



Game-Changing Arbitration Cases: Impacts On Construction Arbitration

March 19, 2015 – 2:00 p.m. to 3:30 p.m. ET

PROGRAM SUMMARY

Speakers: Edward Lozowicki and Charles Sink

Recent cases interpreting the Federal Arbitration Act and AAA Rules significantly expand the powers of arbitrators to rule on important issues such as jurisdiction, arbitrability, defenses, and to streamline the proceedings. In addition the US Supreme Court has greatly expanded the reach of the FAA and its preemptive effect on state law. As a result parties and their lawyers will likely see courts referring more claims and defenses to arbitration, and less time and expense incurred in obtaining an award.

AGENDA

2:00 p.m.	Welcome and Introduction of Speakers	(5 minutes)
2:05 p.m.	Discussion of Arbitration Cases & Their Impact <ul style="list-style-type: none">• The Broad Application of the Federal Arbitration Act To Construction Contracts• The FAA's Pre-Emptive Impact on State Construction Laws• Determination of Arbitrability Issues: Court or Arbitrator?• Construction Arbitrability Issues Referred to Arbitrator• Judicial Review of Arbitration Awards and Grounds for Vacature• Vacature of Award for Arbitrator Exceeding His/Her Powers• Consolidation and/or Joinder of Construction Claims in Arbitration• Trends in Class Action Waivers for Wage & Hour Claims	(75 minutes)
3:20 p.m.	Conclusion and Questions	(10 minutes)
3:30 p.m.	Evaluation	(5 minutes)
3:35 p.m.	Adjourn	

Edward B. Lozowicki, Esq.

Firm & Title	Sheppard Mullin Richter & Hampton LLP - Of Counsel
Profession	Full-time Neutral Arbitrator and Mediator
Work History	Adjunct Professor of ADR Law, School of Law, Santa Clara University, 2013-current; Partner, Sheppard Mullin Richter & Hampton LLP, 2005-2012; Partner, Coudert Brothers LLP, 1995-05; Partner, Pettit & Martin LLP, 1978-95; Sr. Counsel, Owens-Corning Fiberglas Corp., 1971-78; Staff Counsel, California Legislature, Assembly Committee on Constitutional Amendments, 1969-71.
Summary Of Experience	American Arbitration Association arbitrator for over 30 years. Served as a sole arbitrator, panel member or chair in many and varied arbitration cases through hearing and award including: construction claims, energy contract disputes, real estate and commercial contract disputes. Acted as counsel or mediator in numerous mediations involving the same areas of law. While in private practice, represented clients in arbitration and litigation of cases in the above areas of law. Tried many cases for over 40 years before federal and state courts, juries, arbitrators and administrative agencies.
Alternative Dispute Resolution Experience	<p>American Arbitration Association, Member of National Panel of Commercial, Construction, and Energy Arbitrators since 1983; and Member of its Large Complex Case Panel.</p> <p>California Public Works Contract Arbitration Program, Member of Active Arbitrator Panel since 2011.</p> <p>Adjudicated numerous construction, energy, real estate and commercial cases. A partial listing of representative matters follows:</p> <ul style="list-style-type: none">● <i>Geothermal Drilling Project, The Geysers, California</i>: Acted as sole arbitrator in contract dispute between owner and developer of geothermal wells.● <i>Shopping Mall, San Francisco</i>: Member of three-arbitrator panel in dispute between owner/builder and contractor regarding claims for delay and acceleration on new shopping mall project.● <i>Cogeneration Plant, Long Beach, California</i>: Chair of three-arbitrator panel in dispute over tax and contract issues between the Seller and Purchaser of Cogeneration Plant.● <i>Big Box Superstore, Antioch, California</i>: Sole arbitrator in dispute between general contractor and subcontractor regarding termination and defective workmanship issues on "Superstore" project.● <i>Luxury Residence, San Jose, California</i>: Sole arbitrator in dispute between homeowner and general contractor regarding claims and counterclaims for termination, over billing, delay and defective work on project.● <i>Gas Fired Power Plant, Chicago, Illinois</i>: Member of three-arbitrator panel in dispute over termination and damages between EPC contractor and subcontractor.

- *Energy Marketing Contract*: Chair of three-arbitrator panel on dispute over termination of power supply contract between Energy Service Provider and manufacturer/customer.
- *Residential Subdivision, San Jose, California*: Sole arbitrator in dispute over development losses between joint venture partners.
- *Juvenile Detention Center, Los Angeles, California*: Sole arbitrator in dispute over claims and damages for change orders, delay and disruption between County and general contractor.
- *Shopping Center, Fremont, California*: Sole arbitrator in dispute over change in site conditions between contractor and subcontractor.

Legal Experience

In private construction practice, represented owners and contractors on diverse private and public works projects in litigation and arbitration over: delay, disruption, acceleration, extra work, changed conditions, and construction defects, and mechanic's lien claims, bid protests, false claims act violations and other matters.

Project experience includes highways, bridges and undersea tunnels; nuclear, geothermal, hydroelectric, fossil and cogeneration power plants; oil pipeline and power transmission lines; prisons, hospitals, schools and other institutional structures; refineries, chemical and industrial plants; high-rise office, apartment and condominium projects; military bases, ship-building and missile projects.

In private energy practice, represented project developers and owner/operators in the litigation and arbitration of power purchase, fuel supply, wheeling, EPC, CM, BOT and other contract disputes; and represented developers and industrial users in regulatory proceedings before the California Public Utilities Commission. Experience includes issues involving PURPA, FERC and California PUC regulations, contract law, the UCC, business fraud and unfair competition law. Projects included pipelines, refineries and LNG plants.

In private commercial practice, represented owners, developers and technology companies in litigation of a variety of real estate and commercial contract disputes involving such issues as unfair competition, business fraud, Uniform Commercial Code, letters of credit, leases and real estate contracts.

In early career, served as corporate counsel to an international construction/building products company where he negotiated contracts and prepared claims on numerous domestic and international construction and energy projects.

Alternative Dispute Resolution Training

- *Guided Choice: Innovations in Mediation to Get Better Settlements at Less Cost* AAA Webinar: 2014;
- *Exceeded Powers: Recent Trends in Challenging Arbitrator Authority*, AAA Webinar: 2014;
- *Managing the Costs of Exchanging ESI*, AAA Webinar, 2013;
- *Essential Mediation Skills for the New Mediator*, AAA 2013;

- *What's a Respondent Like You Doing in a Place Like This? Confronting Arbitrability and Jurisdiction Issues in Arbitration*, AAA Webinar 2013;
- *Managing the Arbitration Process for Efficiency & Economy Following the Preliminary Hearing*, AAA 2012;
- *Maximizing Efficiency & Economy in Arbitration: Challenges at the Preliminary Hearing*, AAA 2012;
- *Maximizing Mediation: How to Use Mediation Effectively to Resolve Disputes and Obtain Good Results*, AAA/AGC, 2012;
- *Best Practices in Franchise Arbitration*, AAA Webinar, 2011;
- *Dealing With Delay Tactics in Arbitration*, AAA 2009;
- *Chairing an Arbitration Panel: Managing Procedures, Process & Dynamics*, AAA 2007;
- *Arbitration Awards: Safeguarding, Deciding & Writing Awards*, AAA 2006, 2004;
- *Construction Arbitrator II Training: Advanced Case Management Issues*, AAA 2002;
- *Construction Industry Arbitrator Training*, AAA 1997;
- *Faculty, Basic Arbitrator Training*, AAA 1990;
- *Various other ADR training*, 1981-89.

Honors

Award for Distinguished Service in Pursuit of Justice, St. Thomas More Society of Santa Clara County, 2013; Recommended Lawyer for Construction Law, PLC Which Lawyer, 2010-2012; Who's Who Legal: California, 2010.

Professional Licenses

Admitted to the Bar: California state courts, 1970; U.S. District Court, Northern, Central, Southern and Eastern Districts of California, 1978; and U.S. Court of Appeals, Ninth Circuit, 1984.

Professional Associations

Associated General Contractors of California (Legal Advisory and Legislation Committees); American Bar Association (Dispute Resolution Section and Construction Industry Forum); Board of Visitors, School of Law, Santa Clara University; and Board of Fellows, Santa Clara University

Education

St. Joseph's University (AB); Santa Clara University (JD).

Publications

- *Parsing Arbitration Provisions in Construction Contracts*, Law 360, 2012;
- *Special Advisory: New Mechanics Lien Act in California*, Sheppard Mullin, 2012;
- Co-author, *Mechanics' Liens, Construction Bonds And Stop Notices*, Sheppard Mullin, 2012;
- Co-Author, *Arbitrator Can Decide Validity of Arbitration Clause in Construction Contract*, Sheppard Mullin, 2011
- *A Model Litigation Plan for Construction Claims*, Managing Construction Litigation, Aspatore, 2009;
- *Public Private Partnerships*, 3-article series, Sheppard Mullin, 2009;

- Co-Author, *Can the Spearin Doctrine Survive in a Design Build World*, Journal of the American College of Construction Lawyers, Winter 2008.
- Co-author, *Energy Contracts: Negotiating Strategies for Added Value, Energy Law Client Strategies: Leading Lawyers On Litigation, Negotiation And Industry Regulations*, Aspatore, 2007;
- Co-author, *Contracts, Claims, and Dispute Resolution*, Construction Accounting Deskbook, CCH, 2005;
- Co-author, *Presenting And Defending Construction Claims In California*, Lorman, 2004;
- Co-author, *Design-Build & Turnkey Construction in California*, Lorman 2002;
- Author, *Electricity Restructuring- A New Ball Game*, Geothermal Energy Association, 1997;
- Co-author, *Construction Law Manual*, AGC of California, 1992;
- Author, *Binding Arbitration Of Contract Disputes In California*, American Arbitration Association, 1988.

Published Appellate Decisions

Morris v. Horton, 27 Cal. Rptr. 2d 585 (1994); *Owens Corning Fiberglas Corp. v. Center Wholesale, Inc.*, 788 F.2d, 541 (1986); *In Re Center Wholesale*, 759 F.2d 140 (1985); *Nickinello v. Robertson*, 23 B.R. 804 (1982).

Speaking Engagements

- *Recent Developments in Arbitration Law and Impact on Commercial Cases*, American Arbitration Association, Feb. 2014.
- *Prevailing Wage and Misclassification Disputes*, Sheppard Mullin, Nov. 2013.
- *Recent Developments in Arbitration Law and Impact on Construction*, AGC of California, Oct. 2013.
- *Impacts of Senate Bill 474 on Indemnity Agreements*, Aon Risk Services 2012;
- *Pitfalls of Public Works Contracting*, Sheppard Mullin 2010;
- *Public Private Partnerships: The New Wave in Infrastructure Construction*, Construction Superconference 2008;
- *Mechanics Liens, Stop Notices and Construction Bonds: Special Remedies in California*, Associated Builders & Contractors Seminar, Nov. 2007.
- *Defective Specifications: Can the Spearin Doctrine Survive In A Design-Build World*, CLE International Public Works Seminar, August 2007;
- *Presenting and Defending Construction Claims in California*, Lorman Education Services, October 2004;
- *Turnkey Contracts vs. The Implied Warranty of Specification Suitability: Allocation of Risks for Defective Specifications*, Center for International Legal Studies, February 2004.

Citizenship

United States of America

Locale

San Francisco & Silicon Valley, California

Compensation

Hearing: \$350.00/Hr.

Cancellation Period: 0 Days

Comments: Hourly rate charged for hearings, preliminary hearings, study time, and preparation of award. \$100 per hour charged for out-of-area travel, plus expenses for travel, lodging and meals. Fee deposits and suspension of Proceedings for non-payment of fees is per AAA Rules.



CHARLES M. SINK

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Charles M. Sink is of counsel in the firm's Construction Practice Group and former chair of the Complex Litigation Department. He has more than 30 years of commercial litigation experience, largely involving construction or energy claims, and related insurance issues. He also has served as the sole arbitrator or panel chair in over 100 cases with the American Arbitration Association, with California's Office of Administrative Hearings, and with the International Chamber of Commerce.

In state and federal courts, and in private arbitrations, Mr. Sink represents private owners, public entities, architects, engineers, and EPC contractors. His claims experience covers many forms of public and private infrastructure, including: conventional, nuclear, and alternative energy power plants; mass transit systems; sewage treatment plants; bridges and roads; commercial, governmental, and office buildings; housing; and hospitals. Recent engagements: contracts and due diligence work for five utility-scale solar projects (California); \$435 million transit system lawsuit (west coast); \$450 million power plant claim (midwest); \$200 million nuclear power plant dispute (international); \$120 million pipeline arbitration (international); and \$35 million bond claim (Pacific Rim).

He has negotiated, drafted or reviewed all manner of construction documents, including design-build agreements, EPC contracts, purchase orders, and professional service agreements. He regularly advises clients on how to structure projects and how to resolve claims short of litigation or arbitration.

Mr. Sink is a Fellow in the American College of Construction Lawyers. He is a member of the ABA Forum on the Construction Industry. He regularly speaks and teaches classes on construction contracts and on dispute resolution. *Chambers USA* consistently ranks him among the top construction attorneys in California. He is listed in *The Best Lawyers in America* (Construction Law and Litigation - Construction), and has been recognized by *Who's Who Legal* as one of the "Most Highly Regarded Lawyers" in construction for 2012.

For several years, he edited *The Construction Lawyer*, a quarterly publication of the ABA Forum on the Construction Industry. Some of Mr. Sink's recently published books include: *Construction Damages and Remedies*, 2nd Ed. (ABA, 2012) *The 2007 A201 Deskbook*, (ABA, 2008); *False Claims in Construction Contracts: Federal, State, and Local*, (ABA, 2007); "Waivers of Consequential Damages" in *Handbook on Construction Arbitration & ADR* (JurisNet, LLC, 2007).

He graduated *cum laude* from Harvard University, and received his J.D. from Hastings College of the Law, University of California; Order of the Coif.

AAA Policy on Class Arbitrations

July 14, 2005

On October 8, 2003, in response to the ruling of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle*, the American Arbitration Association issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In *Bazzle*, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association.

Commentary to the American Arbitration Association's Class Arbitrations Policy

February 18, 2005

It has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement. The Association's practice has been neither to commence administration of a case nor to refer such a matter to an arbitrator until a court decides that it is appropriate to do so. The Association's determination not to administer class arbitrations where the underlying arbitration agreement explicitly precludes class procedures was made because the law on the enforceability of class action waivers was unsettled; the Association takes no position as to whether such clauses are or should be enforceable.

In a recent review of this practice by the Association's Executive Committee it was agreed that this practice should be maintained in light of the continued unsettled state of the law. Courts in different states and different federal circuits have reached differing conclusions concerning the preclusion of class actions by agreement and "gateway" issues generally. However, the courts that have confronted the question have generally concluded that the decision as to whether an agreement that prohibits class actions is enforceable is one for the courts to make, not the arbitrator. In fidelity to its Due Process Protocols, the Association will continue to require all proceedings brought to it for administration to meet the standards of fairness and due process set forth in those protocols, but the Association will not seek to make decisions concerning class action agreements that the courts appear to have reserved for themselves.

The Executive Committee also determined at the same meeting to proceed forthwith in the creation of a special committee to explore the possibility of identifying counsel who could assist parties who cannot afford to pay for an attorney in arbitral proceedings. This effort would supplement the Association's current ability to provide arbitrators who will serve pro bono, or for a reduced fee, in appropriate cases.

The Association will continue to monitor developments in this rapidly evolving intersection of arbitration and the courts.



AMERICAN ARBITRATION ASSOCIATION®

OPTIONAL APPELLATE **ARBITRATION RULES**

Rules Effective November 1, 2013

Available online at adr.org

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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, 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.



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