



The Appeal of the Right to Appeal: The ICDR Adopts Optional Appellate Arbitration Rules to Advance the Availability of Appellate Rights in International Commercial Arbitration

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L'auteur aborde le rôle des droits d'appel dans l'arbitrage commercial international. Après une discussion sur la pertinence de ce sujet dans l'arbitrage par le CIRDI, l'article porte son attention sur les nouvelles règles du CIRDI, contenant des règles optionnelles d'appel. Bien que l'analyse se concentre sur des aspects fondamentaux de cette procédure optionnelle, il s'intéresse également des objections générales et des inquiétudes souvent soulevées contre l'utilisation de mécanismes d'appel. L'auteur conclut en mettant en avant que la flexibilité est un élément fondamental de l'arbitrage commercial international et que les règles du CIRDI offrent un outil effectif que les parties peuvent adopter s'il constitue une réponse à leurs besoins.

The author tackles the role of appellate rights in international commercial arbitration. After a discussion on the relevance of this topic in ICSID arbitration, the article turns to the new ICDR rules, which contain an opt-in set of appellate rules. While the analysis focuses on key aspects of this optional procedure, it also considers general objections and concerns often raised against the use of appeal mechanisms. The author concludes by pointing out that flexibility is a key element in international commercial arbitration and, as such, the ICDR rules provide an effective tool that parties can choose if it best serves their needs.

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I. INTRODUCTION

In a 21st-century world of global commerce, there is broad appeal for international companies to have arbitration, rather than litigation, serve as the chosen form of cross-border dispute resolution. Before settling on the arbitration clause, however, companies and their counsel should give sufficient thought to the goals at stake for each of the parties and the far-reaching effect of the clause's language. Several issues should thus be considered in negotiating, and ultimately agreeing on, a clause. One such issue that now can, and should, be considered is whether to include, in the clause, the right to appeal the arbitral award. That arbitral appellate right will be the focus of this Article.

For years, none of the world's leading administrators of international commercial arbitral disputes offered a built-in appellate option. These institutions include the International Centre for Dispute Resolution ["ICDR"], Court of Arbitration for the International Chamber of Commerce ["ICC"], London Court of International Arbitration ["LCIA"], Hong Kong International Court of Arbitration ["HKIAC"] and Singapore Court of International Arbitration ["SIAC"]. That changed, however, on 1 November 2013, when the ICDR formally introduced its Optional Appellate Rules.¹ With the unveiling of those rules, the ICDR now stands as the only major international institution that offers an arbitral appellate option.² Though the full impact of the ICDR's Optional Appellate Rules will only come with time, the availability of an appellate mechanism, from the global buffet of leading arbitral institutions, represents a noteworthy development in the international arbitration landscape.

This Article will begin, for context, by addressing the running debate within the parallel investor-state arbitration community as to whether the Secretariat of the International Centre for the Settlement of Disputes ["ICSID"] should adopt an arbitral appellate mechanism. This Article will then turn to the international commercial arbitration side, where the commentary in favor of an appellate option has laid the groundwork for the ICDR's passage of the Optional Appellate Rules. A summary of those Rules, along with an examination of their potential benefits and drawbacks, will follow, and comprise the core of this Article.

II. APPELLATE RIGHTS IN INTERNATIONAL ARBITRATION: FROM ICSID TO ICDR

A. Running Debate Over Whether to Include a Substantive Appellate Mechanism in the ICSID Framework

The concept of appeal is not new in the international arbitration world, though the debate

¹ See American Arbitration Association, "Optional Appellate Arbitration Rules" (2013), online: <<https://www.adr.org>> (these rules apply equally to the American Arbitration Association ["AAA"] and the ICDR, the latter being an international arm of the former) ["Optional Appellate Rules"].

² The ICDR, ICC and LCIA "handle most high-stakes international commercial arbitrations" (see Irene M Ten Cate, "International Arbitration and the Ends of Appellate Review" (2012) 44:4 NYU J Int'l L & Pol 1109 at 1125), and the other arbitral institutions that currently offer the appellate option, such as the International Institute for Conflict Prevention and Resolution, JAMS, and the European Court of Arbitration, are not leading arbitration institutions on a global scale in the sense that they do not administer a high volume of international arbitration cases compared to the institutions mentioned above.

over its utility has been more pronounced in the investor-state arbitration community.³ More than a decade ago, ICSID actively considered introducing an “Appeals Facility” to “expand the scope of review of ICSID awards from the review of procedural legitimacy currently allowed under ICSID’s annulment process to also include review of the substantive correctness of an award.”⁴ In particular, the ICSID Appeals Facility “would review awards for ‘clear error of law’ and possibly ‘serious errors of fact.’”⁵ This proposal was shelved, however, on 12 May 2005, when ICSID determined that the proposed Appeals Facility was “premature.”⁶ This left ICSID’s narrowly-carved annulment mechanism, set forth under Article 52(1) of the ICSID Convention, as the sole means of obtaining any review of ICSID awards.

To date, ICSID’s “Appeals Facility” proposal has remained shelved, but debate over a merits-based appellate procedure to apply to ICSID awards continues in earnest.⁷ Those who seek an ICSID appellate option bemoan the “unfairness” of annulment procedures under Article 52, which limits review to be conducted by an internal ICSID ad hoc committee and does not permit appellate review on the merits.⁸ These pro-appellate advocates also “point to the need for jurisprudential coherence and consistency . . . between investment arbitral tribunals, often citing the experience of the WTO Appellate Body.”⁹

These arguments notwithstanding, efforts to introduce a substantive ICSID appellate mechanism have not prevailed to date.¹⁰ Opponents of ICSID’s proposed “Appeals Facility” “point to the proposal’s lack of legitimacy, inappropriateness for the institutional and structural context of investor-State dispute settlement, and incompatibility with the expectations of States signing on to the ICSID Convention.”¹¹ Under this view, the ICSID Convention created a “self-contained system” under which “access to a centralized appellate mechanism was not part of the States’ expectations of terms and benefits under the ICSID Convention.”¹²

There is also the *raison d’être* of ICSID that breeds pragmatic concerns of any appellate option: ICSID “was created to protect the rights of foreign investors.”¹³ As “the usual winners in ICSID disputes,” investors have a “strong interest in maintaining the finality of ICSID awards.”¹⁴ Thus, “investors do not yet need further help to ensure their rights in ICSID”; and if the Appeals

3 See e.g. Thomas W Walsh, “Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality” (2006) 24:2 Berkeley J Int’l Law 444; Christian Tams, “An Appealing Option? The Debate About an ICSID Appellate Structure” (2006), Essays in Transnational Economic Law No 57 (2006), online: <dx.doi.org/10.2139/ssrn.1413694>.

4 Walsh, *supra* note 3 at 444.

5 *Ibid* at 455.

6 *Ibid*.

7 See e.g. Diane A Desierto, “Rawlsian Fairness and International Arbitration” (2015) 36:4 U Pa J Int’l L 939 at 982—985 (commenting on the benefits and drawbacks of appellate rights in investor-state arbitration).

8 *Ibid* at 982.

9 *Ibid*; accord Tam, *supra* note 3 at 23 (“The WTO Appellate Body is widely credited for having rendered dispute settlement in world trade law more reliable and predictable”).

10 See generally Desierto, *supra* note 7.

11 *Ibid*.

12 *Ibid*.

13 Walsh, *supra* note 3 at 462.

14 *Ibid* at 445.

Facility “is to be adopted it will be cause investors seek to review the accuracy of ICSID awards.”¹⁵

In sum, even without (yet) adopting an appellate mechanism to its permanent architecture, ICSID’s active consideration of an Appeals Facility demonstrates a significant level of interest in an appellate option by at least one key segment within the international arbitration community. It was thus not in a vacuum that the appellate option has been considered within the international commercial arbitration community, and ultimately adopted by the ICDR, as discussed below.

B. The Appellate Option in the International Commercial Arbitration Sphere: Groundwork for the ICDR

Many of the same considerations on the need for an appellate mechanism in the ICSID context can be useful in the context of international commercial arbitration. These considerations include dispute finality, neutrality and the avoidance of a “home town” bias that could flow from litigation in a foreign state’s court, avoidance of undesirable foreign jurisdictions (including, in some instances, the U.S. and its comparatively broad discovery regime), subject matter expertise of arbitrators, and the arbitrators’ potential capacity to handle cases that involve foreign languages, interpretation and application of foreign law, complex and multi-layered choice of law issues and differing legal traditions. These considerations also include the perception of enhanced efficiency that comes from arbitration rather than litigation; although whether, in practice, arbitration of complex international disputes is more efficient than litigating them—in both time and cost—is the subject of debate. As noted by one commentator, “[a]lthough saving time and money is a major factor recommending arbitration in the domestic context, speed and economy are ... less important or negligible in the resolution of complex disputes, including many international matters.”¹⁶

Nonetheless, international commercial arbitration has additional, distinct, features, centered around party autonomy, that may enhance the value of an appellate option in that context. Unlike ICSID, which is a permanent institution governed by a Convention of signatory States, international commercial arbitration is almost entirely a creature of contract between private parties. In addition, unlike the Convention Rules that govern ICSID disputes, the parties’ arbitration clause, and the parties’ selected procedural rules (whether through an institution or *ad hoc*), are what govern the administration of commercial arbitral disputes. In this way, party autonomy is fresh to each arbitration: the parties will have, at least in theory, selected a form of arbitration that is tailored to their unique needs and interests. The option for parties to mutually elect an arbitral process, and outcome, that includes the right to merits-based appeal, is an extension of this party-specific autonomy.

With that in mind, it may come as little surprise that at least certain voices within the international commercial arbitration community have considered the potential utility of an arbitral appellate mechanism. In fact, commentators dating from 2000, to the year preceding the Optional Appellate Rules’ passage, raised the question of whether a leading international arbitration institution, necessarily equipped to handle high-stakes international disputes between sophisticated commercial parties, should adopt an appellate procedure.¹⁷ In particular, commentators evaluating

¹⁵ *Ibid* at 462.

¹⁶ William H Knull, III & Noah D Rubins, “Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?” (2000) 11 *Am Rev Int’l Arb* 531 at 540.

¹⁷ *See ibid*; Cate, *supra* note 2, at 1128—1166 (regional commercial arbitration institutions already had optional

the potential for appellate rights within international commercial arbitration have emphasized the principle of finality. Faith in finality—despite a growing sense that complex arbitrated disputes are far from efficient—can play a critical role in commercial parties’ decision to arbitrate a dispute rather than litigate it. But there is a downside to arbitration’s finality: in the words of Irene M. Ten Cate, “parties and arbitrators have only one chance to ‘get it right.’”¹⁸ A “losing party to a commercial arbitration generally has no avenues for recourse even when it has strong reasons to believe the award is wrong as to an outcome-determinative legal issue.”¹⁹ Due to the lack of any meaningful appellate right in arbitration, finality may be a “liability, rather than an asset, discouraging contracting parties from selecting arbitration.”²⁰

Cate further notes “the absence of external checks on [arbitral] tribunals.”²¹ There is also the absence of any binding, or even necessarily instructive, precedents to guide arbitral tribunals.²² Given these concerns, commentators have long observed that “there is potentially a significant market for optional appellate procedures in international arbitration,” since “the community of arbitration service providers does not offer a solution satisfactory to this segment of potential consumers.”²³

In late 2013, this observation gave way to a new reality, as the ICDR became the first, and presently the only, major international arbitral institution to offer the option of appeal. As discussed in the following section, those rules carry the potential to materially change, if not enrich, the international arbitration landscape.

III. THE MARRIAGE OF ARBITRATION AND APPELLATE RIGHTS: THE ICDR, WITH ITS OPTIONAL APPELLATE RULES, IS UNIQUE AMONG ARBITRAL INSTITUTIONS

On 1 November 2013, the ICDR formally introduced its Optional Appellate Rules. In doing so, the ICDR became, and presently remains, the world’s only major arbitral institution to offer appellate rules as an option for arbitrating parties. This development is significant, because international companies now enjoy a fuller range of autonomy in crafting a dispute resolution

appellate procedures on their books before the ICDR passed the Optional Appellate Rules in 2013).

18 Cate, *supra* note 2 at 1110.

19 *Ibid* at 1128—1131 (discussing *Westerbeke Corp v Daihatsu Motor Co, Ltd*, 304 F (3d) 200 at 204—208 (2d Cir 2000)). In fact, according to the rules of some arbitral institutions, parties’ decision to arbitrate means that “the parties also waive irrevocably their right to any form of appeal.” See e.g. London Court of International Arbitration, *LCIA Arbitration Rules*, London: LCIA, 2014, art. 26.8.

20 Knull & Rubins, *supra* note 16 at 541.

21 Cate, *supra* note 2 at 1166.

22 This is not to suggest that the concern as to the absence of a binding precedent disappears with the presence of an arbitral tribunal. However—and subject to confidentiality considerations that go beyond the scope of this Article—it is conceivable that arbitral precedents, at least within a given institution such as the ICDR, could accumulate over time such that parties and arbitral tribunals alike could eventually draw guidance from prior decisions.

23 Knull & Rubins, *supra* note 16 at 564. It remains to be seen whether the ICC, LCIA and other major arbitral institutions will follow the ICDR’s lead in adopting optional appellate rules. That these other institutions have yet to do so may anecdotally reflect some degree of market preference against an appellate option. The purpose of this Article, however, is not to suggest that the ICDR’s appellate rules fulfill an urgent market demand. Rather, the point is that the existence of a defined appellate procedure will advance party autonomy in the context of international commercial arbitration; i.e., enrich the menu of dispute resolution choices available to contracting parties.

mechanism that best suits their needs in relation to each particular transaction. Namely, through the ICDR's innovation, commercial parties can choose an arbitral appellate procedure that is built into the pre-existing arbitration framework rather than having to create one from whole cloth.

A. General Purpose and Form of the ICDR's Optional Appellate Rules

The ICDR aptly explains its purpose for passing the Optional Appellate Rules in its introduction. The ICDR begins by noting that the “objective of arbitration is a fair, fast and expert result that is achieved economically.”²⁴ In line with the finality principle, the ICDR acknowledges that “an arbitration award traditionally will be set aside by a court only where narrowly defined statutory grounds exist.”²⁵ The ICDR then affirms the virtue of a greater standard of review, for parties who may desire it, in the form of a “more comprehensive appeal of an arbitration award within the arbitral process.”²⁶ That appeal, completed within the arbitral framework of an existing ICDR matter, would comprise separate review of the award, by either a three-person panel or single arbitrator, who would apply a “material and prejudicial” standard of review to issues of law and a “clearly erroneous” standard of review to issues of fact.²⁷

Notably, the ICDR does not intend for arbitration appeals to be overly time-consuming: “the appellate rules anticipate an appellate process that can be completed in about three months, while giving both sides adequate time to submit appellate briefs.”²⁸ The ICDR also makes clear that parties are not required to subject themselves to appeal. The Appellate Rules are expressly optional, and their application “is predicated upon agreement of the parties.”²⁹ The parties must affirmatively agree to be subject to appeal, either through an arbitration clause that post-dates the Optional Appellate Rules' passage on 1 November 2013 or through mutual stipulation.³⁰ As such, a party “may not unilaterally appeal an arbitration award under these rules absent agreement with the other party(s).”³¹

B. Can ICDR Appellate Arbitration Work?

Through its Optional Appellate Rules, the ICDR was conscious to preempt the oft-levied concern that arbitration, with an appellate option, will breed “unnecessary inefficiency” and lapse into an overtly litigation-oriented process.³²

As an initial point, the ICDR is clear, up front, that parties who are already committed to arbitrating can mutually *choose* whether to put the appeals card on the table. They remain free not to do so.³³ The ICDR, along with the world's other major arbitral tribunals, still has appellate-free arbitration as its default. Moreover, to the extent that parties do opt for an appeal option, such appeal is handled through the ICDR,³⁴ thereby avoiding any need for the parties to

²⁴ *Optional Appellate Rules*, *supra* note 1 at 3.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.* at 3; A-5(c), A-10(1)—(2).

²⁸ *Ibid.* at 3.

²⁹ *Ibid.*

³⁰ *Ibid.* at 3; A-1.

³¹ *Ibid.*

³² Cate, *supra* note 2 at 1164.

³³ *Optional Appellate Rules*, *supra* note 1 at A-1.

³⁴ *Ibid.* at A-3.

switch venues. That means that the benefit of a neutral venue concomitant to arbitration remains available through an ICDR appeal.

There are other reasons, too, why the “arbitration-*qua*-litigation” criticism is misplaced and why appellate arbitration, as contemplated by the Optional Appellate Rules, can have profound utility for commercial parties. Those reasons follow below.

i. Preservation of Party Autonomy in Appellate Arbitrator Selection

The Optional Appellate Rules honor the parties’ decision-making autonomy in terms of *who* will preside over the merits of any appeal. As with arbitrator selection on the front-end of a dispute, parties can choose the method of *appellate* arbitrator appointment, including whether the appeal will be governed by one arbitrator or a three-person panel.³⁵ The ICDR also offers a pre-screened “International Appellate Panel” of arbitrators from which to choose the arbitrator or panel.³⁶ Although this arguably limits the range of choice that parties may have in arbitrator selection, their choice is made easier, and more efficient, by having a qualified bench of international arbitrators from whom to select. There is also no present indication that the range of those arbitrators is problematically constrained.

Additionally, parties can rely on the “list” method of arbitrator selection in cooperation with the ICDR, as set forth in Rule A-5. In so doing, parties have the option of requesting the ICDR to include arbitrators with “specific qualifications” on the list. This creates yet another avenue through which parties can exercise choice in arbitrator selection while ensuring that the arbitrators who are ultimately appointed have a threshold level of expertise that bears on the substantive issues at hand. In this way, as well, the benefit of arbitrator subject matter expertise that favors arbitration in the first instance remains fully intact at the appeal phase.

ii. Efficiency of Arbitration Appeal

The ICDR’s Optional Appellate Rules carefully contemplate, and impose, a finite time (and thereby cost) limit on the arbitration appeal process.

aa) 30-Day Deadline After Underling Award to Commence Appeal

Rule A-3 requires an appealing party to file a Notice of Appeal, along with an administrative fee, “within thirty (30) days from the date the Underlying Award is submitted to the parties.”³⁷ The party being appealed against has the option to cross-appeal, but must file its Notice “within seven (7) days” after the Notice of Appeal is filed.³⁸ In turn, Rule A-7 requires the appeals tribunal, within the first week of its appointment, to schedule a conference call with the parties, and the ICDR Case Manager, in order to “review and formalize the briefing schedule, set a deadline for the submission of the record on appeal and address any other procedural issues.”³⁹ That same rule then reiterates the “objectives for an expedited, cost effective and just appellate process.”⁴⁰

35 *Ibid* at A-4-A-5.

36 *Ibid* at A-5.

37 *Ibid* at A-3(a)(i).

38 *Ibid* at A-3(c).

39 *Ibid* at A-7(a).

40 *Ibid*.

bb) Streamlined Briefing Schedule with Optional Oral Argument

The ICDR's envisioned time and cost limitations also apply to the remainder of the proceeding. Oral argument—which “shall” take place within thirty days of filing of the last brief—is only granted if the “appeal tribunal deems [it] necessary,” *or* if the parties request oral argument “within thirty (30) days of service of the Notice of Appeal.”⁴¹ Moreover, the Rules set forth an expeditious briefing schedule with express length limitations, subject to agreement otherwise “by the parties and approved by the appeal tribunal,” as follows: 21 days post-Notice of Appeal to serve the Initial Brief, limited to 30 double-spaced pages; 21 days thereafter to serve an Answer Brief of the same length; and 21 days thereafter to serve a Reply to the Answer Brief, limited to 10 double-spaced pages.⁴² Finally, the Rules require the appeals tribunal to rule on the Underlying Award “within thirty (30) days of the last brief,” with a single 30-day option “to extend the time to render a decision” with good cause or if oral argument is set to take place.⁴³

At the same time, the process affords discretion to the appeals tribunal, and the parties, to adjust the timing as appropriate. The parties are free, for example, to forego oral argument in exchange for a swifter ruling from the tribunal; the parties can also request, and the tribunal can grant, a modified briefing schedule that is either shorter or longer than the default schedule set forth in the Rules.

To be sure, such flexibility may give way to practical timing considerations and slow the overall efficiency of the appellate process. For instance, the same basic timing considerations apply to the selection of an appellate tribunal as to the original tribunal. Demands on the arbitrators' conflict disclosures, investigation of each arbitrator by the opposing party, and review of any arbitrator challenges, may thus build additional time into the process. Similarly, as in any international arbitration setting, briefing and argument deadlines are susceptible to time extensions, especially in complex disputes where the stakes are high. Appellate arbitrators, like other arbitrators, will face the pressure to apply their discretion to extend such deadlines against the threat that a party, in a later effort to vacate an unfavorable award, will argue that it did not receive adequate opportunity to present its case.⁴⁴

Despite these timing concerns, however, the point remains that the ICDR plainly spells out a preference for a three-month window for appeal, and its Optional Appellate Rules offer a clear structure in which that goal can be realized.⁴⁵ Parties that mutually seek to achieve that three-month goal thus have the apparatus with which to pursue it. Thus, although the ICDR's appellate process cannot guarantee efficiency, the process does put efficiency at a premium.

iii. Finality of Arbitral Appeals Award

The Optional Appellate Rules also explicitly honor the bedrock principle of arbitration finality. In particular, Rule A-20, entitled, “Finality of Appeal,” provides:

41 *Ibid* at A-15(a)—(b) (Per (b), the parties' failure to request oral argument within this 30-day period is waiver).

42 *Ibid* at A-17(a)—(g) (These provisions provide equivalent limitations to briefing associated with a cross-appeal).

43 *Ibid* at A-19(a)—(b).

44 *See ibid* at A-17 (providing for briefing schedule “unless ... determined by the appeal tribunal as a necessary deviation”), A-19(b) (the initial 30-day time frame for rendering an award following service of the last brief “may be modified for good cause or if oral argument is to take place”).

45 *Ibid* at 3.

Upon the conclusion of the appeal process and after service of the appeal tribunal's decision upon the parties, the appeal tribunal's decision shall become the final award for purposes of judicial enforcement proceedings.⁴⁶

In rendering the "Final Award" for purposes of judicial enforcement, the appellate arbitrator, or panel, can 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)."⁴⁷ The Final Award on appeal, if rendered by a panel rather than a single arbitrator, need not be unanimous: a "majority" decision suffices for it to be enforceable.⁴⁸ The Final Award on appeal must also "be in writing" and, unless the parties agree otherwise, provide "an explanation for the decision."⁴⁹

In short, the Optional Appellate Rules embrace many of the same core considerations—finality, neutrality, party decision-making autonomy and efficiency—that undergird the threshold decision of whether to arbitrate. Those Rules, therefore, offer commercial parties the additional option of a second look without necessarily lapsing into unrestricted proto-litigation. If the first tribunal "gets it wrong," there will be another, within the framework of a single arbitration, who can review the Underlying Award for any errors of law or fact in a way that a court sitting in a New York Convention country simply cannot do. Put another way, the ICDR appellate process could give commercial parties greater certainty of a legally sound result obtained within the efficiency of a single arbitration mechanism, and thereby increase the likelihood of an outcome consistent with their expectations when originally entering the contract.

C. What Are the Risks of an ICDR Appellate Arbitration?

Nothing is perfect, and the appellate option offered by the ICDR is no exception. The appellate option may not be for parties who prioritize the swiftest possible exit from an arbitrated dispute, as an appeal will unquestionably take more time—even if less than three months—and expense, to arrive at a final result. Moreover, the appellate-related costs would likely comprise more than the lawyer and arbitrator time that is already quite expensive. For example, parties to complex commercial disputes often prefer, understandably, to have a stenographic record of the entire proceeding; and in the international context, such a record often involves multiple languages and corresponding translations. The costs of a stenographer, and any requisite translators, are material ones, among other costs, that the parties would need to incur in the context of an appeal. Yet, commercial parties likely know, or should know, these realities before signing up for the appellate option, so in that sense those parties are less likely to incur an undue burden.

There are other concerns that the ICDR's appellate option poses with respect to: (1) the level of deference given to the original arbitrators, and (2) recognition and enforcement. However, as discussed below, each of these concerns, though valid, is surmountable.

⁴⁶ *Ibid* at A-20.

⁴⁷ *Ibid* at A-19(a)(1)—(2).

⁴⁸ *Ibid* at A-19(d).

⁴⁹ *Ibid* at A-19(c) (the rules do not define these terms precisely, but what is apparent is that they are expected to present a reasoned Final Award that can be enforced in court).

i. Standard of Deference Applied to Underlying Award

The Optional Appellate Rules expressly afford a level of deference to the Underlying Award on appeal. In particular, an appellate arbitrator, or panel, review the Underlying Award for: (1) “an error of law that is material and prejudicial,” or (2) “determinations of fact that are clearly erroneous.”⁵⁰ Despite setting forth standards of review, however, the Rules offer no definitional guidance on precisely *how much deference* findings of fact, and conclusions of law, should receive. For example, the Rules neither define “material and prejudicial” nor expressly equate the term to any analogous judicial standard of review, such as the *de novo* standard in common law jurisdictions, which applies to legal determinations by a lower court. In addition, though the Rules appear to afford a higher level of deference to factual findings through a “clearly erroneous” standard, a definition or explanation of that standard does not feature in the Rules.

The main risk that these ambiguities present is that the appeals tribunal, whether through one person or three, could unwittingly apply an imperfect standard of deference in reviewing the Underlying Award. Put differently, there is a potential that an appeals tribunal may improperly substitute its judgment for that of the original tribunal, through either vacating or modifying the Underlying Award, and thereby cause the “wrong” result as a matter of process, substance, or both.⁵¹ If that happens, it would be the *appeals* tribunal who would fail to “get it right,” with no further appellate recourse to the losing party. This begs the rhetorical question: “Why should a second tribunal have the power to correct ‘mistakes’ made by what the parties considered to be the best available tribunal at the time of appointment?”⁵²

But one compelling answer to this question, which addresses the concern that an appeals tribunal would irrevocably, and incorrectly, alter the original award, is the inherent “mistake correction” value that is afforded by the presence of an appellate tribunal. With no appellate oversight, commercial arbitration may run the risk of “exceed[ing] the parameters imposed by the parties’ contracts,” which arises in the “absence of external checks on tribunals—either through appellate review or through the norms of openness and transparency that apply to court proceedings and decisions.”⁵³

The potential “mistake correction” value afforded through an arbitration appeal, particularly where the appeals arbitrators are chosen in the same manner as the original ones, may thus outweigh the risk of that appeal disrupting an otherwise “right” Underlying Award. The ICDR’s arbitral appellate option could offer the parties continued autonomy over the dispute resolution process while presenting additional safeguards that would otherwise not apply.

For one, appellate review of an award would reduce risk of inadvertent error. The ICDR International Rules, and those of multiple other arbitral institutions, prohibit a tribunal from correcting any error in an award other than “clerical, typographical or computational” errors.⁵⁴ So an arbitral award beset with a clear substantive error, including a material error that even the

⁵⁰ *Optional Appellate Rules*, *supra* note 1 at A-10(1)—(2).

⁵¹ This risk could conceivably be heightened by the Rules’ prohibition on the case being sent by the appellate tribunal “back to the original arbitrators for corrections or further review.” See *ibid* at A-19.

⁵² *Cate*, *supra* note 2 at 1143.

⁵³ *Ibid* at 1166.

⁵⁴ International Center for Dispute Resolution, *International Dispute Resolution Procedures* (2014) art 33(1), online <<https://www.icdr.org/>>.

tribunal itself would acknowledge, is generally not subject to correction. The Optional Appellate Rules would enable an appellate tribunal to make the necessary correction and thus help to ensure that form is not exalted over substance.

Moreover, the potential of an appeal may cause the original tribunal, in the first instance, to be more thorough in rendering, and giving the reasoning for, the original award. That is, “the norms of openness and transparency that apply to court proceedings and decisions” may apply, albeit perhaps less prominently, in an arbitral proceeding in which an appellate option is present.⁵⁵ In the way that some trial courts are “kept honest” through the ever-present potential for reversal on appeal, so too might original arbitral tribunals be led to take particular care in the awards that they issue.

In short, the ICDR could, and probably should, clarify its standard of review for issues of law and fact. But the appellate option, through an actual appeal or potential of one, still appears more, not less, likely to lead to a well-grounded substantive result. And if the process takes place relatively efficiently—which the ICDR’s timing controls seek to do—such a result may well be worth the additional time and cost inherent in an appeal.

ii. Recognition and Enforcement

The fact that an appeals tribunal’s award is “final” means that a court presented with a recognition or enforcement motion should consider *that* award alone. Indeed, the Optional Appellate Rules plainly provide that “the appeal tribunal’s decision”—stated in the singular and with no reference to the Underlying Award—“shall become the final award for purposes of judicial enforcement proceedings.”⁵⁶ Even still, one shortcoming of those Rules as constituted, and one potential flaw that underlies the general idea of arbitration appellate awards, is the possible ambiguity around enforcement.

Courts sitting in New York Convention-signing countries have decidedly narrow bases through which to vacate or modify arbitration awards.⁵⁷ It is unclear, from the ICDR’s Optional Appellate Rules, or more broadly, whether a reviewing court’s consideration of those bases would change if an appeals tribunal rendered its Final Award in substitution for, or modification of, the Underlying Award.⁵⁸ The reviewing court may be tempted, for example, to review *both* the Final Award and Underlying Award in determining whether to enforce.

It is true that the question of judicial enforcement of *arbitral* appellate awards is, in a strict sense, uncharted terrain. But its newness does not erase the overwhelming pro-enforcement mandate set forth in the New York Convention and carried out in signatory states’ courts. The recent jurisprudence of the United States, as just one example, provides a vivid reminder that national courts will strongly resist any invitation to re-open the merits of an arbitrated dispute and, instead, will strive to uphold the arbitration result subject only to narrowly construed (and rarely applied) exceptions.⁵⁹

⁵⁵ *Cate*, *supra* note 2 at 1166.

⁵⁶ *Optional Appellate Rules*, *supra* note 1 at A-20.

⁵⁷ *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 21 UST 2517 at art V(1)(a)—(e), V(2)(a)—(b) (enumeration of the defenses to recognition and enforcement).

⁵⁸ See *Optional Appellate Rules*, *supra* note 1 at A-19(a)(2).

⁵⁹ See e.g. *BG Group PLC v Republic of Argentina*, 82 USLW 4166 at 1210—1211 (US 5 March 2014) (courts

This is not to say that courts faced with vacatur motions will not have to address, and resolve, the question of whether the statutory limited standard of review for arbitration awards is the same in the case of an *appellate*, rather than an original, arbitral tribunal. Courts will face that question; and the unsettled nature of such a new issue may mean a temporary spike in enforcement litigation. Ultimately, however, there is current little in the way of commentary or case law to suggest that the New York Convention's undisputed pro-enforcement mandate will at all come under fire. Far from it: signatory state courts are called to enforce, rather than alter, final arbitral awards, and the ICDR's express definition of an appellate award as "final" only reinforces the intention—by the ICDR and, by proxy, the parties who choose it—for such awards to be enforced accordingly.

IV. CONCLUSION

Lawyers today represent clients that increasingly do business across borders. Many of these international deals involve considerable sums, and parties, through their lawyers, take great pains to negotiate the terms. The lion's share of the negotiations understandably tends to address the business terms, often with comparatively little attention given to the details of the dispute resolution clause that may determine whether those terms will function as intended. That is why transactional and disputes lawyers alike should take care to counsel their international clients on the various dispute resolution options available and negotiate for a mechanism that is best tailored to the client's interests. One such mechanism is the newly unveiled opportunity to select an arbitral institution that affords the built-in option to appeal.

The ICDR is presently the lone major arbitral institution that offers it. With such an option, parties now enjoy more autonomy to consider, as a practical matter, whether they, and their transaction, are best suited being governed by a dispute resolution clause that offers the right to a substantive appeal within a single arbitration framework. Before 1 November 2013, many commercial parties looking to enter cross-border deals did not have such a choice, at least not one that offered the availability of an appellate option without having to create one entirely anew. Now they do. And while time will tell whether the ICDR's efforts to constrain the timing of appeal and preserve the perceived efficiency of arbitration will succeed, its Optional Appellate Rules as structured offer arbitrators a roadmap in which to achieve that goal.

must review arbitration decisions "with considerable deference"); *Landmark Ventures, Inc v InSightec, Ltd*, 619 Fed Appx 37 at 38 (2d Cir 2015) (emphasis added) (affirming district court's decision to confirm ICC arbitration award while observing that "judicial review of arbitration awards is *very limited*"). These cases also reinforce the well-recognized principle that agreements to resolve disputes via arbitration must be enforced as written. That principle favors treating an appellate award as the "final" award for purposes of judicial proceedings given that the parties will have agreed to the *Optional Appellate Rules*, *supra* note 1 at A-20 of which requires that the appellate tribunal's decision "shall become the final award for purposes of judicial enforcement proceedings[.]"