

## INTERNATIONAL DISPUTES ALERT

### WILL YOUR ARBITRATION CLAUSE PREVENT AWARDS BEING APPEALED?

A big advantage of arbitration clauses over litigation in international deals is often said to be finality: no appeals on the merits, and limited grounds for other challenges. Even at the best of times, however, that depends on a sensible choice of seat. However, a recent English decision suggests that some widely used institutional rules may not always be effective in preventing appeals. Similar reasoning may apply in U.S. seat arbitrations and in certain other jurisdictions.

The upshot is this: those drafting arbitration clauses should give particular attention to whether the words they use will be effective in achieving finality.

#### RECENT ENGLISH DECISION

In the 2009 decision *Shell v. Dana Gas Egypt*, Shell was allowed to appeal an arbitration award to the English court on a point of law, despite the applicable UNCITRAL Rules stating that the award was to be “final and binding on the parties” and the arbitration clause stating that it was to be “final, conclusive and binding on the parties”. The court found this meant only that an award could not be re-arbitrated, i.e., *res judicata*.

English law, in certain circumstances, permits an appeal from an arbitral award on a point of law where the tribunal’s decision “is obviously wrong” or is a question of general public importance and is “open to serious doubt”. That right may be excluded by agreement—which is the effect, for example, of adoption of the LCIA

or ICC Rules. However, in *Shell*, the court found that the UNCITRAL Rules did not, as a matter of construction, exclude that right.

The problem examined in *Shell* could also occur in arbitrations other than those under the UNCITRAL Rules. The AAA/ICDR International Rules and the SCC Rules use a similar formulation on finality as in the UNCITRAL Rules.

### **IMPLICATIONS IN THE UNITED STATES**

The same issue may arise in the United States.

In certain situations, awards under U.S. seat arbitrations can be appealed on the ground of “manifest disregard of the law.” On the basis of the reasoning in the 2008 U.S. Supreme Court decision *Hall Street Associates v. Mattel*, it is likely that, in many U.S. federal jurisdictions, parties can validly agree to exclude such right to appeal.

Therefore, if parties do wish to exclude that right, they should not assume that adoption of the UNCITRAL Rules or the AAA/ICDR International Rules will necessarily achieve that outcome.

### **CONTACT INFORMATION**

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