New AAA Rules Provide Straightforward Guidelines for Appeals

By Richard H. Steen – May 21, 2014

The American Arbitration Association (AAA) has adopted rules, effective November 1, 2013, providing parties to commercial and construction arbitrations with an optional process for appealing an arbitration award. Except for the occasional inclusion of an ad hoc private appeal process in a contractual ADR provision, or unique state statutes, there have been limited opportunities for appellate review of the "merits" of arbitration awards.

With increasing frequency, parties dissatisfied with an arbitration award are seeking judicial review of their awards. The scope of that review is limited. In federal court, awards are only reviewed pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, and the limited statutory grounds set forth in the act. The grounds generally relate to the conduct of the arbitrator and include corruption, fraud, undue means, partiality, or other misconduct or fault. The FAA does not provide for review of the merits of an award, and contracting parties cannot confer jurisdiction on the federal courts to expand the scope of judicial review.

In cases where arbitration is governed by state law, states are split on whether parties can confer jurisdiction for review beyond statutory grounds. In the absence of parties including contractual provisions for expanded review, state court review is limited to the normally narrow grounds, like those included in the FAA, provided in their statutes.

New Jersey courts recognize that parties may expand the scope of judicial review of arbitration awards, *Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc. (135 N.J. 349, 1994)*. New Jersey is also unique in that parties may choose to proceed under one of two different statutes. The first, the New Jersey version of the Revised Uniform Arbitration Act, *N.J.S.A 2A:23B-1, et seq.,*

includes the traditional, narrow grounds for vacating, modifying, or overturning an award. The second, the Alternative Procedure for Dispute Resolution Act, *N.J.S.A 2A:23A-1, et seq*., permits expanded judicial review including review, *inter alia,* for errors of law.

The Optional Appellate Rules in Brief

The AAA Optional Appellate Rules (Rules) provide an easier, more standardized process for parties who desire an opportunity for a more comprehensive appeal of an arbitration award. The essence of the process is that parties can get a "review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous." As is the case with arbitration in general, the appeals process is not unilateral, but rather a matter of contract between the parties. In addition to permitting a broader review, the Rules keep the proceeding within the arbitral process, which provides greater confidentiality.

The Rules anticipate their use in matters where the underlying award was rendered under AAA or International Centre for Dispute Resolution (ICDR) proceedings. While parties may agree to use the Rules to appeal arbitration awards rendered under other providers or mechanisms, care must be taken that conflicts are not built in to the ADR scheme.

Parties initiate an appeal by filing a notice of appeal within 30 days of receipt of the award. Cross-appeals are permitted. If the parties have opted for the Rules, the underlying award is not considered final and binding until after the time for filing a notice of appeal has expired. Upon filing of a notice of appeal, the parties agree to toll any judicial enforcement deadlines and stay any judicial enforcement proceedings during the pendency of the appeal.

The Rules do not replace the modification of award remedies under the AAA Commercial Rules, (Rule R-50) or Construction Rules (Rule R-48). In at least one respect, the Rules do impact the underlying arbitration. The AAA's suggested language for incorporating the Rules into an agreement provides that the parties agree that the form of the underlying award shall, at a minimum, be a reasoned award. In the Commercial Rules (Rule R-42), a reasoned award is not necessary or automatic. Query the relationship of a reasoned award to the allowable forms of award in the Construction Rules (Rule R-44)—concise financial breakdown of monetary awards and line item disposition of nonmonetary claims, reasoned opinion, abbreviated opinion or findings of fact, or conclusions of law.

The AAA maintains an appellate panel. The process of selecting a panel is similar to that used in an underlying case—a list of names is sent to the parties who can agree on names, or prioritize and strike names. The prospective arbitrators are required to make the same disclosures of relationships as other AAA arbitrators. A panel of three arbitrators will be used unless the parties elect to proceed with a single arbitrator.

The process begins with a preliminary conference call to set the briefing schedule and address the deadline for submitting the record on appeal. The record on appeal may include "relevant excerpts" of the hearing transcript, any reports, deposition transcripts or affidavits admitted below, arbitration exhibits, briefs or "other evidence relevant to the appeal that was presented at the hearing." A party may not submit issues or evidence for the first time at the appeal if they were not raised during the arbitration. Disputes as to the record on appeal are determined by the panel.

The appellate panel can rule on its own jurisdiction and if it lacks jurisdiction the appeal is dismissed and the underlying award will become final. The panel can also interpret the Rules and assess costs against a party that does not prevail. The panel can proceed in the absence of a party if that party had previously consented to the process and had due notice.

The Rules contemplate a determination on the written submissions, including the record on appeal and the appellate briefs. The panel has the discretion to permit oral argument. There is a tight schedule for briefing; however, the parties can agree or the panel can adjust the schedule. A party can obtain an extension of seven days for good cause shown, and a further extension in the panel's discretion in extraordinary circumstances.

The panel has 30 days from the date of the submission of the last brief, or of the date of oral argument if agreed upon or permitted, to render its decision. The panel can adopt the underlying award, substitute its own award, or request additional information and extend the time by not more than 30 days. The panel may not order a new hearing or send the case back to the original arbitrator(s). The panel's award becomes the final and binding award for purposes of judicial confirmation.

The Effect of the Rules on the Advantages of Arbitration—Good or Bad

Some parties and counsel likely will incorporate the Rules into the ADR provisions of contracts, although it is too early to tell whether they will be widely adopted. Whatever your views on post-

award activity, given the increasing frequency of post-award litigation over all manner of evils in the arbitration process that a losing party can conjure up, the Rules may in fact be beneficial.

The clear trend in recent years is more and more post-award court actions to challenge awards. Such actions are rarely successful, but they add significant time and costs to the resolution of a dispute. One open question is whether courts will treat review of final awards rendered by an appellate panel the same as final awards rendered by an original panel. A party can appeal on the grounds of error of law or erroneous determinations of fact. Under the Rules there is no right to appeal based on the statutory grounds for vacating an award. Is there then an opportunity, after the appellate panel's final award, for a losing party to litigate the statutory grounds for vacating an award as they may be alleged against both the original panel and the appellate panel?

Much has been written about the arbitration process becoming more like litigation, a trend that has eroded the perceived benefits of arbitration over litigation in terms of time, cost, and finality. One clear advantage of arbitration still exists, particularly in construction disputes: the subject matter and industry expertise of the arbitrator compared with a judge and/or jury. An arbitration that is properly managed by a strong and determined arbitrator or panel will still give parties the time and cost advantages that may have informed their selection of arbitration in the first place.

Conclusion

Parties and their counsel will have to consider carefully whether there is a need to incorporate the Rules into their contracts. The greatest fear in the minds of parties and counsel in accepting the finality of the arbitration process is the risk of an aberrant award. These Rules reduce that risk. At the same time, the Rules make an initial arbitration award less final and make obtaining a final award more time consuming and expensive.

The Rules extend the arbitration process a minimum of one month if there is no appeal and at least three more months if there is. Thereafter, post-award litigation to vacate the appellate award is still possible. Additional costs will necessarily be incurred. A losing party in a substantial matter may be more likely to initiate an appeal to delay the finality of the award and to get a second bite of the apple on the merits determinations of the arbitrator(s) below. The only real deterrent is the possibility of fee shifting by the appellate panel. Such a merits appeal to a court in most jurisdictions would be less likely to be successful, leaving parties to continue to litigate over the existence of statutory grounds to vacate or modify the award.

A hallmark of arbitration is its flexibility and the control the parties have to craft a process that works for them. The Optional Appellate Rules enhance that flexibility. They represent a more rational approach than post-award litigation.

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