
THE INTERNATIONAL CONSTRUCTION LAW REVIEW

The Appeal of Appellate Arbitration [2018] ICLR 436 PHILIP L BRUNER

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THE APPEAL OF APPELLATE ARBITRATION

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I. INTRODUCTION

The appeal of appellate arbitration has increased with each passing decade of the 21st century. This increasing appeal points toward continuing expansion into the future.

Appellate arbitration is an extension of the arbitration process with which the world's construction industry long has been familiar and of which it has been quite supportive.

The American construction industry has utilised arbitration for resolution of construction disputes for over 135 years.¹ The 1888 "Uniform Contract," the first American standard form construction contract, which was drafted by the American Institute of Architects and endorsed by the National Association of Builders (predecessor to the Associated General Contractors of America), mandated two methods for binding resolution of disputes between the owner and contractor: (1) the architect was given near dictatorial authority to decide with finality all disputes over "the true construction and meaning of the drawings and specifications," and issues regarding existence of "sufficient grounds" to justify owner termination of the Contract for cause; and (2) the architect's decisions regarding computation of payment for delays or for change orders, when timely "dissented" from by the aggrieved party, could be referred to binding arbitration before a panel of three arbitrators (one appointed by each party plus a third selected by them). This format was broadened in the 1905 Edition of the "Uniform Contract" to authorise referral upon timely notice of all disputes not settled by the architect to:

"A Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference").

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¹ See, Philip L Bruner, *Rapid Resolution ADR*, 31 Const Law 6 (ABA, Spring 2011) ("For well over a century, the American construction industry has promoted the nationwide use of non-judicial dispute resolution methods capable of promptly and fairly resolving complex construction disputes").

In the years since the promulgation of the Federal Arbitration Act of 1925 (“the FAA”), and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“the New York Convention”),² which has been ratified and implemented by most nations, private arbitration has become the world’s dominant method for resolution of complex international and domestic commercial disputes.

Arbitration’s perceived advantages over conventional litigation in local court systems include finality of result, expertise and neutrality of party-selected decision-makers, confidentiality, informality and flexibility of procedures, avoidance of local biases and prejudices, expeditiousness, efficiency, economy, and reduction of “human wear and tear”. As expressed in 1985 by Warren E Burger, Chief Justice of the United States, in his compelling advice to the American legal profession in favour of arbitration:

“The obligation of the legal profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfil that traditional obligation means that there should be mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about ...

My overview of the work of the courts from a dozen years on the Court of Appeals and now sixteen in my present position, added to twenty years of private practice, has given me some new perspectives on the problems of arbitration. One thing an appellate judge learns very quickly is that a large part of all litigation in the courts is an exercise in futility and frustration. A large proportion of civil disputes in the courts could be disposed of more satisfactorily in some other way ...

My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases. In mentioning these factors, I intend no disparagement of the skills and broad experience of judges. I emphasise this because to find precisely the judge whose talents and experience fit a particular case of great complexity is a fortuitous circumstance. This can be made more likely if two intelligent litigants agree to pick their own private triers of the issues ...

The acceptance of this concept has been far too slow in the United States.”³

Chief Justice Burger’s “kinds of cases” most suitable for arbitration clearly include complex construction cases. Moreover, Chief Justice Burger’s remarks regarding the benefits of arbitration surely are applicable equally to appellate arbitration as the process by which parties may obtain expeditious appellate review of domestic and international awards by selected neutral experts applying consensually agreed standards of review and grounds for enforcement and vacatur broader than those available in court.

² United Nations Convention on Recognition and Enforcement of Foreign Arbitrable Awards, 21 UST 2517; 33 UNTS 38 (10 June 1958).

³ Warren E Burger, Chief Justice of the US Supreme Court, *Remarks before the American Arbitration Association and the Minnesota State Bar Association: Using Arbitration to Achieve Justice*, 21 August 1985 in 40 Arb J 3, 6 (1985). See also Warren E Burger, *Isn’t There a Better Way?* 68 ABAJ 274, 275 (1982) (quoting Abraham Lincoln: “Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them that the nominal winner is often the real loser – in fees, expenses and waste of time”).

II. MODERN CONCERNS ABOUT NARROW GROUNDS FOR AWARD VACATUR AND JUDICIAL STANDARDS OF AWARD REVIEW

Even in this 21st century, concerns are voiced by some about the wisdom of submitting disputes to binding arbitration, because grounds for award vacatur under the FAA⁴ and the New York Convention⁵ preclude a reviewing court from vacating an award when arbitrators fail to enforce the express terms of the Contract or otherwise “got it wrong” on the law or the facts.

Neither the FAA nor the New York Convention permit vacatur for errors of law or of erroneous findings of fact. The FAA and New York Convention both promote the policy of dispute resolution “finality” by promulgating extremely narrow grounds for award vacatur as compared to judicial standards for review and reversal of court judgments.⁶ Award vacatur under the FAA and New York Convention is permitted only for lack of an enforceable arbitration agreement, violation of public policy, arbitrator misconduct, exceeding of powers, corruption, fraud, evident partiality,

⁴ Federal Arbitration Act 9 USC §10(a), authorises award vacatur on the following grounds:

- (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
- (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 misbehaviour 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.

⁵ Article V of the New York Convention establishes seven grounds for refusing enforcement of an arbitral award. The court may raise the last two of these grounds *sua sponte* to decline enforcement. These grounds are:

- (1) The absence of a valid agreement to submit the dispute to arbitration;
- (2) The lack of proper notice or opportunity to present a case;
- (3) The arbitral award exceeds the scope of the issues properly submitted to arbitration;
- (4) Improper composition of the arbitral panel;
- (5) The award is not yet binding or has been properly set aside;
- (6) The subject matter of the award is not arbitrable under the law of the enforcing country; and
- (7) Recognition and enforcement would be contrary to the public policy of the enforcing country.

Federal Arbitration Act 9 USC §207 implements the New York Convention in US law. Regarding vacatur of international awards the FAA provides: “The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention”. See also, Bruner and McCormick, “Enforcement of Foreign Arbitral Awards: The US View of International Arbitration’s ‘Final Frontier’” [1994] ICLR 128.

⁶ The same narrow grounds also are included in the UNCITRAL Model Law of International Arbitration. See http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last accessed 15 August 2018). The Model Law has been adopted in whole or in part by many of the world’s commercial nations.

and the like. The merits of the dispute generally are beyond review. Mere arbitrator errors in applying the law or in making factual findings are not grounds for vacatur. “Finality” is the objective.⁷

In contrast to award vacatur standards, US court judgments are subject to much broader standards of appellate review that allow appellate courts to vacate lower court judgments for errors of law or “clearly erroneous” findings of fact. Pursuant to federal and state court rules of civil procedure and governing case law, the reviewing appellate court may review questions of law *de novo* and questions of fact for *clear error*. Thus, a lower court judgment may be vacated upon an appellate court review concluding that the judgment is infected with errors of law or with “clearly erroneous” findings of fact.⁸ The judicial standard of review for mixed questions of fact and law turns on whether the legal question or the factual question predominates in context.

Parties comfortable with the broad judicial scope of review for court judgments, and fearful of arbitration’s narrow review standard for award vacatur, are those who often refuse to agree to arbitration. Concerns have been expressed about the wisdom of arbitrating disputes arising on complex multi-party construction projects, because not all necessary parties can be joined in the same arbitration proceeding and common to all parties must be resolved “piecemeal” in different arbitration and court proceedings.⁹ “Piecemeal” resolution creates the distinct risk that the resulting arbitral awards and court judgments issued by different decision-makers and subject to different standards of appellate review and vacatur, will result in

⁷ See, Doak Bishop and Silvia Marchili, *Annulment under the ICSID Convention* 17 (2012) (“[F]inality of arbitral awards is the distinctive feature of arbitration and a natural consequence of the long-recognised principles of *pacta sunt servanda* and *res judicata*”).

⁸ See, *United States v United States Gypsum Co* 333 US 364, 395 (1948) (“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed”).

⁹ See, *Moses H Cone Mem’l Hospital v Mercury Construction Corp* 460 US 1, 20; 103 S.Ct 927; 74 L.Ed 2d 927 (1983) (expressing its strong support for arbitration, but recognised that such judicial support enhances the peril of “double jeopardy,” and opining that the possibility of the plaintiff having to resolve its disputes in two forums – one in state court and one in arbitration – where one of the parties to the underlying dispute was not a party to the arbitration agreement, “occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement”). (Emphasis in original.); *Dean Witter Reynolds Inc v Byrd* 470 US 213, 221; 105 S.Ct 1238; 84 L.Ed. 2d 158 (1985) (“The preeminent concern of Congress in passing the [Federal Arbitration Act] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is ‘piecemeal’ litigation ...”); *KPMG LLP v Cocchi* 565 US 18, 19; 132 S.Ct 23; 181 L.Ed 2d 323 (2011) (“The [Federal Arbitration Act] has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation ... From this it follows that state and federal courts must examine with care the complaints seeking to invoke their jurisdiction to separate arbitrable from nonarbitrable claims. A court may not issue a blanket refusal to compel arbitration merely because some of the claims could be resolved by the court without arbitration”).

“double jeopardy”¹⁰ – conflicting decisions rendered by different arbitral and judicial forums on issues in the same dispute involving the same set of facts and applicable law resulting in subsequent collateral estoppel and *res judicata*.

According to a 1998 survey of 600 US general counsel or chief litigators about concerns with arbitration, 54% disapproved of arbitration because awards were “difficult to appeal”, and 49% indicated that lack of review of a final award on the merits was a factor for opting against arbitration.¹¹ In 2011, a landmark survey of corporate counsel in Fortune 1,000 companies identified “leading concerns about binding arbitration [as] the lack of judicial review on the merits, the qualifications of arbitrators, and the belief that arbitrators tend to compromise and ignore legal norms [rather than enforce the Contract according to applicable law]”.¹² Professors Thomas Stipanowich and Ryan Lamare advised in 2014 that these “leading concerns” could be addressed as follows:

“[C]oncerns about arbitrators’ conformance to legal norms may be addressed by selecting experienced lawyers or former judges as arbitrators (now the prevailing norm in commercial arbitration), through competent legal advocacy ..., and by imposing contractual standards for award-making in accordance with applicable law. *Despite statutory limitations on judicial scrutiny of the merits of arbitration awards, some organisations publish appellate arbitration rules offering different models for review of arbitration awards.* Concerns about arbitrator compromise may be allayed by better information about award-making, more specific guidance for arbitrators regarding award-making, and relying on single arbitrators in lieu of multi-member panels that might be tempted, for example, to rely on compromise to fix damages.”¹³

¹⁰ For an overview of construction arbitration joinder and consolidation issues, see Philip L Bruner, “Dual Track Proceedings in Arbitration and Litigation: Reducing the Peril of “Double Jeopardy” by Consolidation, Joinder and Appellate Arbitration” [2014] ICLR 537; Philip L Bruner and Patrick J O’Connor, Jr, *Bruner and O’Connor on Construction Law*, §§21:93–108 and 21:277–281.

¹¹ See, Mateus Aimore Carreteiro, *Appellate Arbitral Rules in International Commercial Arbitration*, 33 J Int’l Arb 185, 187–188 (2016), citing David B Lipsky and Ronald L Seeber, *The appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations* 26 (Ithaca 2000). See also, William H Knull, III and Noah D Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?* 11 Am Rev Int’l Arb 531, 533 (2000) (“Both limited empirical evidence and theoretical considerations suggest that a re-examination of the possibility of providing for an appellate option in the international commercial arbitration process is in order. To be sure, limitations on appeal may be accepted by many parties as an integral and desirable part of arbitration as a distinct system of dispute resolution, without which some of its primary benefits, namely cost effectiveness, speed, and predictability of venue, would be greatly reduced or negated. But the perception that arbitration cannot be crafted to include safeguards against egregious errors for those who desire such protection is clearly incorrect. Arbitration is, after all, a creature of contract. If parties can agree *ex ante* that they cannot afford the risk of an erroneous arbitration award without a reasonable means for correction, then the principle of party autonomy — itself part of the bedrock of the arbitral system — should make it possible to provide appeal procedures as options to be elected (or not elected) in the agreement to arbitrate”).

¹² See, Thomas Stipanowich and Ryan Lamare, “Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations”, 19 *Harv Negotiation L Rev* 1 (Spring 2014).

¹³ *Ibid*, at 64.

III. PROPOSED APPROACHES TO OVERCOMING CONCERNS ABOUT ARBITRATION'S NARROW VACATUR GROUNDS AND LIMITED JUDICIAL STANDARD OF REVIEW

To overcome the legal risks imposed by the narrow statutory grounds for judicial vacatur of arbitral awards, commercial lawyers and academicians for the last 30 years have proposed four alternative approaches for resolving the perceived problem, namely:

- (1) Enforce parties' consensual agreements to broaden statutory vacatur standards to be at least consistent with judicial standards of review under which appellate courts could reverse lower court judgments; or
- (2) Seek legislative amendment of statutory standards of judicial review to allow *de novo* judicial reviews of final awards on their merits; or
- (3) Create a transnational court with broad standards of review of international arbitration awards; or
- (4) Uphold consensual private appellate arbitration provisions included in pre-dispute or post-dispute arbitration agreements or arbitration rules, thereby permitting further arbitral review of awards on their merits before the awards become final and subject to limited statutory court confirmation or vacatur.

The principal issues surrounding each of these approaches are as follows:

A. Broadening by party agreement the statutory award vacatur grounds and judicial standard of review. Consensual agreements to broaden statutory award vacatur grounds simply open awards for new court trials on the merits and put an end to arbitral "finality". Loss of "finality" has been a principal reason why American courts have rejected enforcement of such agreements.

In the last quarter of the 20th century, American lawyers sought to overcome the narrow vacatur grounds of the Federal Arbitration Act by drafting arbitration clauses in which the parties consensually agreed to enlarge the court's statutory grounds for vacatur and judicial review of final awards, and to allow courts to review the award *de novo*. There followed a plethora of conflicting US appellate court decisions approving¹⁴ or rejecting¹⁵ the right of parties to alter by agreement the standards for

¹⁴ See, for example, *Roadway Package Systems Inc v Kayser* 257 F.3d 287, 291–293 (3d Cir 2001) (allowing parties by agreement to enlarge the reviewing court's standard of review beyond that specified in the Federal Arbitration Act).

¹⁵ *Kyocera Corporation v Prudential-Bache Trade Services Inc* 341 F.3d 987, 1000 (9th Cir *en banc* 2003) (refusing to allow parties to enlarge by agreement the statutory standard of judicial review of an arbitration award); *Bavavati v Josephthal, Lyon & Ross* 28 F.3d 704, 706 (7th Cir 1994) ("By including an arbitration clause in their contract the parties agree to submit disputes arising out of the Contract to a nonjudicial forum, and we do not allow the disappointed party to bring his dispute into court by the back door, arguing that he is entitled to appellate [court] review of the arbitrators' decision.")

court review of arbitral awards and statutory grounds for award vacatur. The United States Supreme Court put this controversy to rest in 2008 in *Hall Street Associates LLC v Mattel Inc.*,¹⁶ by supporting the finality of the arbitral process, rejecting non-statutory common law grounds for vacatur such as “manifest disregard of the law”, and ruling against consensual enlargement of court review standards and statutory grounds for award vacatur. In *Hall Street*, the parties had agreed in their arbitration clause that: “The court shall vacate, modify or correct the award: (i) where the arbitrator’s finding of facts are not supported by substantial evidence; or (ii) where the arbitrator’s conclusions of law are erroneous”. The court held that the grounds for *vacatur* or correction in Sections 10 and 11 of the FAA were exclusive, and said:

“[I]t makes more sense to see the [vacatur and correction provisions of the Federal Arbitration Act] as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render 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.”¹⁷

B. Legislatively amending judicial standards of review and grounds for vacatur to allow party appeals on broad grounds. In jurisdictions such as the United States that do not permit *de novo* judicial review of an arbitrator’s conclusions of law or findings of fact in either a domestic or international award, there are occasional suggestions that the governing domestic arbitration statutes should be enlarged legislatively to permit broad judicial review on all questions. Such suggestions do not extend to international awards governed by the New York Convention.

Some countries such as England do have statutory language that grants arbitrating parties the right of judicial review of arbitral awards on the merits if all parties consent or with leave of court, or if the court concludes that the award is obviously wrong and prejudicial.¹⁸

Other countries that implement the New York Convention for international arbitration also have domestic arbitration laws that expand standards of judicial review and grounds for award vacatur. Illustrative is Canada’s domestic arbitration law, which empowers Canadian courts

¹⁶ *Hall Street Associates LLC v Mattel Inc* 552 US 576 (2008).

¹⁷ *Ibid*, at 587 (citation omitted).

¹⁸ See, England’s Arbitration Act 1996 (as amended), sections 66 to 69 and 70, which limit appeals of questions of law arising out of an arbitral award to those issues to which all parties consent or with leave of court or upon a judicial determination that the tribunal’s decision is “obviously wrong” and substantially affects the rights of one or more parties or that the tribunal lacks jurisdiction. Under section 70(2) an appeal may not be brought until the exhaustion of all rights of correction and of “arbitral process of appeal or review”.

to vacate arbitration awards for errors on “questions of law” and on “questions of fact” only if the parties so provide in their *pre-dispute* arbitration agreement.¹⁹ Where that arbitration agreement does not so provide, parties may still appeal a domestic arbitration award solely on a “question of law” (but not a question of mixed law and fact or question of fact), if the question was “expressly referred” first to the arbitral tribunal for decision. The standard of judicial review of the question of law is not *de novo*, and is restricted to a standard of “reasonableness”,²⁰ unless the court determines the question of law is of “central importance to the legal system ... and outside the ... specialised area of expertise of the administrative decision maker”, in which case the standard for review is “correctness”.²¹ Because few questions are purely questions of law, and most frequently are mixed questions of law and fact, few Canadian arbitration awards have been vacated on the ground of error of law.²² By US standards, the enunciated Canadian scope of judicial review suggests that – absent a clear agreement of the parties in the arbitration clause and a clear reservation of an appealed question of law from the arbitral tribunal – an arbitral award likely will not be vacated unless the award is infected by a critical error or law of central importance to the legal system, or is clearly “unreasonable,” i.e. near arbitrary and capricious.

¹⁹ See, *Dunsmuir v New Brunswick* (SCC) 2008 SCC 9; [2008] 1 SCR 190 (the leading decision of the Supreme Court of Canada on standards of judicial review of domestic administrative decisions).

²⁰ *Ibid.* at paragraphs 47 and 55. (A standard of “reasonableness” means that the award “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law”).

²¹ See, e.g., Alberta Arbitration Act, Rev Stat Alberta 2000, Chapter A-43, section 44, which reads:

44(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

(2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that:

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

(3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

²² See, *Teal Cedar Products v British Columbia* (SCC) 2017 SCC 32; [2017] 1 SCR 668 (presenting the saga of a six-year long appeal of a purported issue of law, and ruling that the question on appeal was an unappealable question of mixed law and fact); *Homexx v Nelson* 2013 ABQB 513 (both arbitrating parties sought vacation of an arbitration award rendered on a dispute over the construction of a home at a wrong elevation lower than contractually specified, which caused ponding. The arbitrator found the Contractor in breach of its contract, but rejected the owner’s requested recovery of “cost of repair” in favour of ordering the Contractor to change the grade around the house and driveway. Both the homeowner and contractor appealed this award. The Court of Queen’s Bench of Alberta denied both appeals and confirmed the award, because no question of law of “central importance to the legal system has been raised” and because any other question of law was mixed with fact and had been presented to the arbitrator for decision).

C. Creating a transnational court for review of arbitral awards. In the last 35 years, a few commentators on international arbitration proposed that an International Court of Arbitral Awards be created to replace the review and vacatur jurisdictions of national courts over international awards.²³ No such court has been created, but a few existing courts could one day assume such jurisdiction. Illustrative is the Singapore International Commercial Court, with its strong bench of international judges, which offers to provide a court-based mechanism to avoid problems encountered in international arbitration.²⁴ The International Court solution has not received wide acceptance.

D. Engaging in institutional appellate arbitration. The one approach finding widest acceptance among arbitrating parties is appellate arbitration administered by arbitral institutions. Parties arbitrating in the United States or in Europe with the right to appeal an arbitral award to an appellate tribunal have less concern about narrow local standards of judicial review and limited grounds for vacatur of international and domestic arbitral awards.

Three US arbitral institutional providers of arbitral services, and one European provider, now offer to administer appellate arbitrations under their optional appellate arbitration rules. In June 2003 JAMS issued its

²³ See, Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution*, 25 Colum J. Transnat'l L 9, 29 (1986); Mauro-Rubino Sammartano, *International Arbitration and Practice*, Vol 2 (2001) ("The solution which has been proposed by this writer is to institutionalise the appellate instance by entrusting the appointment and supervision of appellate proceedings to a new body, an International Arbitral Court of Appeal"); Priya Sampath, *The Need for a Transnational Appellate Arbitral Review Body*, University of Georgia LLM Thesis (2007) at http://digitalcommons.law.uga.edu/stu_llm/85 (last accessed 15 August 2018) ("The central focus of this thesis is how the establishment of a transnational appellate arbitral review body ... will serve as a suitable replacement for judicial review and be a viable source of appeal in general").

²⁴ See, www.SICC.gov (last accessed 15 August 2018) ("While parties may be able to pursue their claims in international arbitration, they may prefer to resolve their disputes in the SICCC to take advantage of a well-designed court-based mechanism which will enable parties to avoid one or more of the following problems often encountered in international arbitration:

1. over-formalisation of, delay in, and rising costs of arbitration;
2. concerns about the legitimacy of and ethical issues in arbitration;
3. the lack of consistency of decisions and absence of developed jurisprudence;
4. the absence of appeals; and
5. the inability to join third parties to the arbitration.

Given the growing prominence of Asia as a choice destination for foreign trade and investment, Singapore's strategic geographical location together with its well-developed and respected legal system and legal infrastructure makes it well placed to become the Asian dispute resolution hub to cater to the growth in cross-border, multi-jurisdictional disputes in Asia. The SICCC serves as a companion rather than a competitor to arbitration as it seeks to provide parties in transnational business with one more option among a suite of viable alternatives to resolve transnational commercial disputes. It enhances Singapore's share of the global legal services pie without compromising Singapore's success as a seat of international arbitration as well as the international recognition and acclaim enjoyed by the Singapore International Arbitration Centre (SIAC)."

Optional Arbitration Appeal Procedure.²⁵ In 2013, the American Arbitration Association also issued *Optional Appellate Arbitration Rules*.²⁶ In 2015, the International Institute for Conflict Prevention & Resolution (CPR) updated its *CPR Arbitration Appeal Procedure*,²⁷ first published in 1999.

Outside the United States, institutional providers also are issuing appellate arbitration rules. In 2015, the European Court of Arbitration (CEA) began offering appellate arbitral Proceedings.²⁸ In 2016, the British Columbia International Commercial Arbitration Centre issued revised domestic arbitration rules of appellate procedure.²⁹ Even without institutional appellate arbitration rules, countries such as India uphold the right of parties to agree to appellate arbitration and the validity of the parties' appellate arbitration agreement.³⁰

IV. DIFFERENCES IN INSTITUTIONAL APPELLATE ARBITRATION RULES

Among the major institutional providers, there are fundamental differences between rules.³¹ These differences are most pronounced in the following categories:

A. Appellate Arbitral Standards of Award Review. The rules of the major institutions differ in that the US providers limit appellate review to standards limited to prejudicial or material errors of law or fact, whereas the European Court of Arbitration allows a full retrial on the merits:

JAMS: Rule (d) confers broad jurisdictional authority upon the appellate arbitral panel selected by the parties to modify or reverse an award infected with error of law or clearly erroneous findings of fact under the same standard governing an appellate court review of a trial court judgment. Rule (d) provides:

“(d) The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision ... The Panel may affirm, reverse or modify the Award.”

²⁵ Available at www.jamsadr.com under Rules (last accessed 15 August 2018).

²⁶ Available at www.adr.org under Rules (last accessed 15 August 2018).

²⁷ Available at www.cpradr.org under Rules (last accessed 15 August 2018).

²⁸ Available at www.cour-europe-arbitrage.org under Arbitration Service (last accessed 15 August 2018).

²⁹ See, British Columbia International Arbitration Centre, *Domestic Commercial Arbitration Rules of Procedure, Rule 42*, available at www.bcicac.com (last accessed 15 August 2018).

³⁰ See, *Centrottrade Minerals & Metals Inc v Hindustan Copper Ltd* (2006) 11 SCC 245, decided by the Supreme Court of India on 15 December 2016 (rejecting public policy objections and confirming the legality of consensual appellate arbitration under Indian law).

³¹ See, Mateus Aimore Carreiro, *Appellate Arbitral Rules in International Commercial Arbitration*, 33 J Int'l Arb 185 (2016) (reviewing and comparing the rules of JAMS, CPR, AAA and ECA).

CPR: Rule 8 authorises the appellate panel to modify or set aside the original award, where the arbitrators find that the original award contains “material and prejudicial errors of law” or is based upon “factual findings clearly unsupported by the record,” or is subject to vacatur on one or more grounds set forth in the Federal Arbitration Act.

AAA: Rule A-10 allows appeals based on alleged “error of law that is material and prejudicial” and “determinations of fact that are clearly erroneous”.

CEA: Article 28.4 permits the tribunal to conduct “a full review of the dispute by way of rehearing, including dealing in particular with admissibility, the facts and the merits”.

B. Optional Appeal Rights. Under the rules of JAMS, CPR and AAA, the parties must “opt in” by written agreement to have rights of appellate arbitration. Under CEA Article 28.1, however, parties must “opt out” of appellate arbitration under CEA Rules, which grant parties the right to appeal any award “unless expressly excluded by agreement of the parties”.

C. Composition of Appellate Arbitral Tribunal. Under JAMS Rule (a) the appellate panel is selected by the parties. But JAMS will appoint the panel if the parties fail to agree on the tribunal members. Under CPR Rule 4.2, the tribunal is selected by the parties from a list of seven CPR recommendations from its panel to include “former federal judges or others that CPR may deem appropriate”. Under AAA Rule A-5, the parties are expected to choose a tribunal from an AAA strike list of 10-named persons selected by AAA. Under CER Rule 28.5, “the court will appoint all the members of the Appellate Arbitral Tribunal without the parties being involved in the least in such appointments”.

D. Time for Appeal. The time allowed to commence the appeal is 14 days from receipt of the original award under JAMS Rules, 30 days under AAA and CPR Rules, and 40 days under CEA Rules.

E. Effect of Appeal. Upon service of a notice of appeal, all rules provide that the original award is no longer deemed final and thus cannot be presented for judicial confirmation or vacatur. The appellate award, when issued, is deemed the “final award” for purposes of judicial review. The filing of the appeal also acts to toll the running of any statutes of limitation or statutes of repose.

F. Appeal Procedure. The JAMS, CPR and AAA rules provide for the appeal to be submitted based on the arbitral hearing record, documents and transcripts, the parties' submission of appeal briefs, and oral argument if requested by the tribunal. CEA Article 28.4 contemplates a "full review of the dispute", including rehearing of the facts and the merits.

G. Expected Duration of Appeal Process. The expected appeal process duration for JAMS is 21 days, for AAA three months, for CPR six months, and for CEA six months assuming no "evidentiary stage" or nine months with a hearing on the merits.

V. APPELLATE ARBITRATION IS THE BEST APPROACH

American acceptance of appellate arbitration in the early 21st century was slow because of conflicting views between federal and state jurisdictions over whether parties were permitted to fashion their own scopes of judicial review of an arbitral award. In those jurisdictions that refused to sanction such agreements, a cry went up in favour of appellate arbitration, particularly where the award was rendered by a single arbitrator. Illustrative is the advice one judge offered to the Boston Bar Association in 2006:

"Lawyers and their clients sometimes recoil from agreeing to an arbitration clause because there is no appeal [on the merits] from the arbitrator's decision. No matter how wrong or, indeed, stupid [the award is], the arbitrator's decision is binding on the parties as to facts and law, so long as it was arrived at honestly ... Parties might feel more comfortable about submitting disputes to arbitration if there were some machinery, judicial or private, for appealing the arbitral decision. The private appeal panel is the more sure-fire approach.

...

What parties to an arbitration can do is to provide in their agreement to arbitrate that any party to the arbitration may claim review of a single arbitrator's award by a non-judicial, i.e. private panel of arbitrators. That device dodges the considerable uncertainty of being able to obtain judicial review of an arbitral award, and fashions a mechanism to correct serious errors of law or fact by a single arbitrator."³²

Engaging in a courtroom appeal process that can drag on for years makes little sense.

Appellate arbitration can be concluded quickly after service of a notice of appeal and submission of the record and appellate briefs. (Having served as chair of a JAMS appellate arbitral tribunal reviewing an award issued by a non-JAMS arbitrator, my tribunal was able to correct an important error

³² Judge Rudolph Kass, "A Private Path to Appellate Arbitration", 50 *Boston Bar J* 35 (January/February 2006).

of law on the record and issue the Final Award within three weeks after receiving the record and counsel briefs). Appellate arbitration allows the parties to select appellate arbitrators with expertise in construction industry customs and practices, construction law, and expeditious management of the appellate review process. Such expert arbitrators can be expected to pay close attention to and enforce the terms of a complex, lengthy contract. Appellate arbitration also allows parties to agree upon a broader appellate review standard for the tribunal than is accorded to the judiciary by statute. With the added oversight of the appellate arbitrators, all parties can have greater confidence that the award, when reviewed and perhaps modified, is right, and can have assurance that they have been accorded full “due process of law”. Given the thorough attention by two levels of arbitrators, the appealed final award is much more likely to be confirmed and not vacated by a reviewing court.

Provider experience suggests that appellate arbitration’s day has come. Illustrative is JAMS experience. In the past two years, JAMS has opened eleven appellate arbitration cases, as compared to 25 cases in the prior fifteen years. Other providers surely have similar experience. Appellate arbitration appears to be the wave of the future.

As Chief Justice Burger has reminded us:

“The obligation of the legal profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfil that traditional obligation means that there should be mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about ...

... One thing an appellate judge learns very quickly is that a large part of all litigation in the courts is an exercise in futility and frustration. A large proportion of civil disputes in the courts could be disposed of more satisfactorily in some other way ...

My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases ...”

Appellate arbitration is “vastly better” than judicial appeals for the same reasons that arbitration is better than litigation. By assuring that awards in complex cases can be reviewed under broad standards of review for errors of law and fact, appellate arbitration enhances the benefits of arbitration itself.