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Appealing an International Arbitration Award Drafting the International Arbitration Clause, Part 4 of 4

From the Experts

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This article is Part 4 of a four-part series on international arbitration.

It is generally accepted that an international arbitration award is final and binding. Unlike a court judgment that can be appealed for factual and legal review, an arbitration award typically can only be challenged based on procedural irregularities, lack of jurisdiction, lack of arbitrability or violation of public policy.

While some exceptions exist, they are limited in application. For example, the English Arbitration Act of 1996 permits appeal on a point of English law if all parties agree or the court grants leave to appeal. The court's power to grant leave, however, is restricted and requires the court to determine not only that resolution of the question will substantially affect the rights of one or more parties, and that the question was one the tribunal was asked to decide, but also that the tribunal's decision was obviously wrong or "the question is one of general public importance and the decision of the tribunal is at least open to serious doubt."

For many businesses, the limited



bases for challenging an award, coupled with the ability to enforce the award under the New York Convention, make international arbitration the preferred method (some would say the only method) for resolving transnational disputes. For other businesses, the lack of an ability to challenge the factual and legal decisions underlying the award is a serious flaw. Consequently, some practitioners have attempted to expand

the scope of judicial review through agreement of the parties.

In *Hall St. Assocs. v. Mattel* 552 U.S. 576 (2008), the parties entered into an agreement permitting judicial review of the sufficiency of the evidence and tribunal's conclusions of law:

"[T]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the

award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."

At issue was whether the grounds for vacatur and modification provided by Sections 10 and 11 of the Federal Arbitration Act were exclusive. These sections are applicable to international arbitration awards under 9 U.S.C. § 208.

Rejecting the argument that parties may by agreement expand the scope of the judicial review, the U.S. Supreme Court stated:

"Instead of fighting the text, it makes more sense to see the three provisions, §§ 9–11 [§9 confirmation; §10 vacatur; §11 modification or correction], as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straight-away. Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,' and bring arbitration theory to grief in post arbitration process."

Given the restricted bases for review of arbitration awards, this final part of this four-part series will explore whether any of the arbitration rules permit appellate review of an arbitration award.

Ad hoc Arbitration

A. UNCITRAL Rules

The UNCITRAL (U.N. Commission on International Trade Law) Arbitration Rules make no provisions for appeal, simply stating: "All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay."

Institutional Arbitration

B. ICC Rules

The International Chamber of Commerce Rules also provide that the award is final and binding, and that the parties will carry out any award without delay. The ICC Rules also state that the parties "shall be deemed to have waived their right to any form of recourse insofar as such waiver can be validly made." This phrase recognizes there may be limited instances in a minority of jurisdictions in which waiver is not permitted. The ICC Rules do require, however, that every award be reviewed by the ICC Court and approved as to its form before a final award is rendered. In the course of this review, the ICC "may lay down modifications as to form" and "without affecting the arbitral tribunal's liberty of decisions, may also draw its attention to points of substance."

C. LCIA Rules

The London Court of International Arbitration Rules are even more emphatic in their statement regarding waiver of appeal, providing, in pertinent part:

"The parties undertake to carry out any award immediately and

without any delay . . . and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law."

D. ICDR Rules

Like the UNCITRAL Rules, the ICC Rules and LCIA Rules, the International Centre for Dispute Resolution Rules provide that the award is final and binding and should be carried out without delay. The ICDR Rules also recognize that the parties waive their right to appeal, but this waiver is subject to important prefatory language "absent agreement otherwise." Thus, it is possible under the ICDR Rules to provide for appeal by agreement. The appeal, however, is not to the courts but through use of the ICDR's Optional Appellate Arbitration Rules (OAA Rules) enacted in November 2013.

The OAA Rules apply only if the parties either by stipulation or in their contract agree to the appeal of an arbitration award (underlying award) rendered under the auspices of the ICDR (or the American Arbitration Association). Any notice of appeal is to be filed within 30 days of the underlying award. Upon filing, the OAA Rules provide 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.” If the appeal is withdrawn, the underlying award is deemed final on the date of withdrawal.

The parties can agree on how the appellate tribunal will be selected. If there is no agreement, the arbitrators will be chosen using the ICDR “list” method. The appellate tribunal consists of three appellate arbitrators, unless the parties agree otherwise.

The OAA Rules provide two bases for appeal: the underlying award is based on a material and prejudicial error of law, or it contains clearly erroneous determinations of fact. As in a court of law, the parties file briefs and submit evidence, although the entire appellate process is designed to be completed in three months, absent unusual circumstances. Unlike the appeal of a judgment to an appellate court, the appellate tribunal is not empowered to order a new arbitration or send the case back to the original arbitrator(s) for further review and/or correction.

Instead, within 30 days of service of the last brief, the appellate tribunal is required to do one of the following:

1. Adopt the underlying award as its own.
2. Substitute its own award for the underlying award (incorporating those aspects of the award that are not vacated or modified).
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.

When the appeal process is concluded and the appellate tribunal’s

decision is served on the parties, the appellate decision becomes the final award for purpose of judicial enforcement proceedings.

To date, there have been two appeals using the OAA Rules: one each for the ICDR and the American Arbitration Association. Whether the OAA Rules will be used frequently remains to be seen, but they do offer a merits review of the arbitration award, which some parties may find attractive.

Arbitration awards are final and binding on the parties, and the bases to challenge them are limited. For the party that wishes an additional layer of review involving consideration of the facts and law, however, the ICDR’s OAA Rules establish an avenue of review.

Conclusion

As demonstrated by this four-part series, all arbitration rules are designed to provide a procedural framework for conducting arbitrations, but the rules are not fungible. Significant differences exist in the manner in which the various arbitral institutions and UNCITRAL handle the issues of joinder, consolidation, arbitrator appointment in multiparty cases, emergency arbitrators and appellate review. These differences, in turn, have the potential to impact favorably or unfavorably on the ultimate resolution of a dispute. The knowledgeable drafter will consider each of these differences when drafting the arbitration clause.

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