

Client Alert

International Arbitration Practice Group

November 15, 2013

American Arbitration Association Adopts Optional Appellate Arbitration Rules

The American Arbitration Association (AAA) has adopted a new set of Optional Appellate Arbitration Rules (the “Appellate Rules”) that became effective on November 1, 2013. Under the Appellate Rules, parties may agree, either by stipulation or in their contract, to permit the arbitral appeal of an underlying arbitration award, regardless of whether the underlying arbitration was conducted under the auspices of the AAA, its international arm, the International Centre for Dispute Resolution (ICDR), or any other arbitration institution.

Traditionally, an arbitral award may not be appealed before national courts, and parties may seek to vacate an award only on limited grounds. The Appellate Rules now provide for an appeal within the arbitration process and permit appeals based on “(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous” (Rule A-10). The AAA has stated that the Appellate Rules “were developed for the types of large, complex cases where the parties think the ability to appeal is particularly important.” The parties’ election of the Appellate Rules, however, does not constitute a waiver of the right to seek to vacate the final arbitral award in court. Rather, during the pendency of the arbitral appeal, the underlying award will not be considered final for purposes of any court actions to modify, enforce, correct or vacate the award, and the time period for commencing any such judicial action will be tolled (Rule A-2).

Under the Appellate Rules, a party must file a Notice of Appeal within 30 days from the date that the underlying award is submitted to the parties (Rule A-3(a)(i)), after which the appellee has seven days to file a cross-appeal (Rule A-3(c)).

In cases of domestic AAA arbitrations, the appeal tribunal will be selected from the “AAA’s Appellate Panel” and in the case of an international dispute, “from its International Appellate Panel” (Rule A-4(a)). Unless the parties agree to a single arbitrator, the appeal tribunal will consist of three appellate arbitrators (Rule A-5(c)). Upon receipt of a Notice of Appeal, the AAA will send to all parties a list of ten (10) names of individuals matching the requested criteria from the International or AAA’s Appellate Panel. The parties are encouraged to agree on the constitution of the appeal tribunal, but if they cannot agree, they have fourteen (14) days to strike the names of arbitrators to whom they object and must thereafter return the list to the

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AAA. Following this procedure, the AAA will designate an appeal tribunal from among the remaining candidates (Rules A-5).

Within one week of the constitution of the tribunal, the parties, the case manager, and the tribunal are required to schedule a preliminary conference call “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” (Rule A-7(a)). Unless the parties agree otherwise or the tribunal deems it necessary, “all appeals will be determined upon the written documents submitted by the parties” (Rule A-15) and the place of the appeal shall be the same as the seat of the underlying arbitration (Rule A-14).

Under Rule A-19(a), within thirty (30) days of service of the last written submission, the appeal tribunal shall either “(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 entire arbitral appeals process is designed to be completed within approximately three months. Once the appellate tribunal renders a decision, that decision becomes the final award for purposes of judicial enforcement proceedings (Rule A-20).

These rules and their potential applicability to non-AAA/ICDR awards raise several questions, especially regarding their interaction with other institutional arbitration rules. For example, Article 34(6) of the International Chamber of Commerce (ICC) Rules of Arbitration provides that “[e]very award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and *shall be deemed to have waived their right to any form of recourse* insofar as such waiver can validly be made.” The AAA’s new set of rules, however, indicates that parties could agree to ICC arbitration without waiving their right to “any form of recourse” if they agree to apply the Appellate Rules. How these two sets of rules will interact is unclear.

Another potential source of uncertainty arises regarding the final award. In ICC arbitrations, the ICC court scrutinizes an arbitral tribunal’s award before it is notified to the parties. Only after ICC scrutiny is the award considered an ICC award. Yet under the Appellate Rules, the AAA or ICDR appeal tribunal has the power to substitute its own award for the underlying award. It is unclear whether the resulting final award thereby becomes an AAA/ICDR award or remains an ICC award.

While it is too early to tell how the AAA’s new Optional Appellate Arbitration Rules will work in practice, these and other issues will have to be worked out if these Appellate Rules are to offer a viable system of arbitral appeals.

The AAA Appellate Rules can be accessed at <http://go.adr.org/AppellateRules>.

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