

## Alternative Dispute Resolution

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# At Your (Not So) Final Destination: Appellate Procedures in Arbitration

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The finality of arbitration, and lack of judicial review or appeal, is often held up as an important reason for the use of arbitration as a dispute resolution mechanism. Finality refers to the absence in most jurisdictions of extensive appellate review of arbitral awards.<sup>1</sup> As a general rule, the decisions of arbitrators are final and binding.<sup>2</sup> In federal courts in the United States, for example, judicial review of arbitration awards is extremely limited<sup>3</sup>—in marked contrast to federal and state court litigation, where appellate courts may review certain lower court judgments under the *de novo* standard that allows them to review both factual and legal matters.

The benefit of limited appellate review of arbitration awards is a reduction in litigation costs and delays.<sup>4</sup> Indeed, the notion of a dispute without the possibility of a lengthy appellate process is part of the reason that arbitration is perceived to be more efficient than litigation.

The lack of appeal, however, is not without its detractors. In the 2015 Queen Mary/White & Case International Arbitration Survey, in-house counsel respondents listed the lack of an appeal mechanism as one of the worst characteristics of international arbitration.<sup>5</sup> Similarly, a 2011 CPR Institute/Cornell University/Pepperdine University survey of Fortune 1000 corporate counsel revealed that 52 percent of those who did not use arbitration said it was because there is rarely an effective way to appeal awards.<sup>6</sup>

Some arbitral institutions therefore allow the parties to an arbitration agreement to agree to a right of appeal to an arbitration panel and have adopted rules to govern such appellate procedures. Here, we review the rules of AAA/ICDR, JAMS, and CPR.

### AAA/ICDR Optional Appellate Arbitration

The AAA/ICDR maintains Optional Appellate Arbitration Rules (AAA Appellate Rules), which “apply a

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standard of review greater than that allowed by existing federal and state statutes,” “anticipate an appellate process that can be completed in about three months, while giving both sides adequate time to submit appellate briefs,” and “permit review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous.”<sup>7</sup>

As arbitration is a creature of contract, the utilization of the AAA Appellate Rules is predicated upon the agreement of the parties. Reinforcing this point, the AAA Appellate Rules expressly provide that they are inapplicable in an agreement between an individual consumer and a business where the business has a standard application clause and where the terms of such agreement are non-negotiable. In sum, absent agreement, a party may not appeal an arbitration award under the rules.

To appeal an award, a party must assert either a material and prejudicial error of law or a clearly erroneous determination of fact. See *id.* at A-10. If the appeal tribunal determines that it does not have jurisdiction to hear the appeal, the appeal will be dismissed. See *id.* at A-9.

**The Procedure.** Under the AAA Appellate Rules, the process requires the appellant to file a Notice of Appeal

within 30 days from the date the Underlying Award is submitted. See *id.* at A-3. The Notice of Appeal must include, among other things, a statement setting forth the portion(s) of the Underlying Award being appealed and the errors alleged, as well as the qualifications, expertise, and number of appellate arbitrators requested. See *id.* at (a)(iii). Within seven days of the filing of a Notice of Appeal, the Appellee may file a cross-appeal. See *id.* at (c).

Unless the parties have reached an agreement for the method of appointment, the appeal tribunal is selected from AAA’s Appellate Panel or International Appellate Panel (if the dispute is international in nature) pursuant to a list procedure. See *id.* at A-4, A-5. A panel of three arbitrators will be appointed unless the parties agree to use a single arbitrator. See *id.* at A-5(c).

All appeals are resolved upon written submission unless the tribunal deems oral argument necessary or, upon the request of a party, the tribunal at its discretion schedules it. See *id.* at A-15(a). Requests for oral argument, however, must be made within 30 days of service of the Notice of Appeal. See *id.* at (b).

The Appellant may be assessed the appeal costs, and the reasonable costs of the Appellee, if the Appellant

is not determined to be the prevailing party by the appeal tribunal. See *id.* at A-11.

Within 30 days of the service of the last brief, the appeal tribunal is limited to 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 30 days.

See at A-19(a).

#### JAMS' Optional Appellate Procedure

JAMS Optional Appellate Appeal Procedure (JAMS Appellate Procedure) dates back to 2003. Like AAA/ICDR, JAMS requires all parties to agree to the JAMS Appellate Procedure for it to be used by the parties.

**The Procedure.** The Appeal Panel typically consists of three JAMS neutrals with significant appellate experience and provides for application of "the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision."<sup>8</sup> See Rule D. The JAMS Appellate Procedure is to be completed in 21 days. See *id.*

Typically a three-member tribunal is used, unless the parties agree to use one arbitrator. See Rule (A).

The appeal must be served within 14 days from the date the Award becomes final. See Rule (B)(i). A letter or other writing evidencing the appeal must specify the elements of the Award that are being appealed and provide a brief statement of the basis for the Appeal. See *id.* Within seven days of the service of the appeal, the opposing party or parties may serve a cross-appeal. See *id.* at (ii). The parties may either elect to rely upon prior briefing or to set up a briefing schedule and submit briefing. See *id.* at (iv). The panel will conduct oral argument if all parties request it or on its own initiative. See *id.* at (v). The panel is to issue a decision within 21 days of the later of the date of oral argument, the receipt of new evidence, or the receipt of the record and of all briefs. See *id.* at (D).

The panel may affirm, reverse, or modify the award. See *id.* The panel's decision will consist of a concise written opinion unless the Parties agree otherwise. See *id.*

#### CPR's Arbitration Appeal Procedure

CPR first published its Arbitration Appeal Procedure in 1999. Since the initial publication of the Appeal Procedure, the Appeal has gone through minor changes, largely to reflect changes in the CPR Arbitration Rules. CPR's Appeal Procedure is well thought out, and the "Introduction" to the Appeal Procedure addresses the two themes that seem to inform the positions of proponents and opponents of appeals in arbitration.<sup>9</sup>

The Introduction notes: "Most users of arbitration find the finality of an award appealing" and that CPR "does not wish to encourage widespread appeals from arbitration awards." It acknowledges, though, that "some parties to major cases are concerned about the possibility of an aberrant award and would like to appeal from such an award to a tribunal of outstanding appellate arbitrators." Thus, CPR's procedure establishes "relatively narrow grounds for appeal," provides that "an unsuccessful appellant is required to reimburse the appellee's legal fees and other costs," and utilizes a panel of appellate arbitrators consisting entirely of former federal judges who are also experienced arbitrators."

As is further explained in the "Rationale" section of the accompanying Commentary: "On the one hand, CPR wishes to allay the concerns of attorneys and clients regarding the rare arbitration award that blatantly fails to apply the law or for which there is scant support in the record. On the other hand, CPR does not wish to encourage widespread appeals from arbitration awards." Thus, "[t]he Appeal Procedure is intended primarily to serve the interests of a party against which a large sum has been awarded, and that, based on careful professional analysis, concludes that it is the victim of a gross injustice."

CPR also reasons that if parties have the option of an appeal, they may see less need for three arbitrators (which can cause additional cost and delay as opposed to a sole arbitrator) and that the losing party may be less inclined to seek review in court even on statutory grounds (making the process even more efficient).

**The Procedure.** At the outset, as with the other institutions, CPR's Arbitration Appeal Procedure requires the parties to consent to the filing of an appeal under the CPR Arbitration Appeal Procedure. See Arbitration Appeal Procedure, Rule 1.1. The appeal tribunal will be chosen from a panel constituted by CPR to hear appeals. See *id.* at Rule 1.2. No appeal may be filed unless the tribunal was required to reach a decision in compliance with applicable law and rendered a written decision setting forth the factual and legal bases of the award, and there is a record that includes all hearing and all evidence in the arbitration proceeding from which the appeal is taken. See *id.* at 1.3.

Within 30 days of the date on which the award was received, a party may commence an appeal by giving written notice to the opposing parties. See *id.* at 2.1. The appeal shall set forth the agreement in writing providing for the appeal, the elements of the award being appealed, and the basis for the appeal, and shall transmit the portion of the record that is relevant to the appeal. See *id.* Upon receipt of the appeal, the opposing party has 14 days in which to serve a cross-appeal. See *id.* at 2.2.

In general, the appellate tribunal will consist of three members unless the parties agree that it shall consist of one. See Rule 4.1. The tribunal is selected from CPR's appellate panel utilizing a procedure whereby the parties seek first to agree on the candidates from the list provided by CPR. See *id.* at 4.2. If agreement is not reached within 10 days, the parties are to submit the list to CPR rank ordering the candidates on whom they did not agree. See *id.* CPR then selects the candidates with the lowest scores and has the ability to break any tie. See *id.* If there is a three-member panel, the tribunal selects one member from the group to be the Chair. See *id.* at 4.3.

Regarding briefing, the appellant is permitted one opening brief and one response brief while the appellee is permitted one brief. See *id.* at 7.2. If the appellee cross-moves, then they are entitled to a second brief. See *id.* Oral argument shall be held at the request of a party or if the tribunal deems it necessary. See *id.* at 7.4. Also, if the appellant alleges grounds for vacating the award under 9 U.S.C. §10, the tribunal may take evidence supporting and rebutting such an allegation.<sup>10</sup>

The tribunal may modify or set aside an award but only on the following grounds:

1. the award contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or
2. the award is based upon factual findings clearly unsupported by the record; or

3. the award is subject to one or more of the grounds set forth in §10 of the Federal Arbitration Act for vacating an award.

See Rule 8.2.

If the original award is fully affirmed, unless the tribunal orders otherwise, the appellant is required to reimburse the appellee's share of the costs of the Appeal expended by the Appellee as well as the Appellee's attorney fees and other out-of-pocket-expenses related to the appeal. See Rule 12. If, however, the tribunal modifies or reverses the original award, the tribunal may apportion the parties' costs, attorney fees, and other out-of-pocket-expenses, in such manner as it deems reasonable under the circumstances. See *id.*

If, after an appellate award, a party seeks judicial review or opposes confirmation, and that effort does not result in vacation or "substantial modification" of the award or appellate award, the party shall reimburse the opposing party or parties legal fees and other out-of-pocket expenses incurred in connection with the judicial review. See Rule 14.

It should also be noted that the procedure is "free standing" in that it may be invoked regardless of whether the original arbitration was conducted under the CPR Rules. See Rule 1.1.

#### Conclusion

Corporate counsel and their outside counsel should be aware of these options when considering the double-edged sword that is finality. Through well thought out appellate arbitration processes, parties can achieve the efficiencies of arbitration while maintaining protection against egregious errors.



1. Gary B. Born, *International Arbitration: Law and Practice* 13 (2012).
  2. Julian D. M. Lew, Loukas A. Mistelis & Stefan M. Kroll, *Comparative International Commercial Arbitration* 7 (2003).
  3. See, e.g., *Hall Street v. Mattel*, 552 U.S. 576 (2008).
  4. See Born, *supra* note 1, at 13.
  5. 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, at 8. (<http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015.pdf>)
  6. Thomas J. Stipanowich & J. Ryan Lamare, "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations," 19 *Harv. Negot. L. Rev.* 1, 53 (Table P) (Spring 2014).
  7. AAA/ICDR Optional Appellate Rules, Effective Nov. 1, 2013, available at <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2016218&revision=latestreleased>.
  8. JAMS Optional Appellate Appeal Procedure, Effective June 2003, available at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Optional\\_Appellate\\_Procedures-2003.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appellate_Procedures-2003.pdf).
  9. See CPR Arbitration Appeal Procedure and Commentary, available at <http://www.cpradr.org/Portals/0/CPRArbitrationAppealProcedure2015.pdf>.
  10. Section 10 of the Federal Arbitration Act provides the following grounds for vacating an award:
    - (1) where the award was procured by corruption, fraud, or undue means;
    - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
    - (3) where the arbitrators were 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; or of any other misbehavior by which the rights of any party have been prejudiced; or
    - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- See 9 U.S.C. §10.