



AMERICAN ARBITRATION ASSOCIATION®

# OPTIONAL APPELLATE **ARBITRATION RULES**

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# Optional Appellate Arbitration Rules



## Introduction

The objective of arbitration is a fair, fast and expert result that is achieved economically. Consistent with this goal, an arbitration award traditionally will be set aside by a court only where narrowly defined statutory grounds exist. Sometimes, however, the parties may desire a more comprehensive appeal of an arbitration award within the arbitral process. The American Arbitration Association® has included clauses for appellate arbitration in its *Drafting Dispute Resolution Clauses - A Practical Guide* for a number of years. In addition, parties have developed their own processes and standards for conducting these proceedings. In order to provide for an easier, more standardized process, the AAA has developed these Optional Appellate Rules.

The following rules provide for an appeal to an appellate arbitral panel that would apply a standard of review greater than that allowed by existing federal and state statutes. The appellate rules anticipate an appellate process that can be completed in about three months, while giving both sides adequate time to submit appellate briefs. The rules permit review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous.

Utilization of these rules is predicated upon agreement of the parties. The right to appeal an arbitration proceeding is a matter of contract. A party may not unilaterally appeal an arbitration award under these rules absent agreement with the other party(s). The following sample language provides for such appellate review assuming a standard arbitration clause is already in place:

*“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.”*

## Optional Appellate Arbitration Rules

### A-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for the appeal of an arbitration award\* (“Underlying Award”) rendered under the auspices of the American Arbitration Association (AAA), or the International Centre for Dispute Resolution® (ICDR®), or have otherwise provided for these Appellate Arbitration Rules, they shall be deemed to have made these Rules, as amended and in effect as of the date of submission of the appeal, a part of their agreement.

*\*These Appellate Rules do not apply to disputes where the arbitration clause is contained in an agreement between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices.*

### A-2. Effect of Appeal on Underlying Award

- (a) Upon the filing of a Notice of Appeal pursuant to Rule A-3 of these Rules, the parties agree that the Underlying Award shall not be considered final for purposes of any court actions to modify, enforce, correct, or vacate the Underlying Award (“judicial enforcement proceedings”), and the time period for commencement of judicial enforcement proceedings shall be tolled during the pendency of the appeal. The parties agree to stay any already initiated judicial enforcement proceedings until the conclusion of the appeal process. If the appeal is withdrawn, the Underlying Award shall be deemed final as of the date of withdrawal.
- (b) The appellate process is not intended to replace the modification of award remedies available under the AAA’s Commercial Arbitration Rules and Mediation Procedures (“AAA Commercial Rules”), or similar rule if applicable to the Underlying Award. Accordingly, if the sole subject of the appeal is a request for modification then a party must pursue those remedies under the applicable rules governing the Underlying Award. A party may appeal an adverse decision arising from a request for modification.

### A-3. Filing Requirements

- (a) Filing an Appeal: Provided the parties have an agreement for the appeal of an arbitration award pursuant to these Rules, an appeal may be initiated in the following manner:
  - (i) Any party to an Underlying Award may initiate an appeal by filing with the AAA, within thirty (30) days from the date the Underlying Award is submitted to the parties, a Notice of Appeal, the administrative filing fee as set forth in the Fee Schedule, a copy of the applicable arbitration agreement providing for appeal of the Underlying Award, and a copy of the Underlying Award. Filing may be accomplished through use of AAA WebFile®, located at [www.adr.org](http://www.adr.org), or by filing with any AAA office.

(ii) The party filing the Notice of Appeal (the “Appellant”) shall simultaneously provide a copy of the Notice of Appeal and the applicable arbitration agreement to every other party to the Underlying Award (the “Appellees”).

(iii) The Notice of Appeal shall include:

- a. The name of each party;
- b. The address for each party, including, if known, telephone and fax numbers and email address;
- c. If applicable, the names, addresses, telephone and fax numbers and, if known, email address of the known representative for each party;
- d. A statement setting forth the portion or portions of the Underlying Award being appealed and the errors alleged;
- e. The qualifications, expertise and number of appellate arbitrators requested; and
- f. The filing fee.

(b) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of the Notice of Appeal when the filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing for the appeal for administrative purposes, however, any disputes under this rule shall be reviewed and decided by the appeal tribunal.

If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the due date specified by the AAA, the filing may be returned to the filing party.

(c) Cross-Appeal. Each Appellee may file a cross-appeal with the AAA within seven (7) days after notice of filing of a Notice of Appeal. The Appellee shall, at the time of any such filing, send a copy of the cross-appeal to the Appellant and all other parties to the Underlying Award. The cross-appeal shall include a statement setting forth the portion or portions of the Underlying Award being appealed and the errors alleged, and the qualifications, expertise and number of appellate arbitrators requested. The administrative filing fee as set forth in the Fee Schedule must be paid at the time of the filing of any cross-appeal.

If the cross-appeal filing is deficient, and not cured by the date specified by the AAA, it may be returned to the filing party.

#### A-4. Qualifications of Appeal Tribunal

(a) The appeal tribunal shall be selected from the AAA's Appellate Panel, or, if an international dispute, from its International Appellate Panel.

(b) No person shall serve as an appellate arbitrator in any dispute in which that person is precluded from serving under the applicable code of ethics governing the appointment of arbitrators. Prior to accepting an appointment, the prospective appellate arbitrator(s) shall disclose to the AAA any circumstances likely to create

a presumption of bias or prevent a prompt resolution of the appeal. Upon receipt of such information, the AAA shall either replace the appellate arbitrator(s) or immediately communicate the information to the parties for their comments. In the event that the parties disagree as to whether the appellate arbitrator shall serve, the AAA has the authority to make the decision as to whether the appellate arbitrator(s) shall serve or whether another appellate arbitrator(s) shall be appointed by the AAA. The AAA is authorized to appoint another appellate arbitrator(s) if the appointed appellate arbitrator(s) is unable to serve promptly.

#### A-5. Appointment of Appeal Tribunal

If the parties have not appointed an appeal tribunal and have not provided for any other method of appointment, the appeal tribunal will be appointed by the AAA in the following manner:

- (a) Upon receipt of a Notice of Appeal, the AAA shall send simultaneously to each party to the dispute an identical list of ten (10) (unless the AAA decides that a different number is appropriate) names of persons chosen from the AAA's Appellate Panel. The parties are encouraged to agree to the appeal tribunal from the submitted list and to advise the AAA of their agreement.
- (b) If the parties are unable to agree upon the appeal tribunal, each party shall have fourteen (14) days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of the appeal tribunal to serve. If the parties fail to agree on the appeal tribunal from the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the AAA's Appellate Panel without the submission of additional lists.
- (c) A panel of three appellate arbitrators will be appointed unless the parties agree to utilize a single arbitrator. The AAA shall appoint the Chairperson of the panel.
- (d) If the parties have requested an appellate arbitrator with specific qualifications, the AAA will consider such requests when creating the list of the appellate arbitrators. Such requests shall be made by the Appellant in its Notice of Appeal, and by the Appellee within three (3) days of receipt of the Notice of Appeal.

#### A-6. Vacancies

If an appellate arbitrator shall become unwilling or unable to serve, the AAA shall administratively appoint a substitute appellate arbitrator.

## A-7. Preliminary Conference Call

- (a) Within one week of the appointment of the appeal tribunal a preliminary conference call will be scheduled with the parties, the appeal tribunal and the Case Manager to review and formalize the briefing schedule, set a deadline for the submission of the record on appeal and address any other procedural issues consistent with these rules and the objectives for an expedited, cost effective and just appellate process.
- (b) The appeal tribunal shall enter an order reflecting any briefing schedules, and any other timeframes and administrative matters determined during the preliminary conference call.
- (c) The appeal tribunal may require a detailed specification of issues on appeal in advance of the first Appellant brief, and may direct or limit the Appellant/Appellee to certain areas or issues in their briefing or request additional briefing.

## A-8. Absent Parties

The appeal tribunal may proceed with the appeal process in the absence of a party if it is determined by the appeal tribunal that the absent party consented to the jurisdiction of the appeal process by agreement, due notice was provided, and the absent party is provided a copy of the order from the preliminary conference call.

## A-9. Jurisdiction

The appeal tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

If the appeal tribunal determines that it does not have jurisdiction to hear the appeal, the appeal shall be dismissed and the Underlying Award shall be deemed to be final.

## A-10. Issues Subject to Appeal

A party may appeal on the grounds that the Underlying Award is based upon:

- (1) an error of law that is material and prejudicial; or
- (2) determinations of fact that are clearly erroneous.



## A-11. Assessment of Costs

The Appellant/Cross-Appellant may be assessed the appeal costs, and other reasonable costs of the Appellee/Cross-Appellee, including attorneys' fees (if a statute or the parties' contract provides for an award of attorneys' fees), incurred after the commencement of the appeal if the Appellant/Cross-Appellant is not determined to be the prevailing party by the appeal tribunal.

## A-12. AAA Fees and Costs of Underlying Arbitration and Appeal

- (a) As a preliminary matter, all outstanding and unpaid AAA fees and costs from the arbitration proceeding giving rise to the Underlying Award owed by the party filing the appeal must be paid in full before an appeal will be initiated. For cross-appeals, all outstanding and unpaid AAA fees and costs owed by the Cross-Appellant must be paid in full before Cross-Appellant's cross-appeal will be initiated.
- (b) The Appellant shall be responsible for the AAA's administrative fees and appeal tribunal fees and costs arising from the appeal where there is no cross-appeal. If there is a cross-appeal the fees and costs of the appeal shall be shared equally by the Appellant and Appellee, or shared pro rata if there is more than one Appellant or Appellee.
- (c) Within seven (7) days after the appointment of the appeal tribunal the Appellant will be required to pay a deposit to cover the anticipated fees and expenses of the appeal tribunal. If there is a cross-appeal this deposit shall be shared equally or pro rata as set forth in (b) above.
- (d) The appeal tribunal's decision may include a reallocation of a party's share of the fees and costs of the appeal.
- (e) When the appeal has terminated, the AAA shall provide an accounting and return any unexpended balance and excess deposits paid by a party.
- (f) A party's failure to timely pay the deposits required in Rule A-12(c) shall automatically place the nonpaying party's appeal in abeyance for a period of seven (7) days, following which if the deposits are not paid in full within this seven (7)-day grace period, the nonpaying party's appeal may be dismissed. If the appeal has been suspended by either the AAA or the appeal tribunal and the parties have failed to make the full deposits requested within the time provided after the suspension, the appeal tribunal, or the AAA if an appeal tribunal has not been appointed, may terminate the proceedings. The arbitration will terminate on its own accord after fourteen (14) days from the date of suspension.

## A-13. Interpretation of Rules

The appeal tribunal shall interpret and apply these rules insofar as they relate to the appeal tribunal's powers and duties. All other rules shall be interpreted and applied by the AAA.

## A-14. Place of Appeal

Unless all parties and the appeal tribunal agree otherwise, the appeal shall be conducted at the same place of arbitration as the underlying arbitration.

## A-15. Oral Argument

- (a) Unless otherwise directed by the appeal tribunal, all appeals will be determined upon the written documents submitted by the parties. If the appeal tribunal deems oral argument necessary, or a party requests oral argument, the appeal tribunal at its discretion may schedule same.
- (b) Requests for oral argument must be made within thirty (30) days of service of the Notice of Appeal or it is waived. If oral argument is granted it shall be scheduled to take place within thirty (30) days of filing of the last brief.

## A-16. Record on Appeal

The parties shall cooperate in compiling the record on appeal, and may submit as part of the record on appeal relevant excerpts of the transcript of the arbitration hearing giving rise to the Underlying Award, if any, expert reports, deposition transcripts or affidavits that were admitted as part of the arbitration hearing, documentary evidence admitted into evidence during the arbitration hearing, Appellant and Appellee pre- and post-hearing briefs, or other evidence relevant to the appeal that was presented at the arbitration hearing. A party may not present for the first time on appeal an issue or evidence that was not raised during the arbitration hearing. Any disputes concerning whether a document is part of the record on appeal shall be determined by the appeal tribunal. The record on appeal shall be submitted by the parties by the deadline determined by the appeal tribunal at the preliminary conference.

## A-17. Appeal Briefs

Unless otherwise agreed by the parties and approved by the appeal tribunal, or determined by the appeal tribunal as a necessary deviation, the following briefing schedule shall be followed:

- (a) Appellant's Initial Brief shall be served no later than twenty-one (21) days after service of its Notice of Appeal and limited to 30 double-spaced, typewritten pages.
- (b) Appellee's Answer Brief shall be served no later than twenty-one (21) days after service of Appellant's Initial Brief and limited to 30 double-spaced, typewritten pages.
- (c) If Appellee cross-appeals, then its Cross-Appeal Brief shall be served at the same time as Appellee's Answer Brief and limited to 30 double-spaced, typewritten pages.

- (d) Appellant's Reply Brief to Appellee's Answer Brief, if any, shall be served within ten (10) days of service of Appellee's Answer Brief and limited to 10 double-spaced, typewritten pages.
- (e) Appellant's Answer Brief to Appellee's Cross-Appeal shall be served no later than twenty-one (21) days after service of Appellee's Cross-Appeal Brief and limited to 30 double-spaced, typewritten pages.
- (f) Appellee's Reply Brief to Appellant's Answer Brief, if any, shall be served within ten (10) days of service of Appellant's Answer Brief and limited to 10 double-spaced, typewritten pages.
- (g) For good cause shown, each party is entitled to request a single seven (7)- day extension for filing a brief that is to be served under these rules, such extension to be granted by the Case Manager. In extraordinary circumstances, subject to the discretion of the appeal tribunal, an additional extension may be granted.

### A-18. Service of Documents

- (a) Service of notices, briefs, answers, and replies can be accomplished by electronic submission, facsimile, or mail provided all parties who are to receive copies are served contemporaneously in the same manner. Copies of cases, exhibits and the like attached to or referenced in briefs shall be delivered to the appeal tribunal directly via mail or overnight courier at the address provided by the Case Manager (in lieu or in addition to electronic or facsimile submission of these items, as determined by the appeal tribunal at the preliminary conference).
- (b) Unless the rule provides a different method of calculating time periods, all deadlines under these Rules shall be determined by calendar days. If the last day of the time period is a legal holiday or weekend day, the period shall be extended until the first business day which follows.

### A-19. Appeal Tribunal's Decision

- (a) Within thirty (30) days of service of the last brief, the appeal tribunal shall take one of the following actions:
  - 1. adopt the Underlying Award as its own, or,
  - 2. substitute its own award for the Underlying Award (incorporating those aspects of the Underlying Award that are not vacated or modified), or,
  - 3. request additional information and notify the parties of the tribunal's exercise of an option to extend the time to render a decision, not to exceed thirty (30) days.

The appeal tribunal may not order a new arbitration hearing or send the case back to the original arbitrator(s) for corrections or further review.

- (b) The initial thirty (30)-day time frame may be modified for good cause or if oral argument is to take place and it has not yet occurred. In the event the extension is because of oral argument, the initial thirty (30) days for rendering a decision will commence the day following the conclusion of the oral argument.

- (c) The appeal tribunal's decision shall be in writing and shall include a concise summary of the decision and an explanation for the decision, unless the parties agree otherwise.
- (d) When the appeal tribunal consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the appeal tribunal must make all decisions.

### A-20. Finality of Appeal

Upon the conclusion of the appeal process and after service of the appeal tribunal's decision upon the parties, the appeal tribunal's decision shall become the final award for purposes of judicial enforcement proceedings.

### A-21. Confidentiality

The parties and the appeal tribunal shall maintain the confidentiality of these proceedings except in the case of a judicial challenge or court order concerning the proceeding, or as otherwise required by law.

### A-22. Applications to Court and Exclusion of Liability

- (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.
- (c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages, injunctive or declaratory relief for any act or omission in connection with any arbitration under these rules.
- (e) Parties to an arbitration under these rules may not call an arbitrator, the AAA or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and its employees are not competent to testify as witnesses in any such proceeding.

## Administrative Fee Schedule

There is a non-refundable \$6,000 administrative fee to be paid by the party seeking an appellate arbitration under these Appellate Rules. An additional \$6,000 administrative fee is to be paid by any party filing a cross-appeal under these Appellate Rules. These fees do not include the fees and costs of the Appeal Tribunal. Hearing rooms are also available for an additional cost. Please contact the AAA for additional information.

