arbitration Rules:

- *Opting-In:* As with arbitration clauses, the parties must “opt-in” via contract to invoke AAA appellate procedures. That is, the parties must agree to submit to an arbitral appeal. The AAA rules do

not allow for a party to unilaterally invoke the appellate procedures once a dispute arises.

- *30-Day Decision*: The tribunal has 30 days to either affirm the award or craft its own award. Alternatively, the tribunal can request that the parties furnish additional information and extend the time that it has to render an award.
- *No Remand*: The tribunal does not have the authority to remand the case back to the original arbitrator for reconsideration. The tribunal's award is final.
- *Costs and Fees*: The party appealing an arbitrator's decision bears the costs and fees associated with the appeal. If the opposing party files a cross appeal, the parties share the costs equally.
- *Administrative Costs*: In addition to fees and costs of the tribunal, the party submitting an appeal must pay a \$6,000 fee. Any party cross-appealing must also file a \$6,000 administrative fee as well.
- *Filing Deadlines*: The AAA rules impose a 21-day filing deadline for briefs. Briefs are not to exceed 30 pages each.³⁵

JAMS Optional Arbitration Appeal Procedure

In 2003, JAMS instituted the Optional Arbitration Appeal Procedure. The JAMS procedure provides features that are distinct from the AAA rules. First, filing deadlines are stricter under the JAMS procedure. Unlike the AAA rules, which require a party to file a notice of appeal within 30 days of an arbitrator's decision, JAMS requires that a petitioner file their notice within 14 days.³⁶ The appellee, in turn, has seven days to file a cross-appeal. After the petitioner files a notice of appeal, a case manager will recommend an appeal panel and make any necessary disclosures to the parties. The parties must agree to the panel's members. If they cannot, the case manager will appoint the panel.³⁷

Additionally, in an effort to mirror litigation, JAMS seeks to implement the same standard of review as would apply in federal court. The JAMS Optional Arbitration Appeal Procedure provides that the standard of review for JAMS appeals is the "same standard of review the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision."³⁸

Further, the JAMS appellate panel may not remand the case to the arbitrator who rendered the initial decision. The JAMS procedure aligns with the AAA rules in this regard. But the appellate panel may, in its discretion, "re-open the record in order to review evidence that was improperly excluded by the arbitrator or evidence that is now necessary in light of the panel's interpretation of the relevant substantive law."³⁹

Conclusion

In crafting arbitration clauses, the optional appellate rules remain an underutilized but effective tool. Whether a party opts for JAMS, AAA, or another set of rules, appellate arbitration grants parties with an opportunity for expedited review of an arbitral award while preserving the core features of arbitration. As parties familiarize themselves with these still relatively new appellate rules and begin to include them in agreements, this will likely result in the expedient resolution of disputes, lower costs, and less strain on an already overburdened court system, which lacks the institutional resources, manpower, and expertise often necessary to resolving complex commercial disputes. ☉



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Endnotes

¹See Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUDIES 664, 671-72 (2004) (excluding civil actions filed by prisoners, which generally have a higher appellate rate).

²Although states have adopted the Uniform Arbitration Act, or some variation thereof, the FAA often preempts state law, regardless of whether the action is brought in state or federal court.

³Jay E. Grenig, *After the Arbitration Award: Not Always Final and Binding*, 25 MARQ. SPORTS L. REV. 65, 68 (2014); see *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972) ("It is a truism that an arbitration award will not be vacated for a mistaken interpretation of law.").

⁴*Id.*

⁵*Choice Hotels Int'l Inc. v. SM Prop. Mgmt. LLC*, 519 F.3d 200, 206-07 (4th Cir. 2008).

⁶9 U.S.C. § 11.

⁷9 U.S.C. § 10.

⁸See 9 U.S.C. § 10(a)(2).

⁹*Consol. Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995).

¹⁰*Id.* (internal quotes omitted)

¹¹*Id.*

¹²*Three S Delaware Inc. v. DataQuick Info. Sys. Inc.*, 492 F.3d 520, 530 (4th Cir. 2007).

¹³*McCarthy v. Smith Barney Inc.*, 58 F. Supp. 2d 288, 293 (S.D.N.Y. 1999).

¹⁴*Kolel Beth Yechiel Mechil of Tartikov Inc. v. YLL Irrevocable Trust*, 878 F. Supp. 2d 459, 464 (S.D.N.Y. 2012), *aff'd*, 729 F.3d 99 (2d Cir. 2013), and *aff'd*, 729 F.3d 99 (2d Cir. 2013).

¹⁵9 U.S.C. § 10(a)(3).

¹⁶*Id.*

¹⁷*Kolel*, *supra* n.14 at 465.

¹⁸*Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013).

¹⁹*Id.*

²⁰*See MCI Constructors LLC v. City Of Greensboro*, 610 F.3d 849, 854 (4th Cir. 2010).

²¹*Id.*

²²*Id.* at 857 (quoting *Choice Hotels Int'l Inc. v. SM Prop. Mgmt. LLC*, 519 F.3d 200, 206-07 (4th Cir. 2008)).

²³*Sargent v. Paine Webber Jackson & Curtis Inc.*, 882 F.2d 529, 532 (D.C. Cir. 1989) (“[A]rbitral awards may be made without explanation”); *Sobel v. Hertz Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972) (holding the same)).

²⁴*Optional Appellate Arbitration Rules*, AMERICAN ARBITRATION ASSOCIATION (November 1, 2013), http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B9e172798-c60f-4de0-9ebc-438e54e78af8%7D_AAA_ICDR_Optional_Appellate_Arbitration_Rules.pdf.

²⁵Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J. (Apr. 6, 2015, 2:09 PM), <http://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746>; *Federal Judicial Caseload Statistics 2014*, U.S. COURTS, available at <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014> (last visited July 29, 2016).

²⁶*Federal Court Management Statistics, Dec. 2015*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/federal-court->

[management-statistics-december-2015](http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-december-2015) (last visited July 29, 2016).

²⁷*Id.*

²⁸*Id.*

²⁹*Supra* n.24.

³⁰Eisenberg, *supra* n.1.

³¹*Optional Appellate Arbitration Rules*, AMERICAN ARBITRATION ASSOCIATION 7 (November 1, 2013), http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B9e172798-c60f-4de0-9ebc-438e54e78af8%7D_AAA_ICDR_Optional_Appellate_Arbitration_Rules.pdf.

³²*Id.* at 6.

³³*Id.* at 10–11.

³⁴*See generally* AAA Optional Appellate Arbitration Rules.

³⁵*Compare* AAA Optional Arbitration Rules, A-3, available at http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B9e172798-c60f-4de0-9ebc-438e54e78af8%7D_AAA_ICDR_Optional_Appellate_Arbitration_Rules.pdf with JAMS Optional Arbitration Appeal Procedure, available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf (last visited July 29, 2016).

³⁶JAMS Optional Arbitration Appeal Procedure, (A).

³⁷*Id.* at (D).

³⁸*Id.* at (B)(iii).

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