

CPR Arbitration Appeal Procedure and Commentary

Revision History

1999 CPR published the Arbitration Appeal Procedure.

2002 Minor editorial revisions; Case law updates added to Commentary.

2007 Minor edits to reflect Arbitration Rules revised 2007.

Introduction

Most users of arbitration find the finality of an arbitration award appealing. But some parties to major cases are concerned about the possibility of an aberrant award and would like to be able to appeal from such an award to a tribunal of outstanding appellate arbitrators. In response to that concern, CPR has adopted the CPR Arbitration Appeal Procedure ("Appeal Procedure") which is set forth, together with a Commentary. The Procedure may be invoked whether or not the original arbitration was conducted under CPR Rules.

CPR does not wish to encourage widespread appeals from arbitration awards. The Appeal Procedure (Rule 8.2) establishes relatively narrow grounds for appeal beyond the statutory grounds under Section 10 of the Federal Arbitration Act. Moreover, an unsuccessful appellant is required to reimburse the appellee's legal fees and other costs of the appeal, unless the tribunal orders otherwise.

CPR has also organized a panel of appellate arbitrators consisting entirely of former federal judges who are also experienced arbitrators and who already serve on CPR panels. When the Appeal Procedure is invoked, CPR will arrange for the selection of an appellate tribunal.

The CPR Commission on the Future of Arbitration, consisting of over 50 leading experts on arbitration, completed work on a comprehensive guide for arbitration users, entitled "Commercial Arbitration at Its Best: Successful Strategies for Business Users," (CPR/ABA, 2001). The Commission's deliberations on the finality and reviewability of arbitration awards led to the development of the Appeal Procedure, with the advice of Commission members.

CPR ARBITRATION APPEAL PROCEDURE

I. APPEAL CLAUSE

It is suggested that parties wishing to authorize an appeal to the CPR Arbitration Appeal Tribunal under the Rules of the Appeal Procedure set forth below include the following language in their arbitration clause. The appeal provision should in most circumstances appear in the basic agreement between the parties. A similar clause can also be inserted in a post-dispute arbitration agreement.

An appeal may be taken under the CPR Arbitration Appeal Procedure from any final award of an arbitral panel in any arbitration arising out of or related to this agreement that is conducted in accordance with the requirements of such Appeal Procedure. Unless otherwise agreed by the parties and the appeal tribunal, the appeal shall be conducted at the place of the original arbitration.

II. RULES OF APPEAL PROCEDURE

A. General and Introductory Rules

Rule 1. Scope of Application

1.1. The parties to any binding arbitration conducted in the United States, pursuant to CPR Rules for Non-Administered Arbitration ("CPR Arbitration Rules") or otherwise, may agree in writing that a party may file an appeal (the "Appeal") under the CPR Arbitration Appeal Procedure (the "Appeal Procedure") from an arbitration award (the "Original Award").

1.2 The appeal shall be to a CPR Arbitration Appeal Tribunal (the "Tribunal") chosen from the panel constituted by CPR to hear Appeals (the "Panel"), consisting of former federal judges.

1.3 No appeal may be filed hereunder, unless:

(a) the arbitrator(s) (was) (were) required to reach a decision in compliance with the applicable law and rendered a written decision setting forth the factual and legal bases of the award; and

(b) there is a record (the "Record") that includes all hearings and all evidence (including exhibits, deposition transcripts, affidavits admitted into evidence) in the arbitration proceeding from which the appeal is taken.

Rule 2. Commencement of Appeal

2.1 An Appeal shall be commenced by written notice to the opposing party(ies) and to CPR (attention: Panel Management Group), given within thirty days of the date on which the Original Award was received by the parties, unless the parties agree on a different period. The notice shall set forth the agreement in writing providing for the appeal, shall state the elements of the Original Award that are being appealed and the basis for the Appeal and shall transmit that portion of the Record that the appellant deems relevant to the Appeal.

2.2 The opposing party(ies) may serve a cross-appeal by notice in writing to the appellant(s) and to CPR (attention: Panel Management Group) within fourteen days of receipt of the notice of appeal. The notice shall state the elements of the Original Award that are being appealed and the basis for the Appeal. The appellee shall transmit any portion of the Record deemed relevant by the appellee that was not transmitted by the appellant.

2.3 Once an Appeal has been timely filed, the Original Award shall not be considered final for purposes of seeking judicial confirmation, enforcement, vacation or modification. If the Tribunal affirms the Original Award, it shall be deemed final as of the date of the Tribunal's affirmance. If the Tribunal does not affirm the Original Award, its award on appeal (the "Appellate Award") shall be deemed the final award in the arbitration, in lieu of the Original Award. If the Appeal is withdrawn for any reason (other than a settlement), the Original Award shall be deemed final as of the date of such withdrawal.

2.4 By agreeing to become a party to an Appeal under these Rules, each party (a) irrevocably waives the right to initiate court action to seek to confirm, enforce, vacate or modify the Original Award until the appeal process has been completed, and (b) agrees that any statutory time period for the commencement of court actions to confirm, enforce, vacate or modify arbitral awards shall be tolled for the period beginning with the commencement of the appeal and ending with the decision on the

appeal under these Rules. Subject to these Rules of the Appeal Procedure, each party may request the Tribunal to affirm, vacate or modify the Original Award on any of the grounds specified in Rule 8.2 hereof.

Rule 3. Notice

The provisions of Rule 2 of the CPR Arbitration Rules shall apply to all proceedings pursuant to these Rules.

B. Rules with Respect to The Tribunal

Rule 4. Selection of Appeal Tribunal

4.1 The Tribunal shall consist of three members of the Panel, unless the parties agree that it shall consist of one Panel member.

4.2 After CPR has received the notice of appeal and any notice of crossappeal, it shall promptly submit to the parties a list of not less than seven candidates from the Panel (or not less than three candidates if one is to be chosen) who have been pre-screened for possible conflicts and availability. The list shall be accompanied by each candidate's biographic information and compensation rate. The parties shall attempt to agree on the required number of candidates from the list. They shall promptly inform CPR of any candidates on whom they have agreed. Failing complete agreement within ten days, the parties shall submit the list to CPR within an additional five days, rank ordering the candidates on whom they did not agree. Thereupon, the required number of candidates receiving the lowest combined score shall be chosen by CPR, which shall also break any tie. Any party failing without good cause to return a rank-ordered candidate list within the prescribed time shall be deemed to have assented to all candidates on the list.

4.3 If the Tribunal is composed of three members, they shall select one of their number as the chair (the "Chair"). The Chair shall be responsible for the expeditious conduct of the proceedings and for administrative matters, but shall be equal in voting and all other respects.

Rule 5. Qualifications, Challenges and Replacement of Arbitrator

Rule 7 of the CPR Arbitration Rules shall apply to the qualifications of, challenges to and replacement of members of Tribunals selected pursuant to these Rules

Rule 6. Challenges to the Jurisdiction of the Tribunal

Rule 8 of the CPR Arbitration Rules shall apply to any challenge to the jurisdiction of the Tribunal.

C. Rules with Respect to the Conduct of the Appeal

Rule 7. General Provisions

7.1 Rules 9.1 and 9.2 of the CPR Arbitration Rules shall apply to the conduct of any appeal under these Rules.

7.2 The appellant(s) shall be allowed one opening brief and one response brief. The appellee(s) shall be allowed one brief, except that an appellee who is also a cross-appellant shall be allowed two briefs. Briefs or memoranda previously submitted may be used. The Chair shall request the parties to agree on a briefing schedule. Failing prompt agreement, the Chair shall set the schedule. The Tribunal may request the parties to submit such further briefs or other materials as it may deem appropriate.

7.3 The Tribunal may request the parties to supplement the Record initially submitted by the parties as it may deem appropriate in order to fulfill its functions under Rule 8.

7.4 Oral argument shall be held at the request of a party or if the Tribunal sees a need therefor. The Tribunal shall set the date, duration and place for oral argument in consultation with the parties. If the appellant alleges one or more of the grounds for vacating the Original Award set forth in Section 10 of the Federal Arbitration Act, the Tribunal may take evidence supporting and rebutting such an allegation.

Rule 8. The Decision

8.1 If the Tribunal finds that it does not have appellate jurisdiction, it shall forthwith dismiss the Appeal and the Original Award will thereupon be final.

8.2 If the Tribunal hears the Appeal, it may issue an Appellate Award modifying or setting aside the Original Award, but only on the following grounds:

a. That the Original Award (i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record; or

b. That the Original Award is subject to one or more of the grounds set forth in Section 10 of the Federal Arbitration Act for vacating an award. The Tribunal does not have the power to remand the award.

8.3 If the Tribunal does not modify or set aside the Original Award pursuant to Rule 8.2 above, it shall issue an Appellate Award approving the Original Award and the Original Award shall be final as provided in Rule 8.6 below.

8.4 A three-member Tribunal shall make its decision by majority vote. The decision shall be set forth in an Appellate Award in writing and shall include a concise written explanation, unless all parties agree otherwise. A member who does not join the decision may file a dissenting opinion, which shall not constitute part of the Appellate Award.

8.5 If a party refuses to participate in an Appeal after having agreed to do so, the Tribunal shall maintain jurisdiction over the Appeal, including authority to make an Appellate Award.

8.6 The Chair shall cause the Tribunal's Appellate Award and any dissenting opinion to be mailed to the parties. The Appellate Award or the Original Award, as the case may be, shall be final upon receipt by the parties.

D. Miscellaneous Rules

Rule 9. Use of Best Efforts to Avoid Delay

The parties and the Tribunal shall use their best efforts to avoid delay and to assure that the Appeal will be concluded within six months of its commencement.

Rule 10. Compensation of the Tribunal

Each member of a Tribunal shall be compensated at an hourly rate determined at the time of appointment for all time spent in connection with the proceeding and shall be reimbursed for any travel and other expenses.

Rule 11. Deposit of Costs

The Tribunal may require each party to deposit with the Chair an equal amount as an advance for the anticipated fees and expenses of its members. Any such funds shall be held and disbursed in such a manner as the Tribunal may deem appropriate. After the Appellate Award has been rendered, the

Tribunal shall return any unexpended balance from deposits made to the parties. If the requested deposits are not paid in full within twenty days after receipt of the request, the Tribunal may so inform the parties in order that jointly or severally they may make the required payment. If such payment is not made, the Tribunal may suspend or terminate the proceedings.

Rule 12. Distribution of Costs

In the event that the Tribunal fully affirms the Original Award, the appellant(s) shall promptly reimburse the appellee(s) (a) the share of the costs of the Appeal theretofore expended by the appellee(s), and (b) the appellee's attorney fees and other out-of-pocket expenses related to the Appeal, unless the Tribunal orders otherwise. If the Tribunal modifies or reverses the Original Award, the Tribunal may apportion the parties' costs of the Appeal, attorney fees and other out-of-pocket expenses among the parties in such manner as it deems reasonable, taking into account the circumstances and result of the Appeal.

Rule 13. Confidentiality

The parties and the arbitrators shall treat the proceedings, including the Record, and the decision of the Tribunal as confidential, except in connection with a judicial challenge to, or enforcement of, the Original Award and the Appellate Award, and unless otherwise required by law.

Rule 14. Costs with Respect to Judicial Appeal

If following an Appellate Award, a party(ies) seeks judicial review (or opposes confirmation), that does not result in the vacation or substantial modification of the Original Award or the Appellate Award handed down by the Tribunal, that party(ies) shall promptly reimburse the opposing party(ies) legal fees and other out-of-pocket expenses incurred in connection with the judicial review.

Rule 15. Action Against CPR or Member of Tribunal

Neither CPR nor any member of a Tribunal shall be liable to any party for any act or omission in connection with any Appeal conducted under these Rules of the Appeal Procedure, except for willful misconduct.

COMMENTARY

Most parties who opt for arbitration, rather than litigation, find the finality of an arbitration award appealing. However, when the stakes may well be very large, some are concerned about the possibility of an irrational award and finality becomes a deterrent to using arbitration.

The statutory grounds for vacating an arbitration award under Section 10 of the Federal Arbitration Act and state counterparts are limited to matters such as arbitrator corruption, fraud, evident partiality, misconduct and exceeding of powers. These grounds do not go to the merits of the award. The decision in *Hall Street Associates L.L.C. V. Mattel Inc.*, No. 06-989, (March 25, 2008)(available at <http://www.supremecourtus.gov/opinions/07pdf/06-989.pdf>), bars parties from writing contracts that allow *court* review for arbitration awards.

In the first instance arbitrations can and should be structured so as to minimize the risk of an erroneous award or an unjustified compromise award. The single most important factor is the selection of a highly qualified arbitrator or panel. Other suggestions appear below. Nevertheless, there are situations in which the parties may wish to stipulate that an award the loser considers outlandish will be subject to appeal. CPR believes a well structured private appeal to a highly qualified tribunal is likely to be preferable to seeking judicial review with all the attendant uncertainties. Consequently, CPR is promulgating the CPR Arbitration Appeal Procedure (the "Appeal Procedure"), which was

developed with the advice of several leading arbitrators and scholars of arbitration. Special thanks are due Robert B. von Mehren of Debevoise & Plimpton and Dean Paul R. Verkuil of Benjamin N. Cardozo School of Law, who participated actively in drafting the Procedure.

Highlights of the Procedure

- CPR has organized an appeal panel consisting exclusively of former federal judges who are also experienced arbitrators. [The roster is available on the Web at www.cpradr.org.]
- The Appeal Procedure is "free standing." It may be invoked whether or not the original arbitration was conducted under CPR Rules for Non-Administered Arbitration.
- The tribunal for the individual case will consist of three members of the appeal panel, selected in accordance with the Appeal Procedure, unless the parties agree to present the appeal to a single arbitrator.
- Pre-conditions for an appeal are that the arbitrators in the original proceeding be required to apply the law, a record of the original proceeding and a written award stating findings of fact and conclusions of law.
- A cross-appeal may be filed.
- An oral hearing will not be held, unless requested by either party or the tribunal.
- The tribunal may affirm, modify or set aside the original award, but it may not remand the case.
- The grounds for modification or setting aside the award are:
 - a. that the Original Award (i) contains one or more material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) that it is based upon factual findings clearly unsupported by the record; or
 - b. that the Original Award is subject to one or more of the grounds set forth in Section 10 of the Federal
 - Arbitration Act for vacating an award.
 - If the original award is fully affirmed on appeal, the appellant will bear the entire cost of the appeal, including the appellee's legal fees and other expenses, unless the tribunal orders otherwise. If the award is not fully affirmed, the tribunal is empowered to allocate all such costs.
 - If, following the appeal process, a party seeks to have the award vacated in court and is unsuccessful, that party shall bear the opponent's costs related to the court proceeding.
 - The appeal procedure is confidential.
 - The parties can agree on the Appeal Procedure as part of a pre-dispute arbitration agreement or after a dispute has arisen.

Rationale

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. With both objectives in mind, CPR has established relatively narrow grounds for setting aside the original award, beyond the statutory grounds for vacatur under Section 10 of the Federal Arbitration Act and state counterparts.

In addition, the CPR Procedure has built-in financial disincentives to appeal by requiring a record of the original proceeding, a significant expense; and by requiring an unsuccessful appellant to reimburse the legal fees, arbitrator fees and other costs the appellee incurred in connection with the appeal, unless the tribunal orders otherwise.

The 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.

Inability to appeal an arbitration award frequently leads parties in larger cases to opt for a panel of three arbitrators, resulting in substantial additional cost and often delay. If parties have the safeguard of an appeal, they may see less need for three arbitrators. Moreover, if a private appeal is available, the losing party may be less inclined to seek review in court even on statutory grounds.

Party Modifications

a. Monetary Threshold

The Appeal Procedure does not set a monetary threshold for appeals. If the parties wish, they may specify in their arbitration agreement that only a monetary award exceeding a certain amount will be appealable.

b. Unanimous Award by Three Arbitrators

The parties can provide that the Appeal Procedure will not apply to an original award rendered unanimously by a panel of three arbitrators.

c. Waiver of Statutory Vacatur

The Appeal Procedure does not preclude an unsuccessful appellant from seeking judicial review of the appellate award on statutory grounds. The parties may provide in their arbitration agreement that by filing an appeal from the original arbitration award under the Appeal Procedure the appellant waives the right to vacatur under Section 10 of the FAA or state counterparts. However, CPR cannot give assurance that such a waiver would be enforceable.

d. Escrow Deposit

As an additional disincentive, the parties' agreement may require that the appellant deposit all or a part of any monetary award in the original proceeding in escrow pending the outcome of the appeal.

Other Approaches

In addition to assuring the appointment of a highly qualified arbitrator or panel, ways to minimize the risk of an irrational award include:

- require a "reasoned" award
- require the arbitrator(s) to apply the substantive law of a specific jurisdiction;
- prohibit an award exceeding compensatory damages;
- require the parties to submit final offers to the arbitrator(s), who will approve the offer they consider the more reasonable, commonly called "baseball arbitration;"
- the parties can agree in advance on a range that the award may not exceed on the high or low side.